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2 Cal.2d 647

KENNEY v. LOS FELIZ INV. CO. et al.
L. A. 14301.Supreme Court of California.
March 21, 1935.

Rehearing Denied April 18, 1935.

1. Appeal and error ⇨853

Determination of District Court of Appeal on points as to which it agreed with trial court became law of case, binding on party appealing to Supreme Court from second judgment for adverse party.

2. Appeal and error ⇨1099(7)

Appellant's reiteration of its contentions on former appeal and at second trial after District Court of Appeal reversed former judgment so that trial court might determine uncertain intention of parties to contract from evidence, which was sufficient to support court's findings for respondent, *held* unavailing.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Franklin R. Kenney against the Los Feliz Investment Company and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for appellant.

Newlin & Ashburn, Paul Sandmeyer, and Clyde E. Holley, all of Los Angeles (A. W. Ashburn and Paul Sandmeyer, both of Los Angeles, of counsel), for respondent.

SHENK, Justice.

In this action for declaratory and other relief the plaintiff sought an adjudication of the right and obligations of the parties under a note and trust deed given by the plaintiff's predecessor, C. G. Willis, to the defendant and appellant, Los Feliz Investment Company, evidencing and securing deferred payments of the purchase price of an oil producing property at Santa Fé Springs, especially with reference to the application of payments thereon representing proceeds realized from oil and gas produced on the property. Recovery was also sought of various sums alleged to have been paid under duress and protest.

In June, 1931, the case was first tried resulting in a judgment declaratory of the rights and obligations of the parties as contended for by the plaintiff, together with a

money judgment in his favor for \$26,702.86, with interest. The judgment was reversed. Kenney v. Los Feliz Investment Co., Ltd., 121 Cal. App. 378, 9 P.(2d) 223. Prior to the trial the plaintiff filed an amended and supplemental complaint in which he presented the same issues with respect to the construction of the contract and sought the recovery of all alleged duress payments, including those paid pending the appeal and before the second trial. The new trial resulted in a judgment following in substance the declaratory relief as adjudicated upon the first trial, and included a money judgment in the plaintiff's favor for all of the payments made under protest, with interest to December 29, 1932, aggregating \$68,917.29. The present appeal from that judgment is prosecuted solely by the Los Feliz Investment Company.

The property was sold by the company to Willis for a stated consideration of \$1,000,000, \$125,000 of which was paid at the time. Concurrently therewith Willis, under date of March 1, 1929, executed and delivered to the company a promissory note for \$875,000, payable "in installments of Five Thousand Dollars (\$5,000) or more on the 1st day of each and every calendar month beginning on the 1st day of May, 1929," with interest on the unpaid principal at the rate of 7 per cent. per annum payable monthly. The note also provided that the maker of the note should not be held personally liable, and that "such principal and interest shall be payable solely and only out of the proceeds that may be derived for 50% of 13-2/3% of the oil and gas that may be produced, saved and sold from the property covered by the trust deed executed to secure the note * * * Nevertheless, it is understood and agreed that if said minimum payment of Five Thousand Dollars (\$5000) per month and interest is not made as and when each installment becomes due, even though 50% of the 13-2/3% of the proceeds of oil do not equal that amount, then this note shall be deemed in default, and the holder thereof shall have all the rights of foreclosure set forth in the trust deed executed as security for this note."

Concurrently with the execution of the foregoing note the parties executed a trust deed to secure the obligations of the note. The pertinent portion of the trust deed is as follows: "It is understood that 50% of 13-2/3% of all oil and gas that may be produced, saved and sold from the above described premises shall be applied on the hereinafter described note, if, as and when produced,

saved and sold. For the purpose of carrying out this provision as to the division of proceeds of the sale of oil, it is agreed that all such proceeds shall be paid to the trustee herein, and the trustee shall be authorized and instructed to disburse the same as herein provided."

The controversy between the parties was with reference to the proper application of the funds received by the trustee. The plaintiff insisted that under the terms of the note and trust deed the minimum payments due on the first of each month were the monthly interest and the \$5,000 installment of principal and that any excess in the fund to which the plaintiff was entitled should be applied, if necessary and sufficient, to the next and subsequent minimum payments. The company contended that if there was in any one month any excess over the minimum payment of principal and interest next due, then such excess should be credited on the unpaid balance of the obligation. From August, 1929, to February 1, 1931, the trustee received in excess of the minimum payments of principal and interest due during that period the sum of \$264,756.54. If this sum were applied on the unpaid balances of principal and interest, as the company insisted, the plaintiff would be required to make up the minimum interest and principal payments from other sources in the event production fell off to such an extent as to make it necessary, or on failure so to make such payments to suffer default. If such excess were applied as the plaintiff contended, the minimum payments of interest and principal would be safeguarded for many months to come (to and including November 1, 1935), without payment from outside sources even if production stopped. In order to protect himself against a threatened declaration of default the plaintiff, on the company's insistence, made successive payments to satisfy the monthly requirements after application of the excess by the trustee in accordance with the company's theory. The company also insisted that the payments so made by the plaintiff in an effort to protect himself were voluntary payments and in no event could be recovered.

[1] The first trial resulted in findings, conclusions of law, and judgment in accordance with the plaintiff's contentions on all points. The court found and concluded that the term "minimum payment" as used in the note, and the phrase "next minimum payments due," under the installment note, meant the interest payment due on the unpaid principal on the first of the following month and the \$5,000

payment also due on that date; that the excess could not be applied on interest payments except as they became due monthly; that such excess could not be applied in flat reduction of unpaid principal, and that the plaintiff had made payments to protect himself against default, under duress and protest, and should recover the same.

On the appeal from that judgment the District Court of Appeal agreed with the trial court on two of the three major points, first, that it appeared without question from the written evidence of the contract of the parties that the excess at any one time could not be applied to interest beyond the next ensuing monthly due date. This was true especially since interest was payable only on the unpaid balance of the principal; and on the second point that the payments by the plaintiff to protect himself from a threatened declaration of default were made under duress and recoverable. The determination of the District Court of Appeal on these two points has become the law of the case.

[2] On the third point the District Court of Appeal decided that it could not be said with certainty from the writings whether it was the intention of the parties that the excess should be applied as a flat deduction of principal or should be applied on future monthly payments of \$5,000 as the same become due. This uncertainty was suggested by reason of the terms of the note which provided for monthly payments of \$5,000 or more, and the reviewing court determined that the trial court had committed prejudicial error in rejecting evidence of the negotiations and conduct of the parties offered by the company for the purpose of disclosing the intention of the parties in this connection. The judgment was accordingly reversed to the end that the trial court might determine from the proffered evidence the intention of the parties in the premises.

On the retrial the court received evidence of the negotiations of the parties leading up to the final execution of the written instruments, which together constituted the contract and the conduct of the parties thereunder, in order that the uncertainty declared by the District Court of Appeal might be resolved. This evidence was in many respects conflicting. In support of the findings made in favor of the plaintiff's theory, it appeared that the preliminary offers of the company called for the payment of \$5,000 and interest each month, with an additional monthly payment of the excess of the royalties over \$5,000 on account of principal. These offers were

rejected by Mr. Willis. Counter proposals were made, resulting in the final draft of the instruments as executed, from which, and from the oral evidence, the court found the intention of the parties to have been as contended by the plaintiff. Again judgment in his favor was duly entered.

On this appeal the company reiterates its contentions made on the former appeal and at the second trial, but its efforts in that behalf are unavailing. On two of the main points the company is foreclosed by the law of the case and on the third the evidence is sufficient to support the findings in the plaintiff's favor. A more extended discussion of the points presented is not necessary.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.



2 Cal.2d 645

**LOS FELIZ INV. CO. v. SUPERIOR COURT
OF LOS ANGELES COUNTY et al.
L. A. 15013.**

Supreme Court of California.
March 21, 1935.

Prohibition ☞13

Issue of law, presented in proceeding for writ of prohibition restraining court from reducing amount required to be paid into court to maintain injunction in force pending appeal from judgment, need not be determined after affirmation of judgment.

In Bank.

Proceeding by the Los Feliz Investment Company for a writ of prohibition to restrain the Superior Court of the County of Los Angeles and Clement L. Shinn, one of the judges thereof, from granting a motion by Franklin R. Kenney to modify a portion of a judgment in his favor against petitioner.

Peremptory writ denied, and proceeding dismissed.

For prior opinion, see 35 P.(2d) 131.

Chapman & Chapman, of Los Angeles, for petitioner.

Newlin & Ashburn, of Los Angeles, for respondent.

SHENK, Justice.

In this proceeding in prohibition it appears that after the hearing on the retrial of the case of Franklin R. Kenney, plaintiff, v. Los Feliz Investment Company, a corporation, et al., defendants (No. 316426 in the files of the superior court), the trial court announced that the issues in said cause would be determined in accordance with the contentions of the plaintiff therein, and that the judgment would contain an order enjoining the defendants therein from declaring a default and foreclosing the trust deed. Whereupon counsel for the defendant Los Feliz Investment Company stated that his client intended to perfect an appeal from such a judgment. In contemplation of the appeal and for the benefit of the company the court incorporated in the judgment thereafter entered a provision that the injunctive order against default and foreclosure would continue to be operative pending the appeal only on condition that the plaintiff therein deposit into court each month the difference between 50 per cent. of the royalty proceeds received by the company and the amount claimed by the company to be due each month, and that if such deposits be not made the injunction would be stayed pending the appeal. After the appeal was taken, and by reason of the adoption of a Code of Fair Competition for the Petroleum Industry under the National Industrial Recovery Act (48 Stat. 195), the production of oil and gas from the property involved was materially curtailed. The plaintiff Kenney then moved the trial court for an order to the effect that thenceforth the only requirement for maintaining the injunction in force pending the appeal be that he pay into court each month the one-half of the entire royalty proceeds remaining after paying the other one-half thereof direct to the company. The company resisted the motion. Upon the announcement by the court that it intended to grant the motion, the present proceeding was commenced on the theory that the court would thereby act in excess of its jurisdiction.

The appeal from the judgment in the case of Kenney v. Los Feliz Investment Co. et al., supra (Cal. Sup.) 43 P.(2d) 255, has been determined by the filing this day of an opinion and order affirming the judgment. By reason of that fact it is obvious that it is now un-

necessary to determine the issue of law presented in the present proceeding.

The peremptory writ is denied, and the proceeding is dismissed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.



2 Cal.2d 655

HUNTSBERGER v. HUNTSBERGER et al.

L. A. 15064.

Supreme Court of California.

March 22, 1935.

1. Husband and wife ⇨278(5)

Husband could not complain that consideration for his signature to property settlement was illegal because wife consented to procure quick divorce in Nevada, and that his consent was obtained by wife's fraud, where husband executed settlement voluntarily under advice of his independent counsel and wife was induced to get divorce in Nevada because of her desire to help husband to escape criminal prosecution for illicit relations with girl whom he would be able to marry after divorce, and because of his threat that if wife did not obtain divorce he would dispose of his property.

2. Husband and wife ⇨278(5)

Property settlement held not void as being made in consideration of wife's compounding a felony by obtaining divorce to make husband's conviction of illicit relations with girl impossible by enabling him to marry girl, where trial court found that securing of divorce was no part of consideration for settlement.

3. Husband and wife ⇨278(2), 279(1)

Property settlement stating that all marital obligations between husband and wife were permanently settled so that parties might live apart and be free from interference as if each were unmarried held not void as attempting to alter marital relationship by contract and establishing a limited divorce and providing for support other than during separation, but such contract would be construed as a whole after inquiry by court into facts surrounding execution (Civ. Code, § 159).

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Suit by Minnie L. Huntsberger against Paul Huntsberger and others, wherein named defendant filed a counterclaim. From a judgment named defendant and others appeal, and plaintiff moves to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Henry K. Elder and Boyd A. Taylor, both of Los Angeles, for appellants.

Martineau & Stratton and Carl Eardley, all of Los Angeles, for respondent.

PRESTON, Justice.

This cause, an equitable action to enforce a partial assignment contained in a property settlement agreement, is before us on motion to dismiss the appeal of certain defendants or affirm the judgment rendered for plaintiff. The words "defendant" and "appellant" will be hereinafter used to refer to the defendant Paul Huntsberger, plaintiff's former husband. A discussion of the position of the other defendants is unnecessary to a determination of the appeal.

Plaintiff married defendant in the year 1914, and was his wife for some 16 years. There was no issue of said marriage. During 1929 or early in 1930 defendant became involved in illicit relations with an 18 year old girl, Dorothy Myers, and was arrested on the charge of statutory rape. Thereafter, and about June 3, 1930, in Los Angeles county, plaintiff filed an action against him for divorce. A few days later, about June 10th, plaintiff and defendant executed a property settlement agreement whereby defendant gave plaintiff practically all of the community estate, together with some \$5,700 in cash, and likewise agreed to pay for her support and maintenance, so long as she should live and remain unmarried, the sum of \$125 a month. To secure the latter payments, defendant executed to plaintiff an assignment whereby she would be paid said sum monthly from the proceeds of certain of his separate property, to wit, an undivided two-ninths interest in certain real estate under 99-year lease. Plaintiff then dismissed her California divorce action and proceeded to Nevada to establish a residence. All lump sum payments were duly made under said property settlement. Plaintiff sued in Nevada for divorce; the action came on for hearing; defendant voluntarily appeared therein; the

property settlement was submitted to and approved by the Nevada court and incorporated in its decree, rendered September 24, 1930, in favor of plaintiff. Defendant took no appeal from this divorce decree, and it became final. On September 30th he married the said Dorothy Myers, and on October 6, 1930, the criminal case against him was dismissed.

Pursuant to said property settlement and notice thereof, said above-mentioned lessee duly forwarded to plaintiff the sum of \$125 each month from June, 1930, to July, 1933, at which time payments were discontinued upon notice from defendant of revocation of the assignment. Thereafter defendant himself sent plaintiff \$75 in the month of August, 1933, \$100 in September, and \$100 in October. About October 7th plaintiff filed this suit to enforce fully the partial assignment and for declaratory relief.

Defendant answered with a general denial and cross-complaint, to the effect that the property settlement had been obtained from him by force, fear, duress, and undue influence, under pressure of pending criminal prosecution; that plaintiff, during their marriage, literally drove him to illicit association with other women; that she divulged the fact of his relationship with Dorothy Myers, culminating in his arrest, knowing that his only escape from prosecution would be through a quick divorce and marriage to said girl; that she planned to offer to secure a divorce within 90 days in Nevada if defendant would agree to a property settlement particularly favorable to her; that subsequent to the divorce his financial condition changed by reason of loss of business and reduction by one-third of the income from his said two-ninths interest in said lease; that as issue of his marriage with said Dorothy Myers he had two children, aged 11½ months and 2½ years, respectively, and his income was reduced to about \$50 a month; that the property settlement was contrary to sections 158 and 159 of the Civil Code, and was unenforceable.

Plaintiff answered the cross-complaint, denying that she had offered defendant a quick divorce, to enable him to escape prosecution, in return for a favorable property settlement, or otherwise, and in this connection she alleged that she had a cause of action against defendant for divorce by reason of his infidelity and other acts; that she filed an action in Los Angeles county as aforesaid; that, upon being served with summons, defendant stated to her that he would be sent to jail for rape if he did not marry said

Dorothy Myers immediately; that a California divorce would be too late to save him, and he begged and pleaded with her to get a divorce in Nevada, threatening that, unless she did so, he would dispose of all his property in such a manner that she could never secure any support or alimony from him; that she yielded to said entreaties and threats and dismissed her California action, thereafter securing the Nevada divorce; and that said course of action was not taken in consideration of said property settlement or for any other purpose than good sportsmanship and a desire to help the man she loved keep out of prison.

The cause went to trial and voluminous evidence was received. The court made findings in full accord with the claims of plaintiff. It found that the property settlement, in the light of the circumstances of the parties on the date of its execution, was neither unjust nor unfair, and that defendant had acquiesced in and confirmed it by continuing to pay thereunder for approximately three years after dismissal of said criminal case; further, that by acquiescing in said Nevada decree, which approved and adopted said property settlement, and by taking no appeal from said decree, defendant became estopped to dispute the validity thereof. In conformity with these findings, judgment was rendered for plaintiff, awarding the specific sums, with interest, due on back payments and declaring her right to future payments so long as she may live and remain unmarried. Defendant appealed, and, as above stated, the cause is before us on motion to dismiss the appeal or affirm the judgment.

[1] Review of the record shows abundant evidence to support all findings of the court below. This statement will suffice to dispose of a number of defendant's contentions, for example, his claim that the consideration for his signature to the property settlement, to wit, that plaintiff get a quick divorce, was illegal, and that his consent to the agreement was obtained by unfair practice and undue influence exercised by plaintiff. The court found that defendant executed the property settlement agreement freely and voluntarily and under the advice of his own independent counsel and not as the result of any duress, menace, fraud, force, fear, or undue influence. The evidence warrants the conclusion that plaintiff was induced to get the Nevada divorce by reason of her desire to help defendant and also under influence of his threats that, if she did not do so, he would hide his property and cut her off.

[2] The contention that the agreement was void as being made in consideration of plaintiff's compounding a felony (making defendant's conviction impossible by enabling him to marry the complaining witness) may be dismissed with the statement that the trial court found that the securing of a divorce was no part of the consideration for the property settlement.

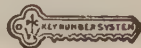
[3] But one other point remains to be mentioned. A preliminary clause of the property settlement agreement states that the parties are desirous of settling their property rights and "that all marital obligations between them be permanently settled and adjusted so that the parties hereto may live separate and apart and be free from interference or control by the other party in all respects as if each were unmarried and so that the obligation of the husband for the support and maintenance of the wife may be fixed and determined. * * *" Defendant contends that this language renders the agreement void as an attempt to alter marital relationship by contract and establish a limited divorce, and provide for support other than during separation. This contention is without merit. Similar provisions have been frequently before the courts, and it has been consistently held that the contract will be construed as a whole, after inquiry by the court into the facts surrounding its execution. Section 159 of the Civil Code provides that: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them * * * during such separation."

There is nothing in the contract here involved which is in conflict with the provisions of this statute or which contravenes public policy. The language of a similar case, *Estate of Clover*, 179 Cal. 313, 314, 176 P. 452, 453, is in point: "This recital contains no contract between the parties in violation of the law. It is merely stated as a basis for the agreement which follows for a separation and division of their property and an adjustment of their future property rights. Such a contract is expressly authorized by section 159 of the Civil Code." See, also, *Cookinham v. Cookinham*, 219 Cal. 723, 28 P.(2d) 1045, and cases there cited. Lastly, it may be remarked that these parties had separated and were living apart at the time of execution of the agreement.

No other contentions of defendant merit discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



2 Cal.2d 714

PEOPLE v. LATONA.

Cr. 3714.

Supreme Court of California.

March 26, 1935.

Rehearing Denied April 25, 1935.

1. Criminal law ☞552(1), 1159(6)

Guilty connection with commission of crime may be established by circumstantial evidence, and reviewing court cannot overturn conviction upon circumstantial evidence except upon determination that there was no evidence to sustain verdict.

2. Homicide ☞250

Evidence held sufficient to sustain conviction for murder.

3. Homicide ☞170

Evidence that automobile of same description as that found in defendant's garage was seen in vicinity of desolate location where deceased's body was found held admissible in murder prosecution, where there was evidence that defendant concealed his ownership of automobile and had taken out insurance on third person whose forged identification card was found on deceased's body.

4. Criminal law ☞1159(2)

Jury's function is to draw proper inferences from evidence, and appellate court may not substitute its finding for that of jury.

5. Homicide ☞305

In prosecution for murder based on theory that defendant had shot or procured shooting of deceased and had placed forged identification card of third person in his clothing to enable defendant to collect insurance on third person's life, instruction that it was immaterial whether defendant directly committed crime or aided and abetted in commission held justified under evidence.

6. Criminal law ☞829(12)

Refusal of requested instruction to jury not to base verdict on mere suspicion held

not error, where court gave instructions on circumstantial evidence and reasonable doubt.

7. Criminal law ⇨829(1)

Refusal of requested instruction covered by instructions already given is not error.

8. Criminal law ⇨564(3)

Evidence of coagulated blood on ground underneath head of deceased *held* sufficient to sustain venue in murder prosecution in county where deceased's body was found.

In Bank.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Ellis J. Latona was convicted of murder, and he appeals.

Affirmed.

K. I. Perky and Ralph W. Eckhardt, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, Justice.

The defendant was convicted in the superior court of Los Angeles county of the murder of Jose S. Flores, a paroled prisoner of the Arizona Penitentiary at Florence. The jury's verdict was without recommendation. This is an appeal from the judgment pronounced thereon and from the order denying defendant's motion for a new trial. The evidence connecting the defendant with the murder is entirely circumstantial. The body of Flores was found in the latter part of May, 1933, lying in the brush in Mint Canyon leading into Antelope Valley and the Mojave Desert, and about 300 yards north of Davenport road. The body bore two shotgun wounds of the head and neck, inflicted with evident intent to destroy the face beyond recognition, and a shotgun wound of the right wrist. Blood had coagulated on the ground underneath the head of deceased. No shotgun was found, but two shotgun shells were discovered near the body. Upon the body were found certain articles such as handkerchief, comb, razor blade, matches, 61 cents in change, parole papers, addressed envelopes for reporting to the warden of the Florence Penitentiary, and in the left breast pocket of the shirt a card case containing an identification card with the following writing on it: "My name is Manuel Villa. I live at 804 Yale street. In case of accident, notify Ellis

J. Latona, who lives at 1179 Isabel street." Villa, a Mexican, and Latona, an Italian, were married to sisters; but the families were not on social terms, although Villa and Latona remained friendly, and knowledge of the relationship seems to have been confined to the immediate families. Neither admitted having known Flores. Villa's wife was in the State Hospital at Patton. Villa had been out of employment and was upon the county relief roll. The appellant had been employed by the Los Angeles Railway Company, and his employment had terminated in September, 1932, with an accident for which he had received workman's compensation, and he had been out of work for several months. A judgment for \$2,000 had also been obtained against him. Some time in March or April, 1933, the appellant called on Villa at his rooming house, 804 Yale street, and stated to Villa that he had an opportunity for employment by an insurance company at a salary, if he could obtain ten or twelve applications for insurance, and asked Villa if he would not help him by taking out an insurance policy. This promise of employment it was testified was never made to appellant by any one connected with the insurance association. Villa stated that he had no money with which to pay the necessary premiums or initial six months membership fee, which Latona agreed to pay.

However, it appeared in evidence that about two years before, the appellant had been called upon, as an insurance prospect, by a Mr. William J. Miller, who represented the Policy Holders' Life Insurance Association, a mutual assessment association, which relied upon the truthfulness of the answers to its questionnaire and required no medical or physical examination. The nature of the life insurance, its cost, and so forth, were explained to appellant. At that time appellant explained that he was receiving workmen's compensation and that his physical condition as a result of his accident was such that he could not take out life insurance although he would like to. In the early part of April, 1933, Miller again called upon appellant to see if he was interested in life insurance at that time. About the 10th of April the appellant went to Mr. Miller's home and stated that he was unable himself to take out any insurance, but he believed he could secure some insurance on the lives of his father-in-law and mother-in-law; that they were not in town at all times, and if given some application blanks he would have them filled out

and return them to Mr. Miller. Appellant was given several application blanks.

In order to help the appellant secure applications, Villa finally agreed to make application for insurance and filled out two applications, telling appellant to make his wife beneficiary. The signatures, however, were printed in pencil, and the applications were rejected because not written out and were subsequently destroyed by Mr. Miller after he had transferred the essential data to new applications which Miller gave to appellant to secure Villa's signature, together with a stamped, self-addressed envelope to be mailed direct to the company's office. Two applications apparently signed by Villa for \$1,500 insurance each and naming the appellant as beneficiary were returned by the appellant to Mr. Miller and insurance policies were issued thereon, and on the 19th or 20th of April, 1933, these policies were given to appellant for delivery to Villa, each naming Ellis J. Latona as beneficiary. The appellant stated to Miller that Villa was a man hard to get in touch with; was away from home a good deal, and that if notices were sent to Villa they might not reach him and the policies might thereby lapse, and that in order that this might not happen all communications and notices in regard thereto were to be sent to the appellant at his address, 1179 Isabel street, Los Angeles.

It also appeared that Villa had a stepson, Joseph Ladato, fourteen years of age, who lived with his grandparents at 658 La Mar street, Los Angeles. April 24, 1933, was Ladato's birthday, and appellant, who is his uncle, called at Ladato's home and took him to school in his automobile, a blue Essex sedan. The story told Villa about a promise of position if appellant secured twelve or fourteen applications for life insurance was repeated to Ladato and he was induced to sign an application for insurance, in which Josephine Latona, appellant's wife, was named as beneficiary. Secrecy was enjoined upon the boy. Ladato never received the policy. The insurance company received no compensation, for it seems that appellant was to receive a courtesy policy for securing the Villa insurance and a promise to put Miller in touch with further life insurance business, and the Ladato application was substituted for the courtesy policy that appellant was to receive, on his own life.

Shortly thereafter Manuel Villa went to Globe, Ariz., the home of his parents, and remained there until returned to Los Angeles by the officers in connection with this case.

In the meantime the appellant had placed a "missing report" as to Villa with the Los Angeles police, who located Villa at Globe, Ariz.

Villa testified that he did print and sign his name at the top and bottom of the two original applications which were rejected, and thereafter destroyed by Miller; that he had never seen appellant or heard from him after leaving Los Angeles, and that he did not sign any further or additional applications for insurance of any kind; that he never received any policies or communications pertaining to such insurance; that he had never seen the identification card or card case found on the body of Flores; and that the handwriting was not his.

The body of Flores was discovered by a young man who reported it to Mr. Hammack, an employee of the Olsen ranch, located about two-fifths of a mile away. The sheriff's office was notified and Deputy Sheriffs Brewster and Morrell examined the body and removed from the clothing the minor articles already mentioned. Mr. Hammack told Officer Morrell that while pasturing cattle the day previous he had seen an Essex sedan in the vicinity of where the body was found about 10:20 o'clock in the morning, and that while circling a knoll about 150 feet away from the automobile he heard two shots about two seconds apart which sounded like blasts from a shotgun but paid no attention to them as there are many hunters out that way. Again, when about 200 feet from the Olsen house he saw this same Essex sedan moving in an easterly direction on the Davenport road, a darkish blue car, with black top, and a metal trunk in the rear. Mr. Bevins, a school bus driver for the Agua Dulce school, who lives on the Mint Canyon highway about three miles from the intersection of Davenport road, between 6 and 7:15 o'clock of a morning within two or three days of the finding of the body, saw a blue Essex sedan, of about a 1927 model, with a metal trunk in the rear, and a man at the wheel, going unusually slow on Mint Canyon highway in front of his home. Bevins noticed a gold star on the right-hand side of the windshield. While returning home after delivering his load of school children, he again saw the same automobile parked a little off the highway and again noticed the brown or gold star on the windshield and noticed that it was a little ragged on a couple of its corners. He was also able to notice the color of the top of the Essex sedan, which was black. It should be added that the tire prints where the Essex was parked at the time of the tragedy were

the size of the Essex subsequently found to belong to appellant and were without tread marks, the tread of the tires on appellant's car having been worn off.

After finding the body Officers Morrell and Sepulveda went to appellant's home at 1179 Isabel street and told the appellant of the finding of the body in Mint Canyon and that an identification card, which read "Manuel Villa" and his address 804 Yale street, and to notify "Ellis J. Latona," had been found thereon, but that they were doubtful if the body was that of Manuel Villa because they had also found parole papers with the name "Jose Flores" and they would like to have appellant come and identify the body as that of Manuel Villa. The officers also stated to appellant that they were looking for a blue Essex sedan and asked appellant if he owned a car. Appellant stated that his car was standing out in front, a Star automobile, and that it had not been in use for some time. The officers discovered that the radiator of the machine was hot, and appellant's son-in-law volunteered that he had just used it. The appellant made no mention of owning a blue Essex sedan. Such a car with ragged gold or brown star on the windshield, and a metal trunk, as described by the witnesses Hammack and Bevins as having been seen in the neighborhood about the time of the finding of the body of Flores, was thereafter found in the possession of the appellant. The windshield with the ragged gold star thereon was admitted in evidence. Subsequently, also, the appellant, when being questioned by the officers, denied any knowledge of the insurance applications, even when confronted by Manuel Villa.

Flores was last seen alive about May 20th, when he was, with a group of other convicts, turned adrift near the California line by the warden of the penitentiary at Florence, Ariz.

Appellant's main ground of appeal is that the evidence is legally insufficient to show participation of the appellant in the killing of Flores, or that he aided or abetted such killing.

[1, 2] As before stated, the evidence as to appellant's participation in the crime is wholly circumstantial. Guilty connection with the commission of a crime may be established by circumstantial evidence (*State v. Cristani*, 192 Iowa, 615, 185 N. W. 111; *People v. Kneeling*, 127 Cal. App. 151, 15 P.(2d) 561), and the jury had before it many circumstances from which they could draw proper legal inferences of guilt. They had the fact that the appellant made statements

inconsistent with the truth when first questioned by the officers; that when told by the officers that they were looking for a blue Essex sedan, he gave no information or intimation that he owned such a car, although such a car was then in his garage, corresponding in description to the Essex sedan described by the witnesses Hammack and Bevins as having been seen by them in the vicinity of where the body of Flores was found about the time of his killing. The jury had the positive evidence of Villa that he did not sign the applications for insurance upon which the policies of insurance were issued in favor of appellant and given to him for delivery to Villa; that Villa had never seen the identification card bearing his name and address and the leather case in which it was contained, and to notify Ellis J. Latona at 1179 Isabel street, nor had he ever signed such a card. There was the further evidence that the signature of "Manuel Villa" was a simulated one which was probably written with the left hand and that appellant refused to make any effort to write with his left hand when requested to do so by the officers.

Appellant contends that there is here presented an extreme case of inferences based upon inferences upon which to base a conviction, and not a case of a principal circumstance or inference from which to infer guilt to a moral certainty, and that taking the framework of "moral certainty" the jury was required to consider elements of time, place, motive, means, opportunity, and conduct, which appellant insists the jury did not do. However, as was said in *People v. Martinez*, 20 Cal. App. 343, 345, 128 P. 952, 953, if "the circumstances established reasonably justified the conclusion of the jury as expressed in their verdict, and, even though this court were of the opinion that such circumstances might be reasonably reconciled with the innocence of defendant, such fact does not warrant interference with the determination of the jury." The case just cited has been approved in the following authorities: *People v. Strauss*, 75 Cal. App. 447-455, 243 P. 67; *People v. Medaigi*, 94 Cal. App. 543-545, 271 P. 552; *People v. Mitsunaga*, 91 Cal. App. 298, 266 P. 1020; *People v. Page*, 86 Cal. App. 148-156, 260 P. 591; *People v. Hector*, 96 Cal. App. 102-106, 273 P. 843; *People v. Frahm*, 107 Cal. App. 253-266, 290 P. 678.

The fact that Flores was murdered was established beyond a reasonable doubt by the finding of his body and the shotgun wounds thereon which caused his death and which could not have been self-inflicted. The jury

was fully justified in concluding that the Essex automobile belonging to appellant was at the scene of the tragedy when it occurred. Who could have placed the identification card in deceased's pocket? Villa did not know him. The only persons knowing the relationship between Villa and appellant were their immediate families. Hence, with the Essex present the jury was justified in deciding that appellant had placed or arranged the placing of the card there, which is also corroborated by his partial identification of deceased as Villa. The circumstantial evidence produced convinced the jury beyond a reasonable doubt under the instructions of the court of the guilt of the appellant, and it is not the province of an appellate court to overturn such a conclusion, except it be determined that there was no evidence to sustain it. *People v. Tom Woo*, 181 Cal. 315, 184 P. 389.

The appellant contends that the evidence was insufficient to support the verdict, in that the autopsy surgeon's testimony as to the number of wounds on the body is incredible, contradictory of demonstrated fact, an invasion of the jury's province, and without probative force, but in what respect this is so is not pointed out and the authorities cited are not helpful to appellant's contention, and the point may therefore be considered as without merit.

[3] He further argues that the trial court erred in receiving evidence with regard to an Essex sedan having been seen in the vicinity of the spot where the body was found. At the trial the appellant objected to this evidence on the ground that it was incompetent, irrelevant, and immaterial, and that it did not tend to prove or disprove any issue in the case, and cited *People v. Smith*, 55 Cal. App. 324, 203 P. 816, where the defendant was charged with the murder of his wife through the use of cyanide, and the trial court admitted in evidence a can of cyanide to which the defendant had access at the place of his employment, and this court held that the presence of the can of cyanide in the filing room where defendant was employed was too remote from the point in issue to have any probative force, and therefore its admission in evidence was prejudicially erroneous. Here we have an entirely different situation. A man was shot and killed. His body was found in a desolate place, visited principally by hunters. A blue Essex sedan with a metal trunk on the rear was seen by a ranch hand on the day the gunshots were heard, parked near the place where the body was found,

and two or three days before this the same kind of an automobile was seen by another person parked off to the side of the Mint Canyon highway, which is the main highway leading to this section of the country, having on the windshield a gold star. The nature of the wounds on the body showed that the deceased was shot with a shotgun with the apparent purpose of destroying the features and for the purpose of passing the body off for that of another person by placing in the clothing on the body a forged identification card of a person on whose life appellant had about a month previously falsely obtained life insurance payable to himself. When appellant was first questioned as to the kind of an automobile he owned, he mentioned a Star automobile parked in front of his home and said nothing about owning a blue Essex sedan, although such a car was parked in his garage at the time. He also at first emphatically denied knowing anything about insurance on the life of Manuel Villa. Later he admitted owning a blue Essex sedan which was found in his garage and which had a gold star upon the windshield similar to that described as having been on the windshield of the Essex sedan which was seen parked off to the side of the Mint Canyon highway by the witness Bevins, and which in other respects resembled appellant's Essex sedan. Later appellant also admitted taking out insurance on the life of Villa of which he was made the beneficiary. The circumstances therefore of a blue Essex sedan with a black top, a metal trunk on the rear, and a ragged gold star pasted on the windshield, having been seen by witnesses in the vicinity of the spot where the body of Flores was found at and about the time the deceased was killed, was connected with appellant by the finding of an Essex sedan of the same description in the appellant's garage. *People v. Peete*, 54 Cal. App. 333, 348, 349, 202 P. 51; *People v. Billings*, 34 Cal. App. 549, 552, 553, 168 P. 396. The motion to strike this evidence was therefore properly denied.

[4, 5] Appellant's next point is that the court erred, to the manifest prejudice of appellant, in authorizing a verdict on the theory of complicity. From the evidence presented it was possible for the jury to have drawn certain legal inferences such as that the appellant himself placed the identification card upon the body so as to identify it as that of Manuel Villa, and that appellant himself wrote the card in a simulated handwriting with his left hand, and that appellant himself secured a shotgun and fired the fatal

shots. Again, the jury might have inferred that while appellant did not do the killing, some one else with appellant may have fired the shots and the appellant had thereafter placed the identification card upon the body. Again, the jury might have inferred that appellant had no shotgun and did not borrow one; that he himself did not write the identification card; that he did not place it upon the body; that appellant's Essex sedan was the one seen at the scene of the killing, and in the general vicinity of the place where the killing occurred; and that the same was loaned by appellant to some one for the purpose of killing a Mexican of the same general height and weight of Manuel Villa and destroying the features and then placing this card upon the body for the purpose of securing the insurance on the life of Manuel Villa. This latter inference would be supported by the fact that appellant failed to disclose to the officers on the day the body was found that he had a blue Essex sedan in his garage after being informed that the officers doubted that the body was that of Manuel Villa, and that they were looking for a blue Essex sedan. It is evident that whoever killed Flores knew Villa and his address and knew appellant and his address. It is also obvious that appellant forged the name or knew of the forgery of the name of Manuel Villa upon the two applications for insurance in which appellant was named beneficiary and that the killing of Flores and the attempt to have the body identified as that of Villa were the final acts in a scheme to collect life insurance upon the forged applications and the policies of insurance issued thereon.

The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act. *People v. Kneiling*, supra.

It is contended by appellant, as already noted, that the court erred in authorizing a verdict on the theory of complicity. Possible theories that may be deduced from the evidence which would support the verdict of the jury have been heretofore suggested. It was, therefore, proper for the trial court to have instructed the jury that it was immaterial whether appellant directly committed the crime or aided and abetted, or, being present, advised and encouraged its commission. In

People v. Burke, 18 Cal. App. 72, 103, 122 P. 435, 449, it is said in speaking of inferences and of an offered instruction in connection therewith, which the trial court refused to give: "In the first place, from the evidence introduced by the prosecution, it would be a fair inference either that the defendant personally exploded the dynamite or that it was done by some one else with his knowledge and co-operation. Hence, appellant's proposed instruction was properly refused. But it cannot be the law under our practice that a defendant must necessarily be acquitted of the crime charged, for the reason that it may be uncertain as to who committed the final act. Of course, it must be shown that the crime was actually committed. Of this there could be no doubt in the case at bar. And, since he can be charged in the indictment as a principal whether he actually committed the offense or aided and abetted or encouraged its commission, he can be justly convicted if the evidence shows that he was connected with the crime in either relation. The district attorney is not required to elect whether he will prosecute or ask for a conviction upon the ground that the defendant was the principal or an accessory before the fact, but he may ask for a verdict if the evidence satisfies the jury of either alternative. It appears to follow that the additional burden is not cast upon the people to identify some one else as having guilty connection with the crime." See *People v. Peete*, supra, 54 Cal. App. 333, pages 356, 357, 358, 359, 202 P. 51. The contention that the court left no doubt in the minds of the jurors that they were entirely authorized to find a verdict against the defendant, even though his testimony as to alibi was true, and he was not at the scene of the murder at the time the homicide was committed, and that this was prejudicial error, is not supported by the cases cited which we have read and considered.

[6, 7] Appellant asserts: "That the court prejudiced the appellant in refusing to instruct the jury, at appellant's request, that they could not base a verdict on suspicion, surmise or conjecture, and that this principle of law does not appear in any of the instructions given by the court."

The court instructed the jury at the request of appellant as follows: "In a case where circumstantial evidence is relied upon by the people for conviction, the circumstances must be consistent with the guilt of the defendant and inconsistent with any other rational hypothesis. If the circumstances in evidence point to the defendant as being guilty, and al-

so point with equal force to some other person not connected with the defendant, or to some unidentified person or agency as the cause of the death of the deceased, and if it is equally probable under the evidence that either the defendant, the third person, or such unidentified person or agency killed the deceased, then your verdict must be 'not guilty.'"

Also: "When the people rely upon circumstantial evidence to convict the defendant, every link in the chain of circumstances necessary to a conviction must be established by the evidence to a moral certainty and beyond a reasonable doubt."

The trial court also defined to the jury, in the language of the statute, the term "reasonable doubt." The rule is too well established to require the citation of authority, that it is not error to refuse a requested instruction if it has been covered by those already given.

[8] Appellant's final point is that the venue was not proved, and it is suggested that the murder might as well have been committed in Arizona and the body brought to where it was found. The coagulated blood on the ground underneath the head of deceased dispels the suggestion that the deceased was killed at some remote place, and the point is therefore without merit.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.



4 Cal.App.2d 158

GERSON v. KELSEY et al.

Civ. 5176 (3).

Supreme Court of California.

March 28, 1935.

Usury ☞47

Provision in note or other contract for payment of interest at rate of 12 per cent. per annum, payable monthly, does not render note or contract usurious.

In Bank.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Rosa Gerson against Horace G. Kelsey, also known as H. G. Kelsey, and another. Judgment adverse to plaintiff was affirmed by the District Court of Appeal, Third District [40 P.(2d) 543], and plaintiff petitioned the Supreme Court for a hearing.

Petition denied.

Oscar Samuels and A. Dal Thomson, both of San Francisco (Louis Ferrari, of San Francisco, of counsel), for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondents.

PER CURIAM.

In denying the petition for a hearing herein, we withhold our approval of the following statement appearing in the opinion [Gerson v. Kelsey (Cal. App.) 40 P.(2d) 543, 544]: "The item of interest 'at the rate of twelve (12) per cent per annum payable monthly,' which was provided for by the terms of the note, is usurious and void." Such a provision in a note or other contract does not render it usurious. Haines v. Commercial Mortgage Co., 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 53 A. L. R. 725.



2 Cal.2d 661

In re GRANT'S ESTATE.

L. A. 14548.

Supreme Court of California.

March 22, 1935.

Executors and administrators ☞231

Where creditors of deceased offset their claims against their debts to widow who was executrix but she did not file claim against deceased's insolvent estate within statutory time, executrix held not entitled to have claims allowed in settlement of her account (Code Civ. Proc. §§ 1490, 1491, 1510, and § 1632 [now Probate Code, § 929]).

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Final accounting of America W. Grant, as executrix of the estate of Ulysses S. Grant, Jr., sometimes known as U. S. Grant, Jr., deceased, to which the trustees of the George J. Keating Medical Fund filed objections.

From an order settling the account and overruling the objections, the trustees of the George J. Keating Medical Fund appeal.

Order modified and, as so modified, affirmed.

Prior opinion, 34 P.(2d) 495.

Harrison G. Sloane, of San Diego, for appellants.

Wright & McKee, C. M. Monroe, and Wright, Monroe, Thomas & Glenn, all of San Diego, for respondent.

CURTIS, Justice.

U. S. Grant, Jr., died leaving a last will and testament in which his wife, the respondent, America W. Grant, was named as the executrix thereof, and as his sole devisee. Upon her appointment as such executrix she duly published notice to creditors, and within the time provided by law for the presentation of claims two claims were presented and allowed against said estate, one by S. A. Reed in the sum of \$457.03, and the other by the trustees of George J. Keating Medical Fund in the sum of \$7,200. The last-mentioned claim was secured by a mortgage upon real property belonging to said deceased. Subsequent to the allowance and filing of said claim, the trustees of said medical fund foreclosed said mortgage and bought in the mortgaged property. After applying the proceeds of said sale to the amount due under the decree of foreclosure, there remained a deficiency of \$3,764.94 due under said decree for which deficiency a judgment was duly docketed against the estate of said deceased. There were also two preferred claims filed against said estate, but as they were paid by said executrix they are in no way involved in the present controversy. After the payment of these preferred claims and the costs of administration, excepting executrix' and attorney's fees, the court decreed that there remained in the hands of said executrix the sum of \$2,443.11, less definite amounts to be paid on executrix' and attorney's fees, and an indefinite amount to discharge any inheritance tax which might be found due from said estate. The balance remaining in the executrix' hands was to be applied pro rata upon the two nonpreferred claims against said estate and the claim of the executrix which arose under the following circumstances: At the time the deceased died he was indebted to the U. S. Grant, Jr., Hotel in the sum of \$1,759.44, the payment of which had been guaranteed by Mrs. Grant. The hotel company deducted this amount from a dividend subsequently declared on stock in said company belonging to Mrs. Grant. The other

debt paid by Mrs. Grant was based upon a promissory note executed by Mr. and Mrs. Grant, the latter simply as surety, in favor of the Bank of America. The bank came into possession of funds, after the death of the deceased, belonging exclusively to Mrs. Grant, out of which it paid the amount due on said note, amounting at that time, principal and interest, to \$6,092. Neither the hotel company nor the Bank of America filed any claim against said estate for its debt against the deceased. Although these two amounts, due primarily by the deceased, were paid by Mrs. Grant from her own separate funds, she filed no claim against said estate for either of said amounts. In her final account she claimed, however, that these two amounts represented legal claims against the estate of her husband, and asked that the remaining funds in her hands as the executrix of the will of said deceased be applied in payment pro rata on the aggregate amount of these two debts as well as on the two claims of S. A. Reed and the trustees of the Keating Medical Fund. The trustees of said fund filed written objections to said account and to the payment to Mrs. Grant, or to the retention by her, of any amount on account of these two claims, on the ground that neither of them was ever filed as a claim against said estate. The probate court after a hearing overruled the objections of said trustees to said account and entered an order directing said executrix to apply the balance of money in her hands to the payment pro rata of the claims against said estate, including the two amounts, aggregating the sum of \$7,851.44, paid by Mrs. Grant in settlement of the debts of her husband due said hotel company and the Bank of America, respectively. From this order, the trustees of said medical fund have appealed.

As U. S. Grant, Jr., died September 26, 1929, and prior to the adoption of the Probate Act, all proceedings in his estate for giving of notice to creditors were governed by the Code of Civil Procedure. Section 1490 provides for the publication of the notice to creditors. Section 1491 limits the time in which claims may be presented to six months after the first publication of said notice, and section 1493 provides that all claims arising upon contract must be filed or presented within the time limited in the notice, and any claim not so filed or presented "is barred forever." Section 1510 provides that if the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Section 1632 of the Code of Civil Procedure was re-enacted without substantial

change as section 929 of the Probate Code, which reads as follows: "If it appears that debts of the decedent have been paid without verified claims having been filed or presented and allowed and approved, and it shall be proven that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, the court, in settling the account, shall allow the sums so paid."

Appellants contend that under the provisions of this last-mentioned section an executor or administrator may have debts, which he has paid without the presentation of verified claims therefor, allowed only in estates which are solvent, and that in estates which are insolvent the court is without any authority to allow debts of the deceased paid by the executor or administrator in the absence of any presentation of verified claims therefor, and if debts against an insolvent estate are paid without verified claims therefor having been filed or allowed, then the executor or administrator paying the same cannot have them allowed in the settlement of his account. We are of the opinion that this contention must be sustained.

Under the sections of the Code of Civil Procedure cited above as in force prior to the adoption of the Probate Code (and the rule is now the same under the Probate Code), all claims against the estate of a decedent arising upon contract must be filed or presented within the time prescribed in the published notice to creditors, and if not so filed or presented they are forever barred. There are certain exceptions to this requirement, but no contention is made that any of these exceptions has any application to the present controversy except possibly section 1632 of the Code of Civil Procedure, now section 929 of the Probate Code. This section in express language permits the allowance of debts paid by the executor or administrator without the presentation or allowance of verified claims therefor in solvent estates only. No mention is made of debts against insolvent estates, and by no process of reasoning can its terms be construed to include such debts. The maxim *expressio unius est exclusio alterius* applies in this instance with controlling force.

While a statute with provisions similar to section 1632 of the Code of Civil Procedure and section 929 of the Probate Code has in various forms been in force in this state since the year 1872, the question presented on this appeal has never been directly passed upon by the courts of this state. It was before the

court in *Re Estate of Card*, 64 Cal. App. 268, 222 P. 145, but that case was evidently decided upon another point, leaving the question in which we are now interested undecided. In *Re Estate of Machado*, 186 Cal. 246, 249, 199 P. 505, the administrator paid certain notes held against the estate without requiring verified claims therefor to be filed or allowed. His acts were approved on the authority of section 1632 of the Code of Civil Procedure, but in that case the court found the estate to be solvent. In *re Estate of Houston*, 205 Cal. 276, 270 P. 939, 60 A. L. R. 730, is in many respects similar to the instant proceeding, but differs from it in other material aspects. In that estate the court allowed a number of claims against the estate based upon debts paid by the executrix for which no verified claims had been filed or presented. The court found that said estate at the time of such payment, and long prior to the expiration of the time for presenting claims against it, was solvent. Over eighteen months after the time for presenting claims had expired, the claimant therein commenced an action in tort against said estate based upon the alleged negligence of the deceased. This action resulted in a judgment against said estate in an amount exceeding the sum of \$10,000. Before the estate was settled, it became insolvent. This court held that on account of the many equitable features existing in favor of the executrix in that estate, and by reason of appellant's lack of diligence in initiating proceedings to establish his claim, equity would not come to his aid, and refused to disturb the settlement of said account by the trial court. We might say at this juncture that the respondent in this case places great reliance upon *In re Estate of Houston*, supra, in support of the order of the trial court allowing the debts of the deceased paid by her without their formal presentation as verified claims. But in the present proceeding there are no such equitable features in favor of the executrix as existed in *Re Estate of Houston*, supra, which caused the court to refuse relief to the appellant therein. The present estate was never solvent. The debts of the estate paid by the executrix without claims being filed therefor were paid with knowledge of the insolvency of the estate. The appellants herein were prompt and vigilant in the presentation of their claim and in the enforcement of their rights against said estate. They filed their claim based upon the promissory note of the deceased secured by said mortgage. Without any unnecessary delay they instituted an action to foreclose said mortgage and prose-

cuted it diligently to final judgment, and after a sale of the mortgaged premises under said judgment they docketed the deficiency judgment against said estate. The executrix was not deceived nor misled at any stage of these proceedings by any act of the appellants. As noted before, the estate was insolvent from its inception, and she made these informal payments of her husband's debts with knowledge of its insolvent condition. We feel justified in making this statement by the fact that the total assets of the estate were less than \$3,600, while the debts paid by her amounted to more than double this amount. She is presumed to know that the law would not permit reimbursement under those conditions without verified claims being filed against the estate. It is probably true, as her counsel claim in their brief, that she considered the debt of appellants adequately secured and she did not anticipate that a deficiency judgment might arise out of said indebtedness. If she was thus lulled into security, it was by no act of appellants. If she arrived at an erroneous conclusion, the fault was not appellants' but her own. Under these circumstances we are constrained to hold that there are no equitable features in this case which take it out of the explicit direction of the Code sections governing the presentation and allowance of claims against estates of deceased persons.

Respondent contends that in this Code section the Legislature does not specifically say that no allowance may be made if the estate is insolvent, but merely provides that the allowance must be made under the circumstances stated therein if the estate is solvent. This construction of the statute, in our opinion, is correct, but we fail to see how it benefits respondent. This section directs the allowance of debts under the circumstances stated therein without verified claims therefor being presented or approved. It is an exception to the general rule set forth in other sections of the Code referred to above providing generally that all claims based upon contract against an estate of a decedent must be presented and approved, or they are forever barred. Respondent cannot bring herself within the general rule, as the debts paid by her were not presented or allowed as provided by the general rule. She cannot come within the exception, as it applies only to solvent estates. In neither case has respondent shown that she is entitled to an allowable claim against said estate.

Respondent further contends that section 929 of the Probate Code should be construed
CAL.REP.43-44 P.2d-2

to mean that debts paid by the executrix without their presentation and allowance may be allowed and paid in full when the estate is solvent, but when the estate is insolvent they are only to be paid pro rata with the claims of other general creditors. We think this argument has been answered by what we have already said as to the meaning of this section. It deals expressly and solely with debts of the deceased where the estate is solvent. To extend its terms so as to provide for the pro rata payment of debts of an insolvent estate would in effect amount to the reading into the section of language which is not to be found therein, and which by no reasonable construction of the section, was it the intention of the Legislature to include therein.

As to the contention that the construction given the Code sections leads to unjust and absurd results, we can see nothing unjust in requiring an executrix, or other personal representative of the deceased to comply with the law requiring the presentation and allowance of verified claims against an estate before the same can be paid. Other creditors of the estate are subject to these requirements, and we see no good reason why the executrix should not also be bound by them. Especially is this true when an estate is insolvent and every effort should be made to conserve the estate's assets for the benefit of the creditors. These same observations apply to the claim of respondent that the results are absurd. It may be possible to imagine a combination of circumstances in which the application of the law as contained in these sections of the Code might lead to unusual results. No such unusual or absurd result is shown to exist in the present proceeding. The fact that these sections of the Code have been in effect almost from the foundation of our state government, and no successful attempt has been made to amend them, nor has any of the absurd results, which counsel for respondent appear to fear, ever engaged the attention of the appellate courts of the state, leads us to believe that the principles of law embraced within these sections are not inequitable and that the unjust and absurd results which may possibly flow from their enforcement are more imaginary than real.

Respondent has cited a number of decisions of this court and of the District Court of Appeal in which the payment of unverified claims against the estate has been approved, but an examination of these authorities shows that in each instance the payment was made under circumstances where it was necessary

either to protect the property of the estate, or advance the estate's interest. None of these cases has any application to a payment like that made by respondent in this estate, from which the estate received no direct or indirect benefit whatever. We are of the opinion, therefore, that the order of the probate court allowing the amounts of the debts of the deceased paid by the executrix without the filing or presenting of verified claims therefor, and directing their payment pro rata with the other nonpreferred claims against said estate should not be sustained.

Respondent relies upon the case of *In re Wiley's Estate* (N. J.) 65 A. 212, 213, which involved the right of an executor to retain the amount of a debt due him from the deceased. It does not appear from the facts stated in the opinion whether the executor had presented a verified claim against the estate, or whether the law of that state, New Jersey, made any such requirement. In that case the court held that, "with reference to the right of retainer, the contention by the accountant that, although this estate is insolvent, he has the right to retain his debt in full is not supported by the law in this state, and the orphans' court correctly found that he must accept a dividend along with the other creditors." Evidently the common-law doctrine of right of retainer was to an extent in effect in that state. Under that doctrine the executor or other personal representative of the deceased was permitted to retain from the proceeds of the estate so much of the assets thereof as would pay his debt before any other creditor was paid whose debt was of equal worth. 3 Blackstone's Commentaries 18. This doctrine, if ever in effect in this state, was repudiated as early as the year 1851 by an act of the Legislature which required the executor or other personal representative of the deceased to present his claims against the estate (Stats. 1851, p. 466), and for failure to do so lost his right to have the same enforced against the estate. *In re Estate of Taylor*, 10 Cal. 482; *In re Estate of Taylor*, 16 Cal. 434; *In re Estate of Hildebrandt*, 92 Cal. 433, 28 P. 486.

It is therefore ordered that the order settling the first account of executrix be modified by striking out the last line of said order, reading as follows: "America W. Grant * * * \$7,851.44," and that, as modified, said order be and it is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.

3 Cal.2d 71

STACK v. WELDER et al.

L. A. 14378.

Supreme Court of California.

April 1, 1935.

1. Appeal and error ⇨356

Appeal from judgment, when taken too late, must be dismissed.

2. Judgment ⇨150

Amendment of complaint in matters of substance after default opens default and thereafter no default judgment can properly be entered unless amended pleading is served on defaulting defendant.

3. Judgment ⇨150

In mortgage foreclosure action, order substituting assignee of mortgage as plaintiff in place of mortgagee, though entered after default without service of amended pleading on defaulting defendants, did not alone authorize vacation of default judgment, since amendment was not a matter of substance.

4. Judgment ⇨150

In mortgage foreclosure action, supplemental complaint seeking as additional relief enforcement of junior lien and application of surplus proceeds thereto held within rule forbidding default judgment, where complaint amended in substantial matter, after entry of default, is not served on defaulting defendant.

5. Judgment ⇨165

In mortgage foreclosure action, defaulting defendants, not served with supplemental complaint which left original pleading intact but sought to establish plaintiff's junior lien, held entitled to have default judgment set aside only as to that portion granting additional relief under supplemental complaint, where plaintiff purchased at foreclosure sale and proposed answer of defaulting defendants raised only issues already determined on answer of codefendant (Code Civ. Proc. § 702).

6. Pleading ⇨279(1)

Complaint and supplemental complaint are considered as separate pleadings.

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In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton and G. R. Freeman, Judges.

Action by Virginia L. Armstrong against Joseph Welder, M. Kirouff, Mary Kirouff and another, in which H. D. Stack was substituted as plaintiff. From an adverse judgment, and from an order denying a motion to set

aside the judgment, defendants Kirouff appeal.

Order affirmed in part, and reversed in part, and appeal from judgment dismissed.

For prior opinion, see 36 P.(2d) 850.

Sarau & Thompson, of Riverside, and Irvin O. Louis and H. B. Pool, both of Los Angeles, for appellants.

Goodman, Bachrack & Brownstone, of Los Angeles, Best & Best, of Riverside, and O. C. Sattinger, of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

In this action in foreclosure, the defendants Kirouff defaulted and are now before us upon appeal from the judgment and from an order denying their motion to vacate and set it aside. As to defendants Welder, the cause was tried on its merits; plaintiff had judgment, from which said defendants appealed, and said judgment was, on April 2, 1934, affirmed by the District Court of Appeal. *Stack v. Welder*, 137 Cal. App. 647, 31 P.(2d) 426. The following statement of facts will make clear the position of these appellants (the Kirouffs):

The Welders and the Kirouffs owned interests in some 700 acres of mountainous land suitable for a hot mineral springs and health resort. On February 26, 1926, the Welders executed to Virginia L. Armstrong four promissory notes secured by first mortgage on the property (three \$10,000 notes upon which payments were not kept up and one \$1,122.92 note, which was paid). On June 7, 1929, said mortgagee brought this action in foreclosure, naming as defendants the Welders, the Kirouffs, and a number of other persons.

On July 10, 1929, the Welders and Kirouffs contracted with two individuals, Conrad and Goelter, to sell the property to a corporation, "Eden Hot Springs, Inc.," which was to be formed with an authorized capital no par value stock of 5,000 shares, 1,000 of which shares said vendors were to receive for their conveyance. This contract was performed, said mortgage, at the time of conveyance of the property, being of record, with \$25,000 still unpaid on the principal indebtedness thereby secured. On December 15, 1929, this plaintiff Stack purchased all of the capital stock of the corporation not held by the Welders and Kirouffs, to wit, some three-fourths thereof. On January 7, 1930, he was elected president of the corporation; thereafter he became one of its five directors

and selected three of the other directors. On January 16, 1930, he purchased said mortgage. The decision on the Welder appeal (*Stack v. Welder*, supra) upholds findings to the effect that this purchase was made with his own money; that he paid the full amount due on the mortgage and advised the other stockholders of the purchase; that the corporation was unable to pay the mortgage; that, however, he did not press his claim thereon for more than two years, during which time he advanced to the corporation sums of money aggregating \$13,714.96; and that on May 26, 1931, he took a corporate note for this sum, secured by a second deed of trust on said property. On June 3, 1932, when this action was called for trial, he procured an order of court substituting himself as plaintiff in the place of said Virginia L. Armstrong. The default of appellants Kirouff had been entered in October, 1931, and they were not notified of the substitution of party plaintiff. The Welders, however, were granted a continuance in order to amend their answer.

The amended answer of the Welders, containing a general denial and special defenses, put in issue the facts relating to conveyance of the property to the corporation, and plaintiff's alleged lack of good faith, as majority stockholder, in purchasing the mortgage and making advancements to the corporation, in return for its note and second trust deed. Trial of the cause was finally had on June 24 and July 1, 1932. On November 10, 1932, plaintiff filed a supplemental complaint alleging execution of said \$13,714.96 note and trust deed and asking that it be declared a valid lien against the property and that any surplus arising from sale under the decree of foreclosure be paid to him to the amount named in said second trust deed. The decision in the Welder Case (*Stack v. Welder*, supra) states that it clearly appeared that this supplemental complaint was in the nature of a supplemental pleading permitted to be filed, upon notice and hearing, to conform to proof adduced upon trial of the action. On November 12, 1932, the Welders filed a demurrer to it, but, so far as the record shows, said demurrer was never ruled on by the court, nor was any further answer filed.

On November 19, 1932, the trial court made findings in harmony with the allegations of the original and supplemental complaints, followed by entry, on November 22, of decree of foreclosure and order for sale of the property, directing that the proceeds of sale be applied to the amount due upon the mortgage, and then that the surplus, if any, be applied upon

the amount due on said second deed of trust. Thereafter sale was held on December 31, 1932, and plaintiff bid in the property for \$32,073.53, being the amount necessary to satisfy the mortgage, interest, and costs.

Thereafter, and on May 8, 1933, the defendants Kirouff moved to vacate the judgment and permit them to file an answer, copy of which proposed pleading they submitted to the court. It was practically identical with the answer of the Welders, on which the case had gone to trial, containing similar allegations charging plaintiff with fraud in the alleged use of corporate funds to purchase the mortgage and in taking said corporate note and second trust deed. As ground for setting aside their default, the Kirouffs alleged that said supplemental complaint amended the original complaint in matters of substance, adding new and different material issues affecting their rights and that said changes were made without service upon or notice to them, and that the judgment for plaintiff was entered on said supplemental complaint. On May 17, 1933, the court denied their motion, whereupon, on June 22, 1933, they appealed both from the judgment and from the order denying said motion.

[1, 2] The appeal from the judgment was taken too late and must be dismissed. *Schlainman v. Kierce*, 199 Cal. 249, 248 P. 905; *Lawson v. Guild*, 215 Cal. 378, 10 P.(2d) 459. As to the appeal from the order refusing to vacate, it is a settled rule that where, after the default of a defendant has been entered, a complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default. *Cole v. Roebeling Construction Co.*, 156 Cal. 443, 446, 105 P. 255, and many cases therein cited.

[3] The application of this rule to the facts before us presents several questions:

(1) Was the order substituting respondent Stack as party plaintiff in the place of Virginia L. Armstrong, an amendment of substance, entitling appellants to have their default set aside? The bringing in of a new party by amendment may or may not be a matter of substance, depending on whether the defaulting parties are affected thereby. 14 Cal. Jur., § 20, p. 890, and cases cited. Here it appears that the change was not substantial as affecting the rights of appellants upon foreclosure of the mortgage and they were not prejudiced thereby.

[4] (2) Were the changes presented by the allegations of the supplemental complaint matters of substance or matters of form? Obviously the pleading alleged entirely new matter, in addition to the original cause of action, materially affecting the rights of appellants. Likewise the prayer of said supplemental complaint was for an entirely new relief, which was accorded in the judgment. In other words, respondent not only succeeded to the rights of the original plaintiff, but asked for and was granted additional relief, which could not have been given under the original complaint. An additional evidence of debt was declared to be a lien upon the property, and the debt was ordered paid from the proceeds of sale, if they were sufficient.

[5, 6] The answer to the first of the above questions being in the negative, and the answer to the second in the affirmative, we are brought to a consideration of respondent's contention that, in any event, the judgment is severable and at most should be set aside only in so far as it affords him relief grounded upon his said supplemental pleading. This contention seems to be sound. The supplemental complaint left the original pleading intact. A complaint and a supplemental complaint are considered as separate pleadings (California, etc., *Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593; *Conlin v. Southern Pac. R. Co.*, 40 Cal. App. 733, 741, 182 P. 67; 21 Cal. Jur. 170, 172) and may give rise to a severable judgment. (15 Cal. Jur. 49.) Thus, only that portion of the judgment affording relief under the supplemental complaint is, as to appellants, void.

Another reason for our disinclination to disturb that portion of the judgment grounded upon the original cause of action is that appellants' proposed answer raises only those issues which have already been fully heard and determined in the *Welder Case*. *Stack v. Welder*, *supra*.

Furthermore, the record shows that Stack became the purchaser at the foreclosure sale, holding the lien of the second trust deed. Under well-settled rules of law, a redemptioner would have to satisfy both liens. Section 702, Code Civ. Proc. This fact reduces the case to a point where the only right left to appellants is the right to contest the bona fides of the indebtedness secured by said second trust deed, either by answer in the present action, or by an independent suit.

So much of said judgment as is based upon the supplemental complaint is void as to these appellants and their right to contest the

issues tendered by it remains without restriction; therefore, so much of said order appealed from as refused to vacate this portion of the judgment is reversed, and in all other respects the order is affirmed. The appeal from the judgment is dismissed.

We concur: THOMPSON, J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.



3 Cal.2d 80

HOLLAR v. SALINE PRODUCTS, Inc., et al.
L. A. 14860.

Supreme Court of California.
April 1, 1935.

Appeal and error ⇐337(2)

Appeal from judgment canceling lease, granting possession of premises involved, and appointing master to make accounting of rent due plaintiff, who was given judgment for "\$——," amount to be inserted later, *held* dismissible as premature.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ruth Susan Hollar against Saline Products, Inc., and another. From a judgment for plaintiff, defendants appeal. On respondent's motion to dismiss appeal.

Motion granted.

Hansen & Sweeney, M. M. Holman, and Goodwin J. Oppegard, all of Los Angeles, for appellants.

Harry H. Parsons, of San Bernardino, and George R. Maury, of Los Angeles, for respondent.

WASTE, Chief Justice.

Based upon allegations of nonpayment of rent and royalties, and other breaches of a lease of a plant and real property, the plaintiff brought this action for cancellation of the lease, immediate possession of the property, and for judgment "for all rents and royalties due." The trial court found in favor of plaintiff on all the issues, and that the defendant "is indebted to plaintiff for rents and royalties in excess of \$——, that

such excess can be determined only by an accounting by the defendants." Judgment was entered that plaintiff "have and recover from defendants the immediate, peaceful, undisturbed possession" of the entire property involved, and that the proper writ of possession issue; and that the sheriff of the county "place plaintiff in possession." It was ordered and decreed that the lease in question be canceled.

It was further ordered that a special master make the accounting found necessary to fix the amount due from the defendants, "report back to [the] court, and inform [the] court in what amount the defendants are indebted to plaintiff on account of said rentals and royalties; that the plaintiff do have and recover judgment against said defendants in the amount of such sum, which is hereafter to be inserted herein, in the sum of \$——. * * * That no stay of execution or of the issuance of the writ of possession shall herein be granted."

The defendants appealed from the judgment, and plaintiff, as respondent here, moves to dismiss the appeal on the ground that it was prematurely taken, contending in support of the motion that no final judgment has been entered in the court below. Under the now accepted rule in this jurisdiction, the motion must be granted.

Respondent relies specifically upon the decision of this court in *Gunder v. Gunder*, 208 Cal. 559, on page 561, 282 P. 794, 795, where the court considered the "conflict of authority on the question whether a decree which settles the basic issues between the parties, adjudges the complainant's right to an accounting and refers the items of the account to be found by a master, etc., is an appealable judgment." The survey of the authorities made in that case is thorough, and the opinion was so recently filed that further discussion of it seems unnecessary. The decision in the *Gunder Case* has been consistently followed by this court and by the District Court of Appeal. *Di Blasi v. Di Blasi*, 209 Cal. 753, 290 P. 7; *Middleton v. Finney*, 214 Cal. 523, 6 P.(2d) 938; *McFarland v. Mott*, 123 Cal. App. 79, 11 P.(2d) 18; *Diller v. Superior Court*, 125 Cal. App. 554, 13 P.(2d) 988; *Security-First Nat. Bank v. Superior Court*, 132 Cal. App. 683, 23 P.(2d) 1055. Prior to the decision in the *Gunder Case*, supra, there had existed considerable confusion as to the final effect of a judgment fixing the liability and rights of the parties, but referring the cause to a

master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account upon which a further decree was to be entered. The court, in its decision in the *Gunder Case*, squarely held that such a judgment is not final. In the *Di Blasi Case*, *supra*, this court affirmed the ruling in the *Gunder Case* and said 209 Cal. page 754, 290 P. 8, that an earlier case (*Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696) might be distinguished, "but even if this were not so, said case would have to be considered as modified to conform to the holdings" referred to, i. e., the *Gunder Case*. In the instant case, the peculiar form of the judgment seemed at first to indicate that it was intended to be a final judgment, but there remained a judicial act to be done, the approval of the account to be stated by the master appointed for that purpose. As entered, the judgment was not complete.

The motion to dismiss the appeal on the ground that it was prematurely taken is therefore granted.

We concur: THOMPSON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

PRESTON, Justice.

I concur with some reluctance in this judgment.

A trial court should, where the judgment disposes of more than one issue, make the same final as to some and interlocutory as to others.

But I think the trial court in such case should declare explicitly whether all issues are to be later readjudicated.



3 Cal.2d 15

PEOPLE v. CAMPOS.
Cr. 3828.

Supreme Court of California.
March 29, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

1. Criminal law ¶274, 998

Where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of

right of a trial on the merits, court in which he was sentenced may, after judgment and after time for appeal has passed, if properly supported motion is seasonably made, grant defendant privilege of withdrawing plea of guilty and reassuming situation occupied by him before plea was entered.

2. Criminal law ¶1189

Where defendant who was an illiterate Mexican had pleaded guilty to murder, in belief that he would receive life imprisonment, whereas he actually received death sentence, and undenied affidavits of defendant and his attorney stated that prosecutor had definitely promised life imprisonment on guilty plea, case was remanded to permit defendant to enter a plea of not guilty.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Apolonio Campos pleaded guilty to a charge of murder, and he appeals.

Reversed and remanded with directions.

David C. Marcus, of Los Angeles, for appellant.

W. Earl Redwine, Dist. Atty., of Riverside, U. S. Webb, Atty. Gen., and Warner I. Paul, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

This is an appeal from an order denying an application for writ of error coram nobis and a motion to vacate the judgment and sentence of death entered upon defendant's plea of guilty to a charge of murder contained in an information filed by the district attorney of Riverside county. In support of his twofold request for relief, and an expressed desire to withdraw his plea of guilty and enter a plea of not guilty, the defendant filed certain affidavits with the trial court wherein he, and counsel who represented him before the lower court, averred that he is an illiterate Mexican unable to speak the English language; that he was unfamiliar with and did not fully comprehend the seriousness of the proceedings had in the court below; that he was induced to plead guilty upon the representation of the district attorney to his counsel that he would be given life imprisonment and would not be sentenced to hang.

[1] It is settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of

a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before plea of any kind was entered. *People v. Schwarz*, 201 Cal. 309, 314, 257 P. 71. In other words, as stated in *People v. Miller*, 114 Cal. 10, 16, 45 P. 986, 987, "the law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motives which may influence him to take one or another course. Therefore it will permit a plea of guilty to be withdrawn, if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced, either by hope or fear, in the making of it."

[2] The following excerpt from one of defendant's affidavits, filed in the court below, sufficiently illustrates his position that he was induced to enter a plea of guilty on the promise of immunity from hanging. He avers "that on or about the 23rd day of May, 1934, one Russell Waite, through an interpreter, interviewed your petitioner in the county jail at Riverside, California, and informed him that he had been appointed by O. K. Morton, judge of said court, to appear and defend him before the above entitled court. That said attorney, Russell Waite, then and there informed petitioner that he had already discussed the matter with the said Earl Redwine of Riverside county, and that he Russell Waite had asked the district attorney what penalty would be demanded by the state. That Redwine answered in substantially the following language:

"Remember what the jury did to Aragon (referring to the case of one Jose Aragon who had been found guilty by a jury a short time previously and sentenced to death.) If your client pleads not guilty and demands a jury trial, we are going to ask the death penalty, but I have already discussed the case with the judge, and if Campos wants to plead guilty he can save his neck and have life imprisonment."

"That Russell Waite further informed your petitioner that District Attorney Redwine had further stated at that time that he had already interviewed the Court Judge O. K.

Morton with respect to the plea of defendant Apolonio Campos charged with the crime of murder; that said District Attorney had advised the Court that he had been informed that the defendant desired to enter his plea of guilty to said charge, that the Court through Honorable O. K. Morton asked said District Attorney what he wanted done with the case and what recommendation he would make to the court. Redwine then replied that he believed the defendant should hang. The Court then stated that he would not accept the defendant's plea of guilty if the District Attorney would demand the death penalty without the court first appointing counsel to represent him. That the District Attorney then replied that he did not desire to put the county to the expense of another murder trial. That he had just completed the prosecution of the Aragon murder case and was compelled to expend some \$700.00 to \$800.00 in that matter. And that in this case, the offense having been committed at Blythe, California, some one hundred seventy-five (175) miles from Riverside, the county seat in which said cause would be tried, that it would be necessary to subpoena the witnesses from that place; that the expense would be considerable, and that, rather than go to that expense, he would recommend to the court and consent to a life imprisonment sentence on Campos in the event that he pleaded guilty. That the court then replied, 'Very well bring him in then.'" The affidavit of Russell Waite, who represented defendant under appointment of the court, contains similar averments.

No counter affidavits were filed by the district attorney. This is explained by the fact that the applications for the writ of error coram nobis and for an order to show cause why the judgment should not be vacated were presented ex parte. There has been presented to this court in diminution of the record, a certified copy of an order made by the court below correcting a clerical error in its minutes so as to cause them to correctly indicate that the people were not represented in court upon the presentation of either the application for writ of error coram nobis or the motion for an order to show cause why the judgment should not be vacated.

In the absence of counter affidavits, in fact of any evidence to the contrary on behalf of the people, we cannot say that the defendant's showing in support of the requested relief was so insufficient as to warrant its refusal.

The motion for diminution of the record is granted. The order appealed from is reversed. The cause is remanded to the trial court with directions to permit the defendant (appellant here) to withdraw his plea of guilty and to enter a plea of not guilty.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.



2 Cal.2d 764

MORRIS v. PACIFIC ELECTRIC RY. CO.

et al.

L. A. 14643.

Supreme Court of California.

March 27, 1935.

Rehearing Denied April 25, 1935.

1. Railroads ☞351(2)

Where there was evidence that approximately 75 feet from railroad crossing motorist was driving between 45 and 50 miles an hour, refusal to charge that, if motorist at and just prior to accident was driving at greater than statutory speed of 40 miles an hour, he was negligent as matter of law, and that, if such negligence contributed proximately, in the slightest degree, to cause the accident, motorist could not recover, *held* error (St. 1927, p. 1436, § 113).

2. Appeal and error ☞928(4)

In determining whether trial court erred in refusing to charge as requested by defendant, evidence must be viewed most favorably to defendant.

3. Constitutional law ☞191

Legislature may make procedural changes applicable to existing causes of action, but may not, under pretense of making such changes, deprive party to existing cause of action of substantive right such as a good cause of action or an absolute or substantial defense theretofore existing.

4. Automobiles ☞6

Amendment providing that motorist exceeding speed limit should not be deemed negligent as matter of law, but that burden should rest upon opposing party to establish that operation of vehicle at such speed constituted negligence, *held* inapplicable to pending action (St. 1931, p. 2121, § 113).

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Charles W. Morris against the Pacific Electric Railway Company and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Prior opinion, 27 P.(2d) 936.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellants.

Swaffield & Swaffield, Roland G. Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

PER CURIAM.

The plaintiff brought this action to recover damages for personal injuries suffered by him and for the wrongful death of his wife resulting from a collision of the plaintiff's automobile with a freight engine operated by the defendant Preston, an employee of the defendant Pacific Electric Railway Company. Judgment went for the plaintiff, and the defendants have appealed.

The accident occurred at approximately 2 o'clock on the morning of June 5, 1929, at a point where Central avenue in the city of Los Angeles intersects the tracks of the defendant company. The conclusion we have reached makes it unnecessary to state the facts at great length. There was evidence from which the jury might reasonably conclude that the defendants at the time of the accident were negligent in their operation of the freight engine. The evidence addressed to the defense of contributory negligence was conflicting, and would warrant a finding in favor of either party, which finding, under settled principles, would be conclusive on appeal. However, the defendants were entitled to have the jury fully and properly instructed on such defense. As we shall presently show, they were not so instructed.

The plaintiff testified that he approached the intersection at a speed not in excess of 30 miles an hour. The defendants offered evidence tending to establish that the plaintiff, when about 75 feet from the intersection, was operating his automobile between 45 and 50 miles an hour. In view of this latter evidence, the defendants contend that the court below erred to their prejudice when it refused to give the following requested instruction: "You are instructed that under the Motor Vehicle Law of this state it was unlawful for any person to drive an automobile at a great-

er rate of speed than forty (40) miles per hour—and if you believe from the evidence that the plaintiff Mr. Morris, at and just prior to the accident, was driving his automobile at a speed greater than forty (40) miles per hour, then he was negligent as a matter of law and if such negligence contributed proximately in the slightest degree to cause the accident, then plaintiff cannot recover.”

[1] This instruction represents a correct statement of the law as it was at the time of the accident and at the time of the trial (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436). *Benjamin v. Noonan*, 207 Cal. 279, 283, 277 P. 1045; *Taylor v. Cockrell*, 116 Cal. App. 596, 599, 3 P.(2d) 16; *Fitzpatrick v. Haskell*, 117 Cal. App. 684, 686, 4 P.(2d) 580. In our opinion, the trial court erred to the defendants' prejudice when it refused to give this instruction on the theory that “it was not the law.” To refuse the instruction was to deprive the defendants of an absolute defense, assuming for present purposes, as we must in considering the propriety of the instruction, that the jury would accept the defendants' version of the plaintiff's manner of operating his car.

[2] The plaintiff seeks to minimize the effect of such refusal by contending that there is an entire lack of evidence to show that his automobile was traveling as fast as 40 miles an hour at the very moment of the collision. The evidence, already referred to, that the plaintiff's car, when approximately 75 feet from the intersection, was traveling between 45 and 50 miles an hour, was amply sufficient, if construed most favorably to the defendants, as it must now be construed, to have justified the instruction. This evidence, if believed by the jury, would entitle it to conclude under proper instructions that the plaintiff was exceeding the statutory limit of speed at the time of the impact. If the jury could so find, then the plaintiff was negligent as a matter of law, and his negligence, if also found to have contributed proximately to the accident, would preclude a recovery.

The plaintiff next contends that the refusal to give such instruction, even though it be error, should not be held to be prejudicial, inasmuch as the Legislature, subsequent to the time of the accident and subsequent to the trial, and while this appeal was pending, amended section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2121), to provide that a driver exceeding the speed limits therein designated shall not be deemed to have been negligent as a matter of law, but the burden shall be upon

the opposing party to establish that the operation of the vehicle at such speed constituted negligence. He urges that the amendment worked a mere procedural change—a change in the rule of evidence—which is applicable alike to all actions, including those pending at the time of its enactment and which had accrued prior thereto.

[3,4] If, as the plaintiff contends, the amendment effects merely a procedural change, and does not affect a substantive right, it would be idle to reverse the judgment because of the refusal to give the instruction, inasmuch as on a retrial such an instruction would be improper. 10 R. C. L. pp. 863, 864; 6 R. C. L. 462, 463; 12 Cor. Jur. 982, 983; 59 Cor. Jur. 1174, 1175; 5 Cal. Jur. p. 747. The foregoing texts and the cases cited therein establish that the Legislature may make changes in or create rules of evidence which are applicable to existing causes of action. As pointed out in *Estate of Patterson*, 155 Cal. 626, 638, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, the operation of such procedural changes is prospective only. They operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect. The same and other authorities indicate that the Legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore. *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327. By the decision in the case of *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 P. 1082, it is shown that the Legislature, by changing the law as to the speed of trolley cars, may not deprive a plaintiff of a cause of action based on a violation of the law as to the rate of speed which existed at the time of the injury. At the time of the accident involved herein, the defendant had an absolute defense, based upon the finding which the jury could have made in its favor on the evidence. In such event the issue would be removed to the realm of law, and the jury would then have been deprived of any discretion in the premises. To apply the amendment now so as to cut off such a substantial defense would be arbitrary and unjust. The Legislature did not assume to make the amendment retrospective, and under the circumstances the court is not warranted in doing so.

The plaintiff relies on the case of *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P.(2d) 58. The decision in that case rested on

the assumption that section 113 (d) of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2121) regulated a procedural change only, without an analysis or discussion of the effect of the amendment on pre-existing substantive rights. The record in that case shows that the disposition of the petition for hearing in the Supreme Court after decision of the District Court of Appeal was pursuant to the stipulation of the parties. The holding in that case must therefore be deemed to be superseded by the ruling herein.

The judgment is reversed.



3 Cal.2d 83

CONNECTICUT GENERAL LIFE INS. CO.
v. **JOHNSON**, State Treasurer (two cases).

S. F. 14732, 14733.

Supreme Court of California.
April 2, 1935.

Rehearing Denied May 2, 1935.

1. Insurance ⇨16

Ordinarily, reinsurance transaction is "doing business" in state where such contract is consummated.

[Ed. Note.—For other definitions of "Doing Business," see Words & Phrases.]

2. Taxation ⇨140

Under statute imposing tax upon gross premiums received by insurance companies upon business done in state less reinsurance in companies authorized to do business in state, sums collected by company authorized to do business in state from another such company from reinsurance of risks in California held taxable as "gross premiums," although contract of reinsurance was executed and carried into effect wholly without state (Civ. Code, §§ 2646, 2648, 2649; Pol. Code, § 596; Const. art. 13, § 14 (b)).

[Ed. Note.—For other definitions of "Gross Premiums," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Two actions, which were consolidated, by the Connecticut General Life Insurance Company against Charles G. Johnson, as State Treasurer. From a judgment for defendant in each case, plaintiff appeals.

Judgments affirmed.

Raymond Benjamin and Hartley F. Peart, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Nell Cunningham, of San Francisco, for respondent.

PRESTON, Justice.

This cause is styled a consolidated action by plaintiff, a life insurance corporation, organized under the laws of the state of Connecticut, to recover from the state of California, through the treasurer thereof, certain sums alleged to be overpayments of taxes, made involuntarily under article 13, § 14 (b), of the California Constitution, which states the rate base for the calculation of such taxes to be the total gross premiums received by the corporation during the period involved from insurance business done in this state. Defendant's demurrer to the complaint in each case was sustained without leave to amend and judgment passed for him. Plaintiff appealed.

The controversy arises over the propriety of the state's action in including within the tax base certain payments made without the state by original insurers to plaintiff at its home office, for reinsurance respecting risks assumed and policies issued and delivered in California. The case brings to the foreground the proper interpretation of the above-mentioned section of the Constitution, which, so far as here material, reads: "Every insurance company or association doing business in this state shall annually pay to the state a tax of * * * per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said * * * per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; provided, that when by the laws of any other state or country, any taxes, fines, penalties, licenses,

fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the Legislature upon insurance companies of such other state or country doing business in this state."

Appellant states the question involved as follows: "Is the money paid to plaintiff in Connecticut, under an agreement made in Connecticut, for indemnifying another insurance company organized under state laws other than California as against possible loss by that other insurance company under some insurance policy it has written and issued in California, taxable against plaintiff under this provision of the Constitution as 'gross premiums received upon its business done in this state'?"

The facts alleged in one of the complaints (the other being identical save as to the year involved) show plaintiff to be a life insurance corporation regularly organized under the laws of the state of Connecticut, with home office at Hartford, and duly authorized at all times herein to transact business in California; that during the year 1927 plaintiff, acting pursuant to agreements made in 1926 without the state of California, with certain other foreign insurance companies, did, by covenants executed wholly without the state of California, indemnify said insurers against possible loss in part upon insurance risks secured, written and issued in California, and for payment therefor received at its home office certain sums commonly styled "reinsurance payments"; that for these payments plaintiff issued no policies of insurance to the insurer companies nor to the policyholders and that, respecting said reinsurance, it performed no act of any kind and transacted no business of any kind in the state of California; that the insurance commissioner of California in 1928, and for the year ending December 31, 1927, required plaintiff to report all such sums received by it for such reinsurance; that such sums so reported for said year were, in the aggregate, \$398,806, and they were then added to the other items going to make up the total gross premiums for said year, making a grand total of \$684,393.85, upon which the tax of 2.6 per

cent. was computed, the amounts so added thus increasing the amount of the tax \$10,316.98 over what it would otherwise have been. The latter sum was paid under protest, and a prayer for its return, with interest, was made herein by plaintiff.

Our problem, as already intimated, is to determine whether the words "gross premiums received upon its business done in this state" include sums collected by one authorized company from another for reinsurance of risks in California where such contract is executed and carried into effect wholly without the state and substantially in the manner above set out.

A distinction, of course, exists between a contract of insurance and a contract of reinsurance. Our Civil Code has defined the nature of the contract of reinsurance as follows: "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." Section 2646, Civ. Code.

"A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." Section 2648, Civ. Code.

"The original insured has no interest in a contract of reinsurance." Section 2649, Civ. Code.

"The ordinary contract of reinsurance operates solely between reinsured and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policy holders. * * *" 33 Cor. Jur. § 735, p. 57.

[1] It is clear also that ordinarily a reinsurance transaction is doing business in the state where such contract is consummated, and this may or may not be in the state where the original risk was assumed. The authorities confirm this conclusion.

"Reinsurance involves no transaction or privity between the reinsurer and those originally assured. The lower courts rightly held that the making of the reinsurance contracts in New York between respondent and insurers of property in Mississippi was not the doing of business in that state." *Morris & Co. v. Skandinavia Insurance Co.*, 279 U. S. 405, 408, 49 S. Ct. 360, 361, 73 L. Ed. 762.

In the case of *State v. Continental Ins. Co.*, 67 Ind. App. 536, 116 N. E. 929, 934, it appeared from the special finding that the re-

insurance involved was transacted at the city of Chicago, Ill. Holding that under the terms of the statute there involved the insurance company was not required to pay taxes to the state of Indiana on said reinsurance premiums, the court said: "Under the terms of the statute, was it the duty of the company to pay taxes to the state of Indiana on reinsurance premiums received from other companies on account of risks located in Indiana? * * * As we construe said section 10216, the legislative intent expressed therein is that the tax shall be imposed only on business done within the territorial boundaries of the state of Indiana. The license is upon the business, and the tax is laid on 'every insurance company not organized under the laws of this state, and doing business therein.' Where a foreign company takes over from another foreign company, for the purpose of reinsurance, risks on property in this state, the transaction is, of course, between the companies, and the insurer would not be subject to the tax on the reinsurance premium received if the business was not done in this state. And this would be so whether the companies were licensed to do business in this state or not."

The Supreme Court of Iowa arrived at the same conclusion in the case of *In re Continental Casualty Co.*, 189 Iowa, 933, 179 N. W. pages 185-188, 189, a case involving taxation of "gross premiums" on "business done in this state" when the right of the state to tax "reinsurance premiums" was presented. The court there said: "It is conceded that the contract of indemnity or reinsurance in question was entered into between these companies in New York, the state of their domicile, and that all the distribution of business and the pro rating of premiums pursuant thereto was done in such state. Clearly, therefore, the business was not done in Iowa." See, also, *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373.

[2] But the foregoing observations do not compel a reversal of the judgments here, nor is such result compelled by the further fact that certain language employed in said provision may be accorded a broader meaning than that which it had when a part of previously existing statutes of the state.

Respondent justifies the ruling of the court below by his interpretation of the section, particularly the language, "less * * * reinsurance in companies or associations authorized to do business in this state," as follows: The provision, when read as a whole, is now applicable to insurance companies of

all types, domestic as well as foreign. Each company must, under section 596 of the Political Code, procure a certificate of authority to transact business in the state. The language, when fairly construed, requires each company of every type to pay a like percentage of its gross premiums collected on policies issued and delivered upon risks assumed in the state; reinsurance premiums received by a domestic corporation must of necessity be returned and a percentage thereof paid to the state. No insurer can claim an exemption upon reinsurance premiums paid to an unauthorized company. Therefore, to prevent unjust discrimination, the state may not allow the exemption for reinsurance paid to an authorized company unless and until it is in a position to claim its uniform percentage of such reinsurance premiums so as to give it in the aggregate the equivalent of the percentage on the original gross premiums paid to the insurer. In short, the transaction is not between "authorized" companies unless this result follows. Further, any other construction of the section would not only be unjust discrimination against the domestic companies, but would enable foreign companies, by a simple process of reinsurance outside the state, to escape altogether such tax exaction.

We think this argument of respondent is sound and unanswerable. The intent to tax all gross premiums, or their equivalent, must be present or else the whole scheme is discriminatory and unworkable. Appellant is charged with knowledge that the state is entitled to said percentage, or to its equivalent, and also with the further knowledge that the state has this right above and in addition to any additional claims it may have under the so-called "retaliatory" rights conferred by said section. Appellant, therefore, in order to state a cause of action for a refund, must of necessity show that these rights of the state have been fully satisfied. This is but another way of saying that appellant is estopped to deny that said reinsurance was consummated in the state unless and until it can show that the insurer has paid the full tax on gross premiums without exemption, including claims of the state, if any, for retaliatory taxes. This showing appellant failed to make.

That the term "reinsurance" premiums is included in the term "gross" premiums is clear, not only because of the nature of the insurance contract, but also from the context of the provision, especially that portion thereof which allows, under certain conditions, a deduction of such payments from "gross pre-

mlums" received, thereby implying their previous inclusion therein.

For the foregoing reasons the complaints fail to state a cause of action.

The judgments are affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; SHENK, J.; LANGDON, J.



3 Cal.2d 77

**LOS ANGELES LAND & WATER CO. v.
CONSUMERS' ROCK & GRAVEL CO.**

L. A. 13899.

Supreme Court of California.

April 1, 1935.

1. Landlord and tenant ⇨149

In absence of agreement clearly imposing such duty on tenant, it is duty of landlord to pay all state, municipal, and county taxes and assessments which during term of lease become chargeable on the premises.

2. Landlord and tenant ⇨148(1)

Under lease imposing on tenant payment of any increase in taxes caused by an increase in assessed value of land involved, tenant held not liable for increase caused by an increase in tax rate.

In Bank.

Appeal from Los Angeles County; J. T. B. Warne, Judge.

Action for declaratory relief by the Los Angeles Land & Water Company against the Consumers' Rock & Gravel Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Anderson & Anderson and Trent G. Anderson, all of Los Angeles, for appellant.

Bauer, Macdonald, Schultheis & Pettit and Fred E. Pettit, Jr., all of Los Angeles, for respondent.

PER CURIAM.

This action for declaratory relief was instituted by plaintiff, as lessor of certain properties situate in Los Angeles county, against the present lessee, to secure the construction of one clause in the written lease entered in-

to between the plaintiff and defendant's predecessor in interest. The clause in question reads as follows:

"Fourth—Lessee to Pay Taxes on Improvements: As a further part of the rental, and in addition to the royalties hereinbefore mentioned, the lessee shall pay all taxes of any city, county or state, or any subdivision, which may be lawfully levied or become a lien upon, or on account of any improvements of the lessee upon the said premises during the term of said lease; and shall also pay any increase in taxes on the lands covered by this lease caused by an increase in the assessed value of such lands in the future over and above the assessed value of said lands for the year 1925: Provided, however, that the lessee shall have the right to contest all such taxes, and pending any such contest and during its continuance in good faith may delay or defray the payment thereof, but not so as to lose the right of redemption from any sale under any tax, assessment or governmental charge. The lessor shall pay the portion of all taxes, assessment and governmental charges on the said premises, levied on account of the land, exclusive of the improvements of the lessee thereon."

The controversy here involved turns upon the proper construction of the italicized portion of the above clause. The parties are agreed as to the effect of the clause except in one situation, viz., where both the assessed valuation and the rate of tax have increased over these existing in 1925. The trial court held that by the words "any increase in taxes on the lands * * * caused by an increase in the assessed value of such lands in the future" over and above the assessed value in 1925, the tenant agreed to pay only such increase "caused" by an "increased valuation," and did not agree to pay any increase in the tax caused by an increase in the rate. The conclusion of the trial court on this point reads as follows:

"That the defendant is entitled to a declaratory judgment herein, ordering, adjudging, decreeing and declaring that under the said provisions of said lease, in the event of both an increase in the assessed value of said lands over and above the assessed value of such lands in the year 1925, and an increase in the tax rate over and above the tax rate fixed and in effect in the year 1925, the defendant shall be required to pay so much thereof as is due to the increase in assessed value over the assessed value of such lands for the year 1925, in accordance with and to the extent of its ob-

ligation as in said lease set forth, and that the plaintiff shall be required to pay that portion of said increase due to increase in tax rate, in addition to the amount of taxes upon said land determined at the valuation and at the rate in effect for the year 1925; together with its costs herein incurred." We are of the opinion that the trial court's interpretation of the language used is the only possible interpretation under the circumstances.

[1] It is elementary that, in the absence of an agreement, the duty to pay all state, municipal, and county taxes and assessments, which during the term of the lease become chargeable upon the premises, is imposed by law upon the landlord. 36 Cor. Jur. 113. Of course, the tenant may assume such liability, but such liability does not exist unless the lease clearly imposes it upon the tenant. 36 Cor. Jur. 115.

[2] In the present case the tenant, as far as the problem here involved is concerned, assumed one liability—to pay any increase in taxes "caused by an increase in the assessed valuation"—he did not agree to pay any increase caused by an increase in the tax rate. It necessarily follows that that liability, not having been expressly provided for, rests where the law, in the absence of agreement, imposes it, upon the landlord.

If, as appellant contends, this interpretation is not in accord with the intent of the parties, appellant's appropriate remedy was an action for reformation.

The judgment appealed from is affirmed.



2 Cal.2d 685

LOS ANGELES & S. L. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

L. A. 14973.

Supreme Court of California.

March 25, 1935.

1. Master and servant ☞416

Question whether Industrial Commission properly exercised its jurisdiction where compromise and release extending limitation for compensation proceeding was effected after six months' limitation had elapsed, was waived by employer's failure to include matter as

ground of objection in petition for rehearing before commission (St. 1917, pp. 841, 873, §§ 11 (b) (1), 64 (c); St. 1923, p. 771, § 27 (b, c).

2. Master and servant ☞417(7)

Industrial Accident Commission and not court is authorized to draw inferences from evidence and base conclusions thereon (St. 1917, p. 875, § 67 (c).

3. Master and servant ☞405(2)

Industrial Accident Commission held authorized to conclude that assistant signal supervisor in charge of maintenance and construction of signal apparatus on Los Angeles division of railroad had authority to hire electrician to work in Utah or Nevada, so that employment contract was made in California making parties amenable to California Compensation Act (St. 1917, pp. 870, 875, §§ 58, 67 (c).

4. Commerce ☞8(6)

If Federal Employers' Liability Act applies, employee may not recover compensation for injuries under state act, since two acts are not cumulative (St. 1917, p. 831, as amended; Federal Employers' Liability Act [45 US CA §§ 51-59]).

5. Commerce ☞27(5)

True test of employment in "interstate commerce," subject to Federal Employers' Liability Act, is whether employee at time of injury was engaged in interstate transportation, or in work so closely related thereto as to be practically part thereof (Federal Employers' Liability Act § 1 [45 USCA § 51]).

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

6. Commerce ☞27(8)

Railroad electrician employed in constructing detour in power line, where new portion was incomplete at time of injury and had not been connected with main line, held not employed in "interstate commerce" within Federal Employers' Liability Act, so as to be precluded from recovering compensation under state act (Federal Employers' Liability Act § 1 [45 USCA § 51]; St. 1917, p. 831, as amended).

In Bank.

Petition by the Los Angeles & Salt Lake Railroad Company, employer, to review an order of the Industrial Accident Commission, awarding compensation to Vernon C. Peeples, employee.

Award affirmed.

Prior opinion, 35 P.(2d) 558.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for petitioner.

Arthur I. Townsend, Everett A. Corten, and Emmet J. Seawell, all of San Francisco, for respondents.

SHENK, Justice.

On November 5, 1932, Vernon C. Peeples filed with the Industrial Accident Commission an application for compensation on account of injuries suffered while he was employed by the petitioner, Los Angeles & Salt Lake Railroad Company, at Elgin, Nev. The commission entered its decision and order on rehearing awarding compensation to the injured employee. The employer was self-insured, and in this proceeding to review the exercise of jurisdiction by the commission seeks to have the award annulled.

The applicant, Peeples, had previously been employed in California by the petitioner. The work which he had been hired to do in California terminated. Subsequently George E. Hodgdon, assistant signal supervisor in charge of maintenance and construction of signal apparatus on the Los Angeles division of the petitioner, informed the applicant that there was work in Utah and furnished him with transportation to that state. Upon his arrival in Utah, the applicant was assigned to assist in the construction and installation of a detour in the company's power line near Elgin, Nev. About December 19, 1930, the applicant was engaged in stringing a line of cable on new poles which had recently been set up and which was to become a part of the existing power line when completed. The existing line started at Los Angeles and terminated at Salt Lake City, Utah. It carried wires for the use of the company in the operation of the signals along the line and in the sending of telegraph and telephone messages. The detour in the line was designed to provide free working space around the entrance to tunnel No. 4, which was required for the spurring out of outfit cars and the erection of buildings in connection with tunnel construction work. The applicant was moving a cable which was to be strung on a new pole about intermediate the newly constructed detour and the signal pole at the entrance of the tunnel. The cable caught on some dry brush which snapped and flew into the applicant's left eye, causing permanent impairment of the vision of that eye.

In the seventh month after the injury occurred, the applicant accepted the sum of \$250 from the petitioner and signed a release. This occurred before any application for compensation was filed, and was without the approval of the respondent commission. The application for compensation was filed in No-

vember, 1932. The commission by its decision on rehearing awarded a total sum of \$1,131.63, less the sum of \$250 paid by the employer.

[1] It was admitted that the injury occurred in the scope of and arose out of the employment. On this review three questions are presented for determination. The first is based upon the contention of the petitioner that the commission had no jurisdiction to make an award because the provisions of section 11 of the act constituted a bar. Section 11 (b) (1) of the act (Stats. 1917, c. 586, p. 841) provides that proceedings for the collection of the benefits payable to the applicant must be commenced within six months from the date of the injury, except as otherwise provided in the act. Section 27 (b) of the act provides that no release of the employer's liability except for the payment of the full compensation shall be valid unless approved by the commission, and subdivision (e) of said section 27 provides that, unless such approval has been obtained, the making of a release or compromise for less than the full compensation shall extend the limitation of time hereinafter mentioned to two years from the date of the injury. St. 1917, p. 855, § 27 (b, e), as amended by St. 1923, p. 771. By its answer to the application for compensation the petitioner affirmatively pleaded the bar of the six-month limitation. The commission, however, inferentially found that the payment of the \$250 to the applicant had extended the period to two years, and concluded that both employer and employee were properly before it under the provisions of the act. The petitioner contends that, inasmuch as the compromise and release was effected after the six-month period had elapsed, the bar of the limitation had already attached and could not therefore be "extended." However, any further consideration of the question whether the commission properly exercised its jurisdiction in this respect was waived by the failure of the petitioner to include the matter as a ground of objection in its petition for rehearing before the commission. Section 64 (c) of the act (St. 1917, p. 873, § 64 (c)).

[2, 3] The second contention of the petitioner is that the commission incorrectly decided that the contract was made in California so as to make the parties amenable to the act pursuant to the provisions of section 58 thereof (St. 1917, p. 870). That section gives the commission jurisdiction over all controversies arising out of injuries suffered without the territorial limits of the state, where the contract of hire was made in the state. Quong

Ham Wah Co. v. I. A. C., 184 Cal. 26, 192 P. 1021, 12 A. L. R. 1190. It is urged in support of this point that Hodgdon had no authority to engage the applicant to work in Utah or Nevada, and therefore there was no contract made in California, but that the only conclusion to be drawn from the evidence is that Hodgdon merely suggested to Peeples that he might go to Utah, where work was being offered, and that the contract of employment was in fact made when Peeples arrived in the latter state. The commission and not the court is to draw inferences from the evidence and base conclusions thereon. Section 67 (c) of the act (St. 1917, p. 875, § 67 (c)). From the evidence before it, the commission was within its province in concluding that Hodgdon had authority to hire the applicant.

[4] The third and main question in the case arises from the petitioner's defense that the applicant was subject solely to the provisions of the Federal Employers' Liability Act (45 USCA §§ 51-59) and its contention that the commission exceeded its jurisdiction in ordering payment of compensation under the state act. The remedies under the Workmen's Compensation Act and the Federal Employers' Liability Act (chapter 149, 35 Stat. 65; title 45, c. 2, U. S. C., 45 USCA §§ 51-59), are not cumulative, so that, if under the facts the provisions of the latter act apply, the applicant may not recover under the state act. *Saxton v. El Paso & S. W. R. Co.*, 21 Ariz. 323, 188 P. 257, and cases cited therein.

[5] Under the federal act both the employer and employee at the time of the injury must have been respectively engaged and employed in interstate commerce. The act (section 1 [45 USCA § 51]) states: "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" where the injury is due to the negligence of the carrier, its agents or employees. It is not questioned that the petitioner was engaged in interstate commerce. The test to be applied in determining whether the applicant was so employed is stated in *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 558, 36 S. Ct. 188, 189, 60 L. Ed. 436, L. R. A. 1916C, 797, as follows: "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * * and that the true test of employment

in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." This test has been adhered to in subsequent cases. *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 52 S. Ct. 59, 76 L. Ed. 173; *Chicago & Eastern Ill. R. Co. v. Industrial Comm. of Illinois*, 284 U. S. 296, 52 S. Ct. 151, 76 L. Ed. 304; *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 52 S. Ct. 205, 76 L. Ed. 370, 77 A. L. R. 1370; *Chicago, Burlington & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Industrial Acc. Com. of California v. Davis*, 259 U. S. 182, 42 S. Ct. 489, 66 L. Ed. 888; *Texas & P. Ry. Co. v. Kelly* (Tex. Com. App.) 51 S.W.(2d) 299, 301; *certiorari denied*, 287 U. S. 644, 53 S. Ct. 90, 77 L. Ed. 557.

In *Chicago & N. W. Ry. Co. v. Bolle*, supra, 284 U. S. 74, at page 78, 52 S. Ct. 59, 61, it was said: "It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation, or in work so closely related to such transportation as to be practically a part of it." The decisions in the cases of *Industrial Acc. Com. of Calif. v. Davis*, supra, and *New York, N. H. & H. R. Co. v. Bezue*, supra, the latter referring among other cases to *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397, further emphasize the fact that interstate railroad transportation cannot be conducted without its necessary corps of persons engaged in various classes of labor and clerical work, all of which might not be employment in interstate commerce, and that it is therefore not the fact of employment alone which is determinative.

Applying the test of the *Shanks Case* when it becomes necessary to determine whether the employee's duties, though not directly con-

cerned with interstate transportation, are "so closely related to it [such transportation] as to be practically a part of it," the decisions have made a distinction between employment in respect to construction, facilities, or equipment which have not as yet become a part of or been used or operated in interstate transportation, or have been withdrawn from such use or operation, and equipment and facilities which are at the time already in such use or operation. A distinction between new construction and repair work was made in the case of *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, and in many other cases. In that class of cases where the construction, facilities, or equipment have not as yet become a part of the system used in interstate transportation, although intended for such use and operation, and in fact subsequently put to such use, or where they have been withdrawn, even temporarily, from such use, it has been held that the employee is not subject to the provisions of the federal act. *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 52 S. Ct. 205, 76 L. Ed. 370, 77 A. L. R. 1370; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43, 37 S. Ct. 268, 61 L. Ed. 583; *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Industrial Acc. Com. of California v. Davis*, 259 U. S. 182, 42 S. Ct. 489, 66 L. Ed. 888; see, also, *Williams v. Schaff*, 282 Mo. 497, 222 S. W. 412.

In *Industrial Acc. Com. of California v. Davis*, supra, 259 U. S. 182, at page 187, 42 S. Ct. 489, 491, Mr. Justice McKenna said: "The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation, we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act. And there is a difference in the instrumentalities. In some, the tracks, bridg-

es and roadbed and equipment in actual use, may be said to have definite character and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances. * * * And it is this separation that gives character to the employment, as we have said, as being in or not in commerce."

[6] In *New York, N. H. & H. R. Co. v. Bezue*, supra, the court refused to adopt what it designated an "artificial classification," and rejected the contention of the petitioner that a locomotive withdrawn from service for a periodical boiler wash was nevertheless still in service.

We think it unnecessary to extend the discussion, or the list of decisions which we believe compels the conclusion that in the present case the applicant was not employed in interstate transportation nor in work so closely related to it as to be practically a part of it. The trend of the decisions of the Supreme Court of the United States appears to be to draw the line under the rule of the *Shanks Case* with clearer precision, based on the test of whether the construction, or other equipment upon which the employee is engaged in work, is or is not at the moment actually a part of the facilities operating the interstate movement of persons and commodities. In *Texas & P. Ry. Co. v. Kelly* (Tex. Com. App.) 51 S.W.(2d) 299 (certiorari denied, 287 U. S. 644, 53 S. Ct. 90, 77 L. Ed. 557), the construction of a new block system was involved, and it was held that the employee injured while working in the construction of the new system was not engaged in work which was a part of interstate transportation so as to come within the provisions of the federal act. The same tests applied to the facts before us lead to the same conclusion. This is not a case such as *Pedersen v. Delaware, L. & W. R. R.*, supra, where mere repair work upon an existing construction already in use in interstate commerce was involved. Here a portion of the existing system was being reconstructed to provide a detour or a change in the routing of the system, and the old line was kept in operation until the new portion should be completed and the connection through the detour made. At the time of the injury, the new portion was still incomplete and the connection had not yet been made so as to make it a portion of the line which may be said to have the definite character of an instrumentality employed in interstate transportation. This character had not as yet been transmitted to the incompleting and detached portion of the

line which the employee was helping to construct.

The foregoing decisions of the Supreme Court are persuasive and are deemed controlling. They point to and justify the conclusion that the petitioner herein has not made a showing of facts sufficient to displace the state's jurisdiction in the premises.

The award is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.



2 Cal.2d 632

**WILSON v. SUPERIOR COURT IN AND
FOR SANTA CLARA COUNTY.
S. F. 15282.**

Supreme Court of California.
March 21, 1935.

1. Building and loan associations ⚡24

Power granted by statute to building and loan commissioner to sell personalty of building and loan association does not necessarily mean restricted power to sell for cash (Gen. Laws Supp. 1933, Act 986, § 13.16; Civ. Code, § 1721, subd. 2, and § 1729, subd. 2).

A "sale" is the exchange of an interest in real or personal property for money or its equivalent.

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

2. Building and loan associations ⚡45(1)

Act authorizing building and loan commissioner to liquidate insolvent building and loan associations must be liberally construed, since "liquidation" of a business is the winding up or settling with creditors and debtors, and term does not have restricted meaning of sale of assets for cash (Gen. Laws 1931, Act 986, §§ 13.11, 13.13; Gen. Laws Supp. 1933, Act 986, §§ 13.16, 13.16a; Civ. Code, § 1721, subd. 2, and § 1729, subd. 2).

[Ed. Note.—For other definitions of "Liquidation," see Words & Phrases.]

3. Building and loan associations ⚡45(5)

Act authorizing building and loan commissioner "to do any act or to execute any instrument not expressly authorized by this act" held to authorize commissioner to exchange note secured by deed of trust for approved claims against building and loan as-

sociation in liquidation, where claims and note were valued at fixed price (Gen. Laws 1931, Act 986, §§ 13.11, 13.13; Gen. Laws Supp. 1933, Act 986, §§ 13.16, 13.16a; Civ. Code, § 1721, subd. 2, and § 1729, subd. 2).

In Bank.

Petition for prohibition by Frank Wilson against the Superior Court, in and for Santa Clara County.

Alternative writ of prohibition discharged, and application for peremptory writ denied.

Robinson, Price & Macdonald, Harrison S. Robinson, and Robert W. Macdonald, all of Oakland, for petitioner.

Thomas M. Gannon, of San Francisco, and J. C. Hughes, of Oakland, for respondent.

LANGDON, Justice.

This is a petition for a writ of prohibition to restrain the respondent superior court from authorizing certain acts by the building and loan commissioner of this state.

Within the last few years many building and loan associations in California have become financially involved, and, pursuant to the terms of the Building and Loan Act, the commissioner has taken over the business of a number of such associations for the purpose of liquidation. The present proceeding arises out of certain contemplated action in connection with his winding up of the affairs of California Mutual Building & Loan Association, although it appears that the same thing has been done, and will be done, in many other cases unless restrained. What the commissioner seeks to do may be briefly stated. An association in liquidation has a number of creditors, including depositors and certificate holders, whose claims are presented and approved. It has certain assets, including real property, and notes secured by mortgage or deed of trust on real property. Normally, no doubt, the liquidator would sell such real property or enforce the obligations of overdue notes by action or sale of the security, and would use the cash realized in the payment of approved claims. Occasionally, under an express power conferred by the statute, the commissioner negotiates an exchange of real property owned by the association for approved claims against the association. In the instant case he has attempted to exchange, not real property, but a promissory note secured by deed of trust, for approved claims. Petitioner is a holder of an approved claim against this association, and in a representa-

tive suit on behalf of himself and other such holders attacks this procedure as beyond the powers conferred upon the commissioner by the statute.

The problem is clarified somewhat by an examination of the proposed transfer in detail. The association is the owner of a promissory note in the principal sum of \$2900, on which at the time the exchange was negotiated there was due for principal and interest a total of \$3,000.79. The note was secured by a deed of trust on property appraised at \$900. The petition filed in the superior court by the commissioner alleges that the makers of the note are insolvent, and that no deficiency judgment could be collected against them. The person with whom the exchange was agreed upon offered to transfer approved claims against the association, based upon investment certificates, in the sum of \$2,600, par value. It appeared, therefore, from the petition, that by making the exchange the association would be saved the cost of foreclosure or other enforcement of the obligation represented by the note, and the additional cost of real estate commissions incident to any subsequent sale of the property in the event that it became necessary for the association to purchase at the sale; and that it would extinguish liabilities in the sum of \$2,600 by giving up assets valued only at \$900. It further appeared from the said petition that, upon determining the total value of the assets of the association and the claims against it, the estimated "surrender value" of approved claims was 45 per cent. In other words, the approved claims having a par value of \$2,600 had an estimated surrender value of \$1,170, which is \$270 more than the appraised value of the security which would be given in exchange by the association. There is no challenge to these figures, and their substantial accuracy may be taken as established. The transaction is thus shown to be of substantial benefit to the association and of no harm whatever to the holders of claims against it. No charge is made, moreover, of any misconduct or unfairness in connection therewith. The single issue, then, is whether the commissioner possesses the necessary power under the statute.

The Building and Loan Association Act (1 Deering's Gen. Laws, 1931, Act 986, p. 460), as amended in 1933 (Deering's 1933 Supp., p. 1199), is the source of the commissioner's power in this connection. Section 13.11 provides that, where it appears that any association is in an unsafe condition, the commissioner may take and retain possession of the property, business, and assets until its affairs

are liquidated, or it resumes business with his consent. Section 13.13 provides that upon taking such possession he shall have authority to collect money "and to do such other acts as are necessary or expedient to collect, conserve or protect its business, property and assets." Section 13.16 provides that in liquidating the affairs of an association he shall have power to approve and pay just claims; "and on the order of the superior court of the county in which the principal office in this State of such association is located, given and made after a hearing on such notice as the court shall prescribe, to compound bad or doubtful debts or claims and to sell, convey and transfer real and personal property." The same section gives him power to execute any instruments "necessary and proper to effectuate any sale of real or personal property or other transaction in connection with the liquidation" of an association. Section 13.16a gives him the power, subject to approval of the court after hearing, to accept approved claims based on investment certificates in exchange for real property of the association; the claims being accepted at their respective surrender values as estimated by the commissioner and fixed and determined by the court.

Section 13.13, *supra*, also contains the following blanket provision: "Whenever the commissioner shall be in possession of the business, property and assets of any association, and regardless of whether or not he shall be liquidating the affairs of such association, the commissioner may in his discretion (1) apply to the superior court of the county in which the principal office in this state of such association is located for an order confirming any action theretofore taken by the commissioner, or authorizing the commissioner to do any act or to execute any instrument not expressly authorized by this act, which order shall be given and made after a hearing on such notice as the court shall prescribe.

* * *

The foregoing provisions expressly authorize the exchange of real property for approved claims, but do not specifically cover the exchange of personal property (such as the promissory note involved herein) for approved claims. It is petitioner's contention that the act thereby discloses a deliberate legislative intent to deny this latter power. It is argued that the commissioner is in effect a statutory receiver whose powers are limited to those given by statute, that the power to sell personal property, granted in section 13.16, does not include the power to exchange, and that the blanket provision in section 13.13 cannot be deemed to have conferred unlimited

power upon the commissioner, but must be construed with reference to its purpose; namely, the liquidation of the affairs of the association. In our opinion this position is unsound, and the proposed action of the commissioner is within his powers.

[1] The power to sell personal property, expressly granted in section 13.16, does not necessarily mean the restricted power to sell for cash. Language such as this has been sometimes interpreted to mean "sell for cash" (see *Iowa Service Co. v. City of Villisca*, 203 Iowa, 610, 213 N. W. 401), and sometimes held to include exchanges, where the property received in exchange was taken at a fixed money value, so that the equivalent of money was received as the price. *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620, 15 A. L. R. 256; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 18, 15 S. Ct. 756, 39 L. Ed. 873; *Ullmann v. Land*, 37 Tex. Civ. App. 422, 84 S. W. 294; *Merritt v. American Catering Co.*, 71 Wash. 425, 128 P. 1074; *People ex rel. Davis v. Middleton*, 14 Cal. 540; *Mansfield v. District Agricultural Association*, 154 Cal. 145, 97 P. 150. Moreover, in the Uniform Sales Act which governs sales of goods in California, a sale is defined as a transfer "for a consideration called the price" (Civ. Code, § 1721, subd. 2), and the price "may be made payable in any personal property" (Civ. Code, § 1729, subd. 2), thus including exchange within the meaning of sale as used in the act. See commissioners' note, 1 Uniform Laws Annotated, p. 81; *Edward v. Ioor*, supra. In *People ex rel. Davis v. Middleton*, supra, the commissioners of the funded debt of the city of San Francisco had power to sell certain real property and apply the proceeds to the liquidation of the floating debt of the city. They undertook to accept in payment scrip representing part of said indebtedness, and the court upheld their power to do so. The *Middleton* Case was approved and followed in *Mansfield v. District Agricultural Association*, 154 Cal. 145, page 147, 97 P. 150, 151, where the court said: "Though the word 'sell' itself in transactions touching personal property usually has reference to a pecuniary or money consideration, yet courts have never hesitated to give the word a broader significance, when the meaning of the law or of a private contract seemed to call for it, and the much more generally accepted definition of a sale is the exchange of an interest in real or personal property for money or

its equivalent." In the instant case, both the claims and the note given in exchange were valued at a fixed price, so that the transfer was made for the equivalent of money. Nor should it be forgotten that the asset transferred was of uncertain value in view of the insolvency of the makers of the note, and that the statute contains the statement that the commissioner may, upon court order, "compound bad or doubtful debts or claims" (section 13.16).

[2, 3] It is apparent from the foregoing that, by a reasonable interpretation of the statute, the power claimed by the commissioner may be found to exist. The petitioner argues for a strict construction, but advances no compelling reasons therefor. The act is designed to accomplish an important and beneficial public service, the liquidation of insolvent associations in the interest of creditors and claimants. The "liquidation" of a business is the winding up or settling with creditors and debtors (see *Lafayette Trust Co. v. Beggs*, 213 N. Y. 280, 283, 107 N. E. 644; *Ex parte Amos*, 94 Fla. 1023, 1035, 114 So. 760), and the term does not have the restricted meaning urged by petitioner; namely, the sale of the assets for cash. The successful achievement of the object of the statute requires broad rather than limited powers, and justifies a liberal rather than a strict construction. Not only is this sound policy, but it is in accordance with the unmistakable language of the act itself. Nothing can be clearer, from a reading of the blanket provision of section 13.13, than a legislative intent to give the widest possible powers to the commissioner, when he acts under court order, after notice and hearing. The authority "to do any act or to execute any instrument not expressly authorized by this act" may not be a grant of unlimited power, but, taken in connection with the specific powers to sell personal property and compound doubtful debts, it unquestionably covers the proposed exchange of personal property for approved claims.

The alternative writ of prohibition heretofore issued is discharged, and the application for a peremptory writ is denied.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

3 Cal.2d 46

**QUIGLEY v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
L. A. 15036.

Supreme Court of California.
April 1, 1935.

1. Master and servant ⇨417(7)

In compensation case, where evidence was squarely conflicting as to cause of injury, appellate court could not interfere with decision of Industrial Accident Commission.

2. Master and servant ⇨417(7)

On review of decision of Industrial Accident Commission denying award to claimant, court was limited to determining whether there was any substantial evidence to support such conclusion.

3. Master and servant ⇨405(4)

Industrial Accident Commission's finding that spontaneous haemo-pneumothorax sustained by employee was due to tuberculosis and not to lifting of heavy desk in performance of duties as janitor held sustained by evidence.

In Bank.

Proceeding under Workmen's Compensation Act by Eugene Debs Quigley, claimant, opposed by the Ward Chandler Building Company, employer, and the Pacific Indemnity Company, insurance carrier. The Industrial Accident Commission denied claimant compensation, and claimant petitions for a writ of review.

Award affirmed.

See, also, 35 P.(2d) 544.

Ethel H. Harradine, of Los Angeles, for petitioner.

F. Britton McConnell and Claude F. Weingand, both of Los Angeles, and Everett A. Corten, Atty. for Industrial Accident Commission, and Emmet J. Seawell, Asst. Atty. for Industrial Accident Commission, both of San Francisco, for respondents.

PER CURIAM.

This is a proceeding to review a decision of respondent commission denying petitioner's application for compensation for an injury which he claims to have sustained in the scope and course of his employment.

[1] We have read the entire record. We are convinced that the case presents no question of law, but is one where the evidence was squarely conflicting as to the cause of

injury. Under such circumstances, we cannot interfere with the decision of the commission. In fairness to petitioner, it should be stated that the evidence produced by him would support an award in his favor, had such an award been made, but unfortunately for him, the commission chose to believe the medical testimony produced by the insurance carrier of his employer. We have no power to interfere with an award made under such circumstances.

The facts are not in dispute. Petitioner was employed as a janitor by respondent Ward Chandler Building Company. On the afternoon of July 21, 1933, in the course of his employment, he was engaged in the act of lifting a heavy desk for the purpose of changing the telephone wires. There was only a small space in which to work. While on his knees and while in a "twisted" position, he attempted to lift one end of the desk, so as to put the wires under it, and, as he did so, he experienced a sharp pain on the left side of his chest. As petitioner expressed it, it felt like something "gave way" in his chest. He immediately told his superior, who was present, what had happened, and she told him not to try to lift the desk, but that she would get one of the other boys to lift it. Apparently no further symptoms occurred for a period of about twenty-four hours. During the afternoon of the next day, July 22, while stooping over a washbasin, cleaning the same, petitioner experienced a very sharp pain, so acute that he could not straighten up. From then on he experienced considerable pain until July 25th, when he was sent to the Santa Fe Hospital, where he remained nine days, attended by doctors employed by the insurance carrier of the employer. At the end of that period, the insurance company denied liability and petitioner was then removed to the Los Angeles County General Hospital, where he remained for twenty days. Following that, he underwent regular and periodic examinations and treatment as an "out" patient of that hospital, and was still being treated at the time of the various hearings before the commission.

[2] There is no doubt of the nature of the ailment from which petitioner is suffering. He sustained what is known as a spontaneous haemo-pneumothorax, that is, a complete collapse of the left lung. The only disputed question is whether the collapse resulted from a pre-existing pathological condition not connected with the employment, or whether it resulted from the strain of lifting the desk

in which event, of course, it would be compensable. The commission, on the original hearing, and again on rehearing, decided the injury did not arise out of the employment. On this review, we are limited to determining whether there is any substantial evidence to support this conclusion.

Dr. Richard J. Flamson, who attended petitioner at the Santa Fe Hospital, after testifying in the case, rendered a written report, which was admitted into evidence. In this report, he reviews the history of the case, tells what was done for petitioner at the hospital, and then concludes as follows: "This patient has a spontaneous haemo-pneumothorax. The inception of this apparently was while he tried to arise from a stooping position while cleaning a washbasin on July 22nd. I do not believe that there was anything unusual about arising from a stooping position. * * * This condition, the haemo-pneumothorax, is in the great majority of the cases a complication of old or active tuberculosis. * * *

Dr. Lawrence Chaffin, who also attended petitioner while he was at the Santa Fe Hospital, in his report, after reviewing substantially the same facts as did the report of Dr. Flamson, concluded, "I find no evidence in this case that patient's left lung collapsed as a result of his employment. I believe this is a classical spontaneous left pneumothorax unassociated with patient's employment."

On the rehearing before the commission, respondent insurance carrier presented the testimony and the report of Dr. Frank Porter Miller, a specialist in lung diseases and the operator of a sanatorium for tubercular patients. He testified that he made a physical examination of petitioner some months after the occurrence of the injury, had examined the X-rays taken while petitioner was a patient at the Santa Fe Hospital, and had examined the reports of the various doctors. He testified that the X-rays showed a thickened pleura at the left apex, which "indicates that there has been some pathology, not necessarily active at the present time"; that he could not tell definitely whether petitioner had had tuberculosis; that the findings on this point "were not exactly definite, there were marked suspicions that he did"; that if petitioner had come to him for treatment he "would have treated him as potentially tuberculous"; that practically all cases of spontaneous pneumothorax develop from a ruptured tubercle on the outer surface of the lung; that the rupture of a single tubercle will produce a spontaneous pneumothorax without a great deal of infection of the lung; that it is true

that other conditions besides tuberculosis, which conditions he enumerated, can provoke spontaneous pneumothorax, but that none of those other conditions were present here. In response to the question as to whether a person whose lungs are entirely well, healthy, and normal could have a spontaneous pneumothorax, he answered, "There are cases in which it is very difficult and sometimes impossible to demonstrate the pathology. It has been my own experience and observation of probably 225 pneumothoraces that probably always if you are diligent enough you can locate the source or origin; sometimes, it is impossible—but I do not believe it occurs without accompanying pathology." He further testified that in his opinion there is always a pathological condition preceding a spontaneous pneumothorax, whether it is demonstrable or not; that in analyzing petitioner's case he had considered all possible causes of pneumothorax of which he knew and that he was able to rule out all of them except tuberculosis; that if petitioner's case was caused by tuberculosis of a minimum kind, such as the bursting of a single tubercle, it is possible that with the care petitioner has had the tuberculous condition would be entirely healed and that it would now, some months after the injury, be impossible by physical findings to ascertain the cause; that the fact that petitioner spat up blood while at the Santa Fe Hospital is indicative of some pathology; that it is impossible to say whether the condition occurred when petitioner lifted the desk; that even if it did then occur, he was of the opinion that it was not caused by the strain of lifting the desk; that he was of the opinion that no case of pneumothorax ever occurred from strain; that when the condition gets ripe the lung collapses, whatever the patient is doing; that most cases occur while the patient is asleep or at rest. In his written report, Dr. Miller states:

"Statistics show that 90% of these cases are due to tuberculosis and approximately in 98% there are immediate and acute symptoms. * * * I have never known this condition to develop in a patient whose lungs were normal and healthy. We hear of an occasional case where spontaneous pneumothorax develops in a well individual, but it is my opinion that there is always some pre-existing pathology whether demonstrable or not. * * This man [petitioner] has the physical attributes of a tuberculous individual. Has a fair skin, red headed (red headed people are notoriously tuberculous). He is underweight, tall and emaciated. * * *

"The information at hand from the physical findings is not sufficient to definitely state that this boy has an active tuberculosis at this time, but we have grave suspicions due to the old healed pleural thickening at the left apex, considerable scarring in the right lung, and the tension in the left shoulder group of girdle muscles which is indicative of activity. This condition * * * commonly comes on suddenly without any apparent cause. As stated above 90% have definite tuberculous involvements. 98% show immediate and acute symptoms, and it is my opinion that the other 2% have pathology to account for the condition whether demonstrable or not. It is the most probable conclusion that tuberculosis is the underlying cause. * * *

"There must be a lesion before man can have a pneumothorax because as far as is known to medical science, healthy, normal lungs do not develop this condition. It is a fairly safe conclusion that a tubercle near the outer surface of the lung ruptured, causing the pneumothorax and the most probable cause is tuberculosis. * * *

"Long continued effort, such as running or working at high speed over a considerable period, would, of course, increase the circulation of blood through the lung, and increase the respiration rate, as well as the depth of breathing; however, a short sustained effort cannot be shown physiologically to increase the effort. The human lungs are constructed so as to withstand, without damage, far more pressure than it is possible for an individual to build up by physical effort. * * *

"A scientific conclusion cannot be drawn that the effort in moving a desk, which was made by this patient, increased the air pressure to an extent which caused his pneumothorax. * * *

Dr. George W. Jones, assistant medical director of the commission, rendered a written report in which he states: "I find no explanation for a 24-hour period lapsing before the onset of acute disabling symptoms that characterize such pathology. * * * Spontaneous pneumothorax is not characterized by delayed symptoms. * * * I do not believe that the lifting act of July 21, 1933, was the precipitating cause of the development of a spontaneous pneumothorax with the acute symptoms not manifesting themselves until 24 hours after this particular physical effort."

[3] The above evidence amply supports the award of the commission denying compensation to petitioner. Such evidence refutes petitioner's contention that the lifting act caus-

ed or accelerated his injury. It is true that the doctors called by petitioner, all men of unquestioned ability, gave a logical explanation of the cause of the delayed symptoms, and also positively testified that the lifting act of July 21, with its accompanying strain, caused a tear in the lung tissue, ultimately leading to the collapse of the lung. These doctors could find no evidence of tuberculosis. However, such evidence is directly contrary to the evidence summarized above, particularly that of Dr. Miller. We are not permitted to weigh the evidence. Under the circumstances here disclosed, the award must be affirmed.

It is so ordered.



2 Cal.2d 727

UNION OIL ASSOCIATES v. JOHNSON,

State Treasurer.

L. A. 14286.

Supreme Court of California.

March 26, 1935.

1. Statutes ☞225¾

Where legislation is framed in language of earlier enactment on same or analogous subject, which has been judicially construed, there is very strong presumption of intent to adopt construction as well as language of prior enactment.

2. Statutes ☞226

Where statute is patterned after legislation of another state or of federal government, or of foreign country, which has been judicially construed in jurisdiction of its enactment, there is very strong presumption of intent to adopt construction as well as language of prior enactment.

3. Taxation ☞117

1933 amendment to Bank and Corporation Franchise Tax Act providing that corporation organized to hold stock or bonds of other corporation and not trading in such stock or bonds or other securities, and engaging in no other activities than receipt and disbursement of dividends shall not be considered financial, mercantile, manufacturing, or business corporation, or corporation doing business in state for purposes of act, was enacted for purpose of clarifying legislative intent by expressly declaring meaning of words used in act (St. 1929, pp. 19, 20, §§ 4, 5; St.

1933, pp. 693, 694, §§ 4, 5; Const. art. 13, § 16, subds. 2 (a), 5, adopted in 1928).

4. Taxation ☞ 117

Holding company organized for purpose of consolidating in one pool shares of capital stock of another corporation in return for which holding company issued like number of its own shares, whose stockholders received all dividends paid on acquired shares, minus such sums as were necessary to be deducted to pay corporate expenses, and whose only income was from acquired shares none of which was ever transferred, *held* not "business corporation" within act imposing franchise tax on business corporations doing business within state (St. 1929, pp. 19, 20, §§ 4, 5; Const. art. 13, § 16, subds. 2 (a), 5, adopted in 1928).

[Ed. Note.—For other definitions of "Business Corporation," see Words & Phrases.]

THOMPSON and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Union Oil Associates, a corporation, against Charles G. Johnson, State Treasurer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 32 P.(2d) 360.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for appellant.

Andrews & Andrews, L. W. Andrews, and Paul M. Gregg, all of Los Angeles, for respondent.

SEAWELL, Justice.

The plaintiff, Union Oil Associates, a California corporation, brought this action in the superior court of Los Angeles county to recover from Charles G. Johnson, state treasurer, \$49,099.72, which sum represents the amount of taxes, plus interest, levied against plaintiff for the year 1931 under the Bank and Corporation Franchise Tax Act (St. 1929, p. 19), and paid by it under protest. The defendant state treasurer demurred to the complaint on the ground that it did not state a cause of action. The court below overruled the demurrer, and upon defendant's failure to answer entered judgment for plaintiff.

Section 16, article 13, state Constitution, as it read at the time of levy and payment of the tax herein, provided that "all financial, mercantile, manufacturing and business cor-

porations doing business within the limits of this State, subject to be taxed pursuant to subdivision (d) of section 14 of this article [Article XIII], in lieu of the tax thereby provided for, shall annually pay to the State for the privilege of exercising their corporate franchises within this State a tax according to or measured by their net income. * * *

Plaintiff is a holding company organized under the laws of this state to own and hold stock of the Union Oil Company of California and distribute dividends paid thereon to its own stockholders. It is conceded that plaintiff is neither a financial, mercantile, or manufacturing corporation. It contends that it is not a "business corporation" or "doing business" within the meaning of section 16, article 13, and the Bank and Corporation Franchise Tax Act enacted pursuant thereto. It is plaintiff's contention, sustained by the court below that the phrases "doing business" and "business corporation," as used in federal excise tax acts, have acquired a well-defined meaning through judicial interpretation, which precludes their application to a holding company such as plaintiff; and that in view of the history of the constitutional amendment (section 16, article 13), and the Bank and Corporation Franchise Tax Act, enacted pursuant thereto, said phrases must be given the same interpretation when used therein as in the federal statutes. Defendant state treasurer contends that it was not the intention of the people or the Legislature to adopt the federal construction; that when a corporation is doing the very things it was organized to do, and it is not a charitable, benevolent, or social corporation, it is a "business corporation" and subject to pay the tax according to or measured by net income.

We have quoted above the provision of subdivision 2(a), section 16, article 13, Constitution, providing for a tax to be paid by financial, mercantile, manufacturing, and business corporations. Subdivision 5 of said section provides as follows: "The Legislature shall define 'corporations' and 'doing business.' * * *"

The Bank and Corporation Franchise Tax Act, enacted in 1929 to carry the constitutional provision into effect, provided that every corporation "of the classes referred to in subdivision 2(a) of section 16 of article thirteen of the constitution of this state," should pay annually to the state for the privilege of exercising its corporate franchises within the state a tax at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year.

St. 1929, pp. 19, 20, § 4. In section 5 of the act the Legislature defined the term "corporation" as follows: "The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and *business* corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States." "Doing business" is defined in said section 5 as follows: "The term '*doing business*,' as herein used, means any transaction or transactions in the course of its *business* by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state." (Italics supplied.)

In 1933 the act was amended by addition of the following provision in section 4: "Any corporation organized to hold the stock or bonds of any other corporation or corporations, and not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt and disbursement of dividends from such stock or interest from such bonds, shall not be considered a financial, mercantile, manufacturing or business corporation or a corporation doing business in this State for the purposes of this act." St. 1933, p. 693. Plaintiff corporation, upon the basis of the allegations contained in its complaint, brings itself within this proviso. However, the taxes which it seeks to recover were for the year 1931, prior to the amendment. Although exempted from payment of the tax according to or measured by net income, such companies as plaintiff, in 1933, after change in the constitutional provisions of section 16, article 13, were made subject to an annual tax of \$25 by the amendatory provisions of the act. The definition of the term "doing business" was changed in 1933 to read as follows: "The term 'doing business,' as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." St. 1933, p. 694.

Section 16, article 13, state Constitution, and the Bank and Corporation Franchise Tax Act also provide for a tax according to or measured by their net income to be paid by banks and banking associations, both state and national. Subdivision 1 (a), § 16, art. 13. In 1928, the tax commission appointed by the Governor pursuant to an act of the 1927 Legislature (St. 1927, p. 781), reported that the existing share tax method (subdivision c, § 14, art. 13, State Constitution) as applied in this state to shares of stock in national banks was "probably invalid" as a result of several

recent decisions of the Supreme Court of the United States, commencing with *Merchants' National Bank of Richmond, Virginia, v. City of Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135, and including *First National Bank of Hartford, Wisconsin, v. City of Hartford*, 273 U. S. 548, 47 S. Ct. 462, 71 L. Ed. 767, 59 A. L. R. 1, and *State of Minnesota v. First National Bank of St. Paul*, 273 U. S. 561, 47 S. Ct. 468, 71 L. Ed. 774. The commission found that unless an amendment to the state Constitution should be passed in the fall of 1928 to lay the foundation for a valid system of bank taxation, revenues paid to the state by the banks under protest in 1926 and 1927, and revenues which would become due from them for 1928, 1929, and 1930, to the extent of \$22,050,000, would be jeopardized. Special Report of the California Tax Commission, appearing in Final Report of the California Tax Commission, March 5, 1929, p. 243, particularly at pp. 247 and 250-264. Before submission of the commission's report in August, 1928, the banks generally had brought suit to recover taxes paid under protest in 1926 and 1927. Acting upon the plea of the commission that a grave fiscal emergency existed which demanded immediate corrective action, the Governor called a special session of the Legislature which met on September 4 and 5, 1928, and voted to submit to the people the constitutional amendment recommended by the commission. Report Tax Commission, p. 2. The amendment was approved at the election of November 6, 1928, and in 1929 the Legislature enacted the Bank and Corporation Franchise Tax Act to carry into effect the provisions thereof.

The state's power to tax national banks depends entirely upon section 5219 of the United States Revised Statutes (see 12 USCA § 548), in which the various methods for the state taxation of national banks consented to by Congress, and the prescribed conditions to which each is subject, are set forth. *New York ex rel. Williams v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, 347, 46 S. Ct. 135, 70 L. Ed. 295; *Bank of California v. Richardson*, 248 U. S. 476, 483, 39 S. Ct. 165, 63 L. Ed. 372. In 1926 said section was amended to authorize the states to tax national banking associations "according to or measured by the net income," provided "the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within

its limits." Subdivision 1 (c), § 5219, Revised Statutes of the United States (12 USCA § 548 (c)). The tax commission was of the view that of the methods of taxing national banks permitted by section 5219, this new fourth method offered the only practical legal solution which could be adjusted to other features of our tax system. Final Report, California Tax Commission, March 5, 1929, p. 263. It appears from the report of the tax commission that the banks had indicated that they would withdraw suits instituted by them to recover taxes paid under protest if provision were made for a satisfactory tax according to or measured by net income. This solution, however, required a recasting of the existing corporation taxes to comply with the requirement as to national bank taxation according to or measured by net income that the rate upon banks "not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits." The commission was further of the view that aside from using a corporate income tax to validate a tax on banks "according to or measured by their net income," such a tax would be more equitable as a business tax than the existing corporate excess method of taxing such corporations. Report Tax Commission, March 5, 1929, p. 268; for discussion of corporate excess method of taxation, see *Miller & Lux v. Richardson*, 182 Cal. 115, 187 P. 411. Accordingly, the constitutional amendment approved by the people on November 6, 1928, provided for a tax according to or measured by net income to be paid by banks and by certain corporations doing business within this state.

Both the constitutional provision and the Bank and Corporation Franchise Tax Act provide that "financial, mercantile, manufacturing and business" corporations "*doing business* within the limits of this state" shall pay the tax. (Italics supplied.) Thus our state constitutional provision and legislation adopt the language of that portion of section 5219, Revised Statutes, by which the validity of a tax upon national banking associations according to or measured by net income is made to depend upon the rate being not "higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations *doing business* within its limits. * * *" Not only in enumerating the classes of corpora-

tions subject to the tax did the Legislature adopt the language of section 5219, but in defining the term "corporation" it expressly refers to said section 5219 in the following manner: "Sec. 5. The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States." The "classes referred to in subdivision one (c) of section 5219" are "financial corporations" and "mercantile, manufacturing and business corporations *doing business* within its [the state's] limits." Hence, plaintiff argues, it was the intent of the people and the Legislature that the interpretation placed upon the phrases "business corporation" and "doing business" by the federal courts should govern our state provisions, with the result that a holding company is not a "business corporation." We are in accord with this contention.

The cases to which respondent has cited us to establish the federal definition of "business corporation" and "doing business" did not interpret those terms as used in subdivision 1 (c) of section 5219, adopted in 1926, but, rather, involved the federal excise tax acts of 1909 and of 1916 and subsequent years. The Corporation Tax Act of 1909 (36 U. S. Stat. c. 6, pp. 112-117) provided for an excise tax to be paid by corporations "organized for profit" and "engaged in business in any State * * * with respect to the carrying on or doing business by such corporation * * * equivalent" to a stated percentage upon net income. The act of Sept. 8, 1916 (39 Stat. c. 463, p. 789) provided for a tax upon domestic corporations organized for profit "with respect to the carrying on or doing business" at certain rates for a fair value of their capital stock, and exempted corporations "not engaged in business" during the preceding taxable year. Through decisions interpreting these excise tax acts it became settled that corporations which were mere holding companies were not subject to the tax. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35 S. Ct. 499, 59 L. Ed. 825; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 S. Ct. 361, 55 L. Ed. 428; *McCoach v. Minehill & S. H. Ry. Co.*, 228 U. S. 295, 33 S. Ct. 419, 57 L. Ed. 842; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 37 S. Ct. 201, 61 L. Ed. 460; *United States v. Hotchkiss*

Redwood Co. (C. C. A.) 25 F.(2d) 958; Rose v. Nunnally Inv. Co. (C. C. A.) 22 F.(2d) 102; Clallam Lumber Co. v. United States (D. C.) 34 F.(2d) 944; Argonaut Consol. Min. Co. v. Anderson (D. C.) 42 F.(2d) 219.

[1, 2] There can be little doubt that the Supreme Court of the United States in construing the meaning of the terms "doing business" and "business corporations" in subdivision 1 (c) of section 5219, Revised Statutes, which authorizes a state excise tax upon national banking associations, would follow the definition given by it to those terms as used in the Tax Acts of 1909, 1916, and subsequent years establishing federal excise taxes. It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. In re Nowak, 184 Cal. 701, 195 P. 402; Dalton v. Leland, 22 Cal. App. 481, 486, 135 P. 54; 59 C. J. 1061; 23 Cal. Jur. 794; Hecht v. Malley, 265 U. S. 144, 44 S. Ct. 462, 68 L. Ed. 949; Latimer v. United States, 223 U. S. 501, 32 S. Ct. 242, 56 L. Ed. 526. A similar principle applies where a statute is patterned after legislation of another state, or of the federal government, or, indeed of a foreign country, which has been judicially construed in the jurisdiction of its enactment. Ocean Accident, etc., Co. v. Industrial Accident Commission, 173 Cal. 313, 317, 159 P. 1041; Estate of Potter, 188 Cal. 55, 68, 204 P. 826; Charles Nelson Co. v. Morton, 106 Cal. App. 144, 288 P. 845; People v. Norcross, 71 Cal. App. 2, 234 P. 438; 23 Cal. Jur. 794; 59 C. J. 1065.

In the instant case our constitutional amendment and legislation were enacted to establish a mode of taxation which would comply with the federal permissive statute. The presumption that the adoption of the words of the federal enactment evinces an intent to adopt the federal construction thereof is even stronger than in the ordinary case where legislation of one jurisdiction is merely modeled after that of another. It is true that subdivision 1 (c) of section 5219 is not a restriction upon the classes of corporations which the state may tax, and does not proscribe a tax upon holding companies measured by net income. It simply provides that if a tax according to or measured by net income is levied on banks, the rate must not be higher than the rate on other financial corporations,

nor higher than the highest of the rates assessed on mercantile, manufacturing, and business corporations. Consistently with this restriction the state might have provided that holding companies should be subject to the tax along with other corporations, but the constitutional and legislative provisions are not subject to such construction. The proposed constitutional amendment submitted to the Legislature by the tax commission provided that "corporations doing business in this state, of the class covered by subdivision (d) of section 14," article 13 should pay the tax, and omitted the modifying adjectives "financial, mercantile, manufacturing and business." The Legislature rejected this inclusive language and instead appropriated the exact words of section 5219 before submission of the amendment to the people. Report of the California Tax Commission, March 5, 1929, p. 290. The Legislature further evidenced the intent to adopt the federal construction by expressly defining "corporation" to include "every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States." (Italics supplied.)

[3] In the light of this analysis the purpose of the Legislature in adopting the 1933 amendment to sections 4 and 5 of the act, quoted earlier herein, and providing that such a holding company as plaintiff shall not be considered a "business corporation," was to clarify the legislative intent by expressly declaring the meaning of the words used in the act. Diethelm v. Rainey, 1 Cal.(2d) 245, 33 P.(2d) 1026; 59 C. J. 1097; 2 Sutherland, Statutory Construction, p. 777. By the same amendment, holding companies, although not "business corporations," were made subject to an annual tax of \$25. Section 16 of article 13 was also amended in that year, and the authorization therein for corporate taxation does not limit the corporations to be taxed thereunder to financial, mercantile, manufacturing, and business corporations. In an "Analysis of the Bank and Corporation Franchise Tax Act" submitted to the California Tax Research Bureau in the office of the state board of equalization in January, 1933, the authors point out that to tax holding companies under the act according to net income would drive them out of the state. Traynor and Keesling, Analysis of the Bank and Corporation Franchise Tax Act, p. 46; see, also, 21 Cal. Law Rev., p. 545.

[4] The federal courts have declared that it is impossible in the nature of the case to prescribe fixed rules which may be applied in all cases to determine whether a corporation is a mere passive holding company, or a business corporation, and that each case must be decided on its particular facts. The judgment for plaintiff in the case herein was entered upon defendant's demurrer to the complaint. By the allegations of said complaint plaintiff brings itself clearly within the federal definition of a holding company. By the complaint it is made to appear that plaintiff was organized for the purpose of consolidating and maintaining in one holding or pool shares of the capital stock of the Union Oil Company of California. In return for shares of stock of the Union Oil Company it issued an equal or like number of its own shares. Its stockholders received all dividends paid on Union Oil Company shares minus such sums as were necessary to be deducted in order to pay the corporate expenses of plaintiff. Further, it is alleged that the only assets possessed by plaintiff, other than capital stock of the Union Oil Company, was its office furniture and equipment, and from time to time small amounts of cash for defraying current corporate expenses. Its only income is from shares of stock of the Union Oil Company, none of which stock, it is alleged, has ever been sold, mortgaged, or hypothecated. The corporations expressly declared not to be "business corporations" in the amendment of 1933 to the Bank and Corporation Franchise Tax Act likewise would not be "business corporations" under the federal decisions, but holding companies. We have heretofore held that this state has adopted the federal definition, and that the amendment of 1933 is a clarification and legislative expression of the meaning of existing legislation. Plaintiff, upon the basis of the allegations of its complaint is not a business corporation according to said amendment. It is organized to hold the stock of the Union Oil Company, and does not trade in such stock, and engages in no other activities than the receipt and disbursement of dividends.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.

PRESTON, J., deeming himself disqualified, does not participate herein.

THOMPSON, Justice (dissenting).

I cannot bring myself to concur in the prepared opinion.

This action was brought by the plaintiff to recover from the defendant the franchise tax paid by the plaintiff in the year 1931, based upon its income for the year 1930. The demurrer of the defendant being overruled, and he declining to answer, his default was entered and judgment followed. This appeal is from the judgment.

By the complaint it is made to appear that the respondent was organized for the purpose of consolidating and maintaining in one holding or pool shares of the capital stock of the Union Oil Company of California. In return for shares of stock of the Union Oil Company, it issued an equal or like number of its own shares. Its stockholders received all of the dividends paid on Union Oil Company shares minus such sums as were necessary to deduct in order to pay the corporate expenses of the respondent. Further, it is alleged that the only assets possessed by respondent, other than capital stock of the Union Oil Company, was its office furniture and equipment and from time to time small amounts of cash for the defraying of current corporate expenses. Its only income is from shares of stock of the Union Oil Company, none of which stock, it is alleged, has ever been sold, mortgaged, or hypothecated.

Further allegations disclose that, by action of the franchise tax commissioner, approved by the state board of equalization, respondent was obliged to pay the sum of \$44,552.63, plus interest in the sum of \$4,522.09, the amount of which tax was arrived at by estimating that of the sum of \$4,872,864 paid to the respondent as dividends by the Union Oil Company 29.643976 per cent. thereof arose out of and was paid from income earned by the Union Oil Company in business transactions outside the state of California.

In 1928, section 16 of article 13 was added to the state Constitution and in its material parts provides as follows:

"2. (a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article * * * shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. * * *

"5. The legislature shall define 'corporations' and 'doing business'; shall define 'net income,' and may define it to be the entire net income received from all sources. * * *

In 1929 there was passed the "Bank and Corporation Franchise Tax Act" (St. 1929, pp. 19, 20), the pertinent provisions of which are as follows:

"Sec. 4. Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision (2) (a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. * * *

"Sec. 5. The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States.

"The term 'bank,' as hereinafter used, shall include national banking associations.

"The term 'doing business,' as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state.

"Sec. 6. The term 'gross income,' as herein used, includes gains, profits and income derived from the business, of whatever kind and in whatever form paid; gains, profits or income from dealings in real or personal property; gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise received in carrying on such business; all interest received from federal, state, municipal or other bonds, and, except as hereinafter otherwise provided, all dividends received on stocks.

"Sec. 7. The term 'net income,' as herein used, means the gross income less the deductions allowed."

In providing what deductions from the gross income shall be permissible, section 8 (h) reads:

"Dividends received during the taxable year from income arising out of business done in this state; but if the income out of which the dividends are declared is derived from business done within and without this state, then so much of the dividends shall be allowed as a deduction as the amount of the

income from business done within this state bears to the total business done.

"The burden shall be on the taxpayer to show that the amount of dividends claimed as a deduction has been received from income arising out of business done in this state."

That portion of section 5219, Revised Statutes of the United States (as amended by Act March 25, 1926 [12 USCA § 548]), referred to in section 5 of the Bank and Corporation Franchise Act which is material to the present case, permits the states to tax national banking associations "according to or measured by their net income, provided the following conditions are complied with:

* * * (c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations."

It is respondent's first contention that it is not doing business in this state within the meaning of the constitutional section, that the Legislature has not the right to create a liability by defining the words "doing business," and that by the adoption of the section of the Constitution we have adopted the construction placed upon the phrase "engaged in business" used in the federal acts referred to later in this opinion.

However, the mere recital of the constitutional provision, the sections of the legislative act, and the material provisions of the federal act provokes two preliminary observations: First, it is to be noted that the tax here in question is one upon the franchise

of domestic corporations and foreign corporations "doing business" in this state, and not one upon the income of such corporations. Second, the enumeration of certain kinds of corporations in section 5219 of the Revised Statutes of the United States is in nowise restrictive of the corporate franchises which may be taxed by the state, but only that those enumerated must be taxed if a franchise tax measured by the net income is to be laid upon national banking associations. In other words, it was the congressional intention to prevent discrimination in favor of the designated corporations to the detriment of national banking associations. These observations suggest that the expression "doing business" was employed in the constitutional provision in order to include foreign corporations "doing business" of an intrastate character in the state. This thought is to a degree confirmed by decisions heretofore rendered to the effect that it is the exercise of the right by a foreign corporation to do intrastate business in the state which was the property to be taxed under article 13, section 14, subd. (d) of the Constitution providing that the franchises of all corporations except those otherwise mentioned in the section should be taxed at their actual cash value. See *People v. Alaska Pacific S. S. Co.*, 182 Cal. 202, 187 P. 742, 745; *People v. Ford Motor Co.*, 188 Cal. 8, 204 P. 217, 218. In the first cited case this court said: "The theory that the potential unexercised right of a foreign corporation to do business in this state, which exists by comity only, constitutes taxable property within this state, would lead to results ridiculous and absurd. Every corporation of any foreign state or country is privileged to enter this state and do business therein (herein). While it is doing such business it is exercising corporate powers within this state and the privilege of doing so becomes valuable, but before it exercises that power, or when it ceases to do so, it is no longer possessed in this state of anything of value." And in the second case cited we find the following persuasive language: "The right to be a corporation, or to do business as a corporation, is a franchise which ordinarily has its situs at the place where the home office of the corporation is situated, but, when a corporation engages in business in a state other than the state wherein it was chartered, the actual exercise of the power to engage in business creates valuable intangible property in the foreign state where the business is transacted. In other words, the actual exercise of the power to do business is also a franchise, and such a franchise has a sub-

stantial existence in every state where the business is transacted."

The respondent places great weight for its contention that the words "doing business" must be held to mean "the aggressive pursuit of gain" and not merely the receipt of the ordinary fruits incident to the ownership of property, upon decisions of the federal courts construing and applying the Corporation Tax Law (Act of August 5, 1909, 36 U. S. Stat. c. 6, pp. 11, 112-117), and the Capital Stock Tax Law of 1918 (40 Stat. p. 1126, § 1000) and 1921 (42 Stat. p. 294, § 1000), which levied a tax upon corporations "engaged in business," but excluded those not so engaged. Having before it the contention that the tax imposed by the act of 1909 was a direct tax upon property, the United States Supreme Court, in the case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, at page 145, 31 S. Ct. 342, 346, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, says: "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any state or territory, as heretofore stated." And in *Rose v. Nunnally Inv. Co.* (C. C. A.) 22 F.(2d) 102, 103, in applying the Capital Stock Tax Law the court uses similar language as follows:

"Upon the authority of these cases it may safely be stated that the tax is based, not upon the charter powers of the corporation, but upon its activities, and that a corporation which merely receives the income earned by assets which it owns, and distributes that income among stockholders, is not engaged in business." Bearing in mind the restriction against the levy of direct taxes by the federal government except when apportioned according to population (for thorough discussion of the subject of direct taxes see *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759), the consequent necessity of levying an excise tax upon the doing of business under a corporate form, if the corporation is to be taxed, and the difference between a tax so levied and that laid upon the franchises of domestic corporations and foreign corporations "doing business" in this state, it becomes apparent that the federal cases construing the statutes already mentioned cannot be considered as controlling. This conclusion disposes of the contention that we have adopted the construction of the words "engaged in business" placed thereupon by the federal courts, and also demonstrates that the Legislature did not transcend its power of definition when it placed a construction upon the words "doing business" which they would have borne even without legislative expression.

As we have already indicated, the intention sought to be expressed in the constitutional provision, followed by the legislative enactment by the use of the words "doing business," was to subject those corporations to a tax which are doing some substantial part of their ordinary business, or exercising some of the functions for which they were created (*Estate of Wellings*, 192 Cal. 506, 221 P. 628), because they are then doing business within the state. See *Estate of Wellings*, supra; *Bullfrog Goldfield R. Co. v. Jordan*, 174 Cal. 342, 163 P. 40; 7 Cal. Jur., p. 222, §§ 704-706.

We have already observed that the expression "doing business," as construed by the federal courts, is not in point because the tax there imposed was not upon the franchises of the corporations but upon the doing of corporate business. The constitutional amendment expressly declares against the adoption of the interpretation put upon the phrase by the federal courts when it says in subdivision 5 of section 13 of article 13, " * * * the legislature shall define * * * 'doing business.'" Following this declaration by the people that the Legislature was to determine the meaning of the phrase "doing

business," the Legislature, in section 5 of the Bank and Corporation Franchise Tax Act, already quoted, said: "The term 'doing business,' as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state." How can it be said, when the people have directed the Legislature to define the phrase and the Legislature has defined it, that the interpretation put upon the phrase by the federal courts when considering a different kind of tax was intended to be carried over into our act?

There is another reason why it seems to me impossible to escape the conclusion that the respondent fell within the provisions of the act and was taxable thereunder. In 1933, pursuant to the "Analysis of the Bank and Corporation Franchise Tax Act" submitted by Roger J. Traynor and Frank M. Keesling, and mentioned in the opinion prepared by Mr. Justice SEAWELL, the Legislature adopted an amendment to the Bank and Corporation Franchise Tax Act (see St. 1933, pp. 692, 693) in which, among other things, it is provided as follows:

"Any corporation organized to hold the stock or bonds of any other corporation or corporations, and not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt and disbursement of dividends from such stock or interest from such bonds, shall not be considered a financial, mercantile, manufacturing or business corporation or a corporation doing business in this State for the purposes of this act."

It was also provided that every corporation subject to be taxed pursuant to subdivision (d) of section 14 of article 13 of the Constitution and not otherwise taxed should pay annually to the state a tax of \$25 in lieu of the tax on its general corporate franchise. In other words, the Legislature, recognizing that by the terms of the Bank and Corporation Franchise Tax Act holding companies were taxed, by the amendment relieved them of such taxes and imposed an annual tax of \$25. The amendment constitutes a legislative construction of the previous act and is entitled to weight in our determination of whether the respondent is subject to the tax.

Respondent also contends that it is not within the act because it is neither a financial, a mercantile, a manufacturing, or a business corporation. We may assent to the proposition that it is neither mercantile nor

manufacturing in character. But we cannot agree that it is neither a business nor a financial organization. The expression "business corporation" signifies a corporation the purpose of which is that of personal material gain to its members. *National Bank Taxation in California*, 17 *Calif. Law Review*, 456, at 493, and cases cited. The respondent's articles of incorporation, by reference made a part of its complaint, disclose that it was formed for the purpose of buying or otherwise acquiring shares of stock of the Union Oil Company and of exercising all of the rights, powers, and privileges of the ownership of such shares and to avail itself "of all benefits at any time offered to or conferred upon, or made available to, stockholders of said Union Oil Company of California," and to vote the stock at meetings of the stockholders of the Union Oil Company. We cannot say to what degree the respondent controls the management of the Union Oil Company through its stockholdings, but it is apparent that its purpose is the mutual protection and material, pecuniary gain of its members.

Respondent asserts that the act is unconstitutional because article 13, § 16, subd. 2 (a), already quoted, provides that corporations "shall annually pay * * * a tax according to or measured by their net income" wherever the act says that the tax shall be "upon the basis of its net income for the next preceding year." It is claimed that the act is at variance with the Constitution. We need spend but little time on this statement. The tax is measured by the nearest ascertained income, and we know of no more logical or reasonable way of carrying out the intention of the people. Instead of being at variance, the two provisions are in complete harmony.

It is also claimed that the tax exacted from respondent constitutes a burden upon interstate business. The only argument advanced in support of this statement is that the tax "is based entirely upon income derived from the interstate business of the Union Oil Company—a tax with relation to interstate commerce alone." A complete answer to this suggestion is found in *Pacific Co. v. Johnson*, 212 Cal. 148, 298 P. 489, wherein it was held that, the tax being upon the franchise of the corporation without reference to the character of the property in which its funds are invested, income from nontaxable securities might be used for the purpose of measuring the tax.

Finally, it is said that the act is discriminatory, in that personal corporate stockholders of the Union Oil Company are not taxed. A complete refutation of this assertion may be framed as follows: Every corporation of like class pays a similar tax upon its franchise; hence there is no discrimination. Individuals are not involved.

From what has been said it is evident that appellant's demurrer should have been sustained without leave to amend and judgment entered for the defendant.

I concur: SHENK, J.



3 Cal.2d 19

**FRANCIS v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

**DELOREY et al. v. SAME.
L. A. 15005, 15007.**

**Supreme Court of California.
March 29, 1935.**

Rehearing Denied April 26, 1935.

1. Contempt ☞60(3)

In contempt proceedings against attorneys for condemnee and condemnor for making motion for new trial of condemnation case before judge other than judge who presided at trial, despite availability of judge who presided at trial, evidence authorized finding that attorneys participated in making motion with knowledge of attending circumstances (Code Civ. Proc. § 661).

2. New trial ☞114

Requirement that motion for new trial "shall" be heard and determined by judge who presided at trial, except in event of his absence or inability, is mandatory, not directory (Code Civ. Proc. § 661).

[Ed. Note.—For other definitions of "Shall," see Words & Phrases.]

3. Statutes ☞227

Test in determining whether statute is directory or mandatory is whether mode of action prescribed thereby is of essence of thing to be accomplished, such as whether it relates to matter material or immaterial, to matter of convenience or of substance.

4. Statutes $\Rightarrow$ 227

Whether statute is mandatory or directory depends upon legislative intent as ascertained from consideration of the whole act.

5. Contempt $\Rightarrow$ 60(3)

In contempt proceedings against attorneys, evidence held to show that attorneys made motion for new trial before another judge with intent to evade order and judgment of judge who presided at trial (Code Civ. Proc. § 661).

6. Contempt $\Rightarrow$ 10

Action of attorneys in making motion for new trial before another judge with intent to evade order and judgment of judge who presided at trial constituted contempt of court, notwithstanding all parties stipulated that motion might be taken up and granted by judge before whom motion was made (Code Civ. Proc. §§ 661, 1209, subds. 3, 9).

7. Contempt $\Rightarrow$ 10

That judge who presided at trial was advised of attorneys' intention to make motion for new trial before another judge would not relieve attorneys who made motion before another judge of contempt of court, unless judge who presided at trial consented to such proceedings (Code Civ. Proc. § 661).

8. Contempt $\Rightarrow$ 54(4)

Affidavit in contempt proceedings against attorneys in condemnation case for making motion for new trial before another judge than judge who presided at trial held not defective as failing to show that judge who presided at trial did not consent to hearing of motion before other judge, where affidavit alleged that records of condemnation case disclosed that no further action was taken after verdict in condemnation case until motion for new trial in question was made (Code Civ. Proc. § 661).

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Petitions by George H. Francis and E. H. Delorey and another against the Superior Court in and for Los Angeles County and another to review an order and judgment of respondent adjudging petitioners guilty of contempt of court.

Rehearing denied; SHENK, J., dissenting. Judgment affirmed.

Prior opinion, 35 P.(2d) 634.

A. L. Bartlett and Lewis B. Randall, both of Los Angeles, and Boyd C. Barrington, of

Santa Monica, for petitioners E. H. Delorey and Boyd C. Barrington.

Richard H. Cantillon and George H. Francis, both of Los Angeles, L. K. Floyd, of Modesto, and W. Torrence Stockman, of Los Angeles, for petitioner George H. Francis.

Libby & Sherwin and Warren E. Libby, all of Los Angeles, for respondents.

CURTIS, Justice.

These two proceedings were instituted in the District Court of Appeal for the purpose of reviewing the order and judgment of the superior court of the county of Los Angeles adjudging the three petitioners guilty of contempt of court, and that each of them pay a fine of \$500, and in default of such payment that they be imprisoned in the county jail of said county. Each paid the fine under protest, before the institution of these proceedings, in order to escape the jail sentence. As the two proceedings grew out of the same set of circumstances and the convictions of all petitioners were embraced in one order and judgment, the matters were consolidated and are before us on a single record.

The proceedings in contempt were initiated by the filing of an affidavit by Edward S. Shattuck, a deputy city attorney of the city of Los Angeles. By this affidavit it was alleged that on July 10, 1930, the city of Los Angeles filed a complaint in which it sought to condemn certain real property for public street purposes. Simon Verghis was made a defendant in said proceeding, and filed an answer to the complaint through his attorney, E. H. Delorey, one of the petitioners herein. Said action as to the defendant Verghis was tried by the court without a jury. Judge Emmet H. Wilson, before whom the action was tried, awarded said defendant the sum of \$1 as damages in said action. Notice of intention to move for a new trial, signed by Boyd C. Barrington, one of the petitioners herein, as attorney for said defendant Verghis, was regularly served and filed. Said motion was granted by the court on October 30, 1931, and the case was again set for trial before Judge Wilson, and the same came on for hearing before Judge Wilson on November 27, 1931, petitioners E. H. Delorey and Boyd C. Barrington appearing for defendant Verghis, and resulted in a judgment that said defendant Verghis take nothing. It was not until May 23, 1932, that the interlocutory decree was entered in which said defendant Verghis was awarded nothing.

ing. It is recited in said decree that the two petitioners, E. H. Delorey and Boyd C. Barrington, appeared as counsel for defendant Verghis at said trial. No further action of any kind or character was taken with reference to the interest of the defendant Verghis in said action until June 7, 1932, when George H. Francis, the remaining petitioner herein, as deputy city attorney and as attorney for the city of Los Angeles, and the said E. H. Delorey and Boyd C. Barrington as attorneys for defendant Verghis, appeared before Judge Lewis H. Smith, one of the judges of said superior court of Los Angeles, and presiding in Department 9 of said superior court, being an entirely different department from the department in which Judge Wilson presided, and moved the court for a new trial in said action as to the defendant Verghis, which motion was granted on the stipulation of the parties thereto, as represented by their respective attorneys. The action was then tried before Judge Smith and resulted in an award in favor of defendant Verghis in the sum of \$2,500. On June 10, 1932, the interlocutory judgment was signed by Judge Smith, which recited that Messrs. Erwin P. Werner and George H. Francis appeared for the plaintiff, the city of Los Angeles, and said E. H. Delorey and Boyd C. Barrington appeared for the defendant Verghis. No claim is made that City Attorney Werner personally appeared in said proceedings, his only appearance being through this deputy, the said George H. Francis. Said interlocutory judgment further recited that findings of fact and conclusions of law were waived, and it was decreed therein that said defendant recover from the city of Los Angeles the sum of \$2,500 and costs of suit. Said judgment was regularly docketed on June 13, 1932, and on July 6, 1932, a satisfaction of said judgment signed by said E. H. Delorey, "Attorney for Creditor," dated July 5, 1932, was filed. It further appears from said affidavit of Edward S. Shattuck that said sum of \$2,500 was paid by the city of Los Angeles to E. H. Delorey, assignee of Simon Verghis, and that the warrant of said city by which said payment was paid was made out in the name of E. H. Delorey, assignee of Simon Verghis, and was indorsed as drawn. It further appears by said affidavit that on the 7th, 8th, 9th, and 10th of June, 1932, Hon. Emmet H. Wilson was sitting in Department 4 of the above-entitled court (the superior court of the county of Los Angeles), and was at all times available for his usual duties. The facts as stated in said affidavit were re-

cited more in detail than we have set them forth herein. We think, however, we have stated all the material facts alleged in said affidavit, and that our statement is sufficient for all our present purposes. The gist of the charge against the petitioners is that, after a judgment was rendered against the defendant Verghis by Judge Wilson, and while he was sitting in his department and was available for his usual duties, which would include the hearing of said motion for a new trial, the petitioners deliberately went into another department of said superior court, presided over by Judge Smith, and presented a motion for a new trial in said action and had the same considered and determined by Judge Smith.

[1] Upon the filing of said affidavit, proper proceedings were had which resulted in petitioners being brought before the said superior court to answer the charge against them as set forth in said affidavit. The petitioners appeared personally and by counsel, and a full and complete hearing was had in said court upon the matters charged against petitioners. At the conclusion of said hearing, the judge before whom the proceedings were pending found the charges contained in said affidavit to be true, and imposed the order and judgment now under review. The evidence taken at the hearing of the contempt proceedings, which has been certified to this court, amply supports the findings of the trial court in said proceedings as to all three petitioners. As to petitioner E. H. Delorey, there can be no question as to the sufficiency of the evidence to show his actual participation in the making of said motion with full knowledge of all the attending circumstances. He was the leading counsel for the defendant Verghis, and made all the preliminary arrangements for the hearing of said motion before Judge Smith, and knew full well that the former trial resulting in the judgment which he was seeking to have set aside by Judge Smith had been held before Judge Wilson. The evidence against him is most conclusive. While not as convincing against his associate, Mr. Barrington, the evidence does show that he was fully informed as to all the prior proceedings in said action in so far as they affected his client Verghis, and that he prepared the notice of intention to move for a new trial after the second judgment was rendered against his client by Judge Wilson, and was present and participated in the making of the motion for a new trial before Judge Smith. He claims that, while he was an attorney of record for defendant Verghis

and participated in certain proceedings therein before Judge Wilson, his employment ceased before the second trial before Judge Wilson, and that it was by a mere chance that he happened to be in Judge Smith's court at the time the motion for a new trial was made before Judge Smith. The record hardly bears out this claim, since even his own evidence taken at the hearing of the contempt charge would seem to refute his contention that he did not personally participate in the proceedings before Judge Smith. After testifying that he went with Mr. Delorey to Judge Smith's court, and that Mr. Francis either went with them or that they met him there he was asked by the court whether Mr. Delorey was associated with him in that case (the Verghis case), to which inquiry he replied:

"It was Mr. Delorey's case. I was really associated with him.

"Q. That is, you were associated together?

A. Yes, that was my case, the will case (referring to a case in which Mr. Delorey and Mr. Barrington were then engaged in the trial) and Mr. Delorey was associated with me in that case, but this Verghis case was his case, and I was associated with him in this Verghis matter."

Further along in the record we find the following testimony given by Mr. Barrington:

"Q. But you were both associated in the matter of setting the case before Judge Smith? A. No, I had nothing to do with that.

"Q. (by Mr. Simons). When you went over there how did you come to go to Judge Smith's court with Mr. Delorey? A. We were in the court room together trying this case together before Judge Sproul, and he said he had a couple of matters to hear before Judge Smith, and I went along with him. It developed when we got there that he had the Cline case and this Verghis case.

"Q. The Cline case you were not interested in? A. Not the slightest; did not know anything about it.

"Q. But in the Verghis case you were? A. Yes.

"Q. And at that time did you file a motion for a new trial? A. Before that Mr. Delorey told me he had a stipulation with the city attorney's office that a motion for a new trial was to be granted, and a judgment obtained thereunder, for approximately \$2,500.00, and asked me to prepare the motion for a new trial, which I prepared. I had knowledge of

the proceeding; he told me he had had these conferences with Pete Werner and Mr. Francis, and that a new trial was to be granted.
* * *

Mr. Barrington further testified relative to the proceedings before Judge Smith as follows:

"Q. As near as you can recollect, Mr. Barrington, who stated anything to the court? A. Why, Mr. Delorey had a conference with Judge Smith; I was present and Mr. Francis was present, I think that was in chambers, asking if he would not hear this stipulation for a new trial, and for a judgment, and I think, as I recollect, Judge Smith asked if it was a stipulation. He said yes. He said, 'Well, if it is a stipulation, I will hear it,' and he came out, took his position on the bench, heard the Cline case first, which took about five or ten minutes, and then called this case, and the motion for a new trial was presented, and it was stated through Mr. Francis that it was stipulated that it should be granted, and it was granted. They proceeded to trial, and called one witness, Mr. Frisbie, who testified as to the damage that had been done to Mr. Verghis' property, and he rendered judgment for \$2,500.00.

"Q. When you were in Judge Smith's court, you knew that this Verghis matter, the motion for a new trial, was to be made there on a stipulation before the court that it would be granted, that it could be granted by the court, did you believe that you had a right to go before Judge Smith with such a motion, based upon such a stipulation? A. Why, yes."

Judge Smith, in answer to a question as to who was present at the trial of said action, replied, "Mr. Delorey, Mr. Barrington and Mr. Francis."

From the foregoing evidence, most of it from his own lips, we think Mr. Barrington's interest in and connection with the Verghis case continued through the trial thereof before Judge Smith, and that his appearance in the courtroom at the time of the motion for a new trial and subsequent trial of the Verghis case was not so much in the role of innocent bystander as it was in that of an active participant in said proceedings.

Petitioner George H. Francis was a deputy in the office of the city attorney of Los Angeles, and during the pendency of said condemnation proceeding had charge of the condemnation department of said city. He appears of record as one of the attorneys for the city with Mr. Thurmond Clarke, also a deputy city

attorney, at the first trial of the Verghis case before Judge Wilson, but the record does not show that he was present at the second trial before Judge Wilson. However, immediately after said trial he had a conversation about the Verghis case with Mr. Clarke, from whom he learned the result of said trial. He was fully advised of the status of the case, both from the conversation with Mr. Clarke and from a conference with Mr. Frisbie, the appraiser of the city in condemnation proceedings. He felt that Mr. Verghis was entitled to \$2,500 damages for his property taken in the condemnation proceeding and that Judge Wilson's decision awarding him nothing was not justified by the facts in the case. He felt that the city attorney's office was to a large extent responsible for the unfavorable result in Judge Wilson's court. As far as the record shows, he made no attempt to rectify this result in any proceeding before Judge Wilson, or in the latter's court, but, upon a telephone message from Mr. Delorey in which the latter asked Mr. Francis to meet Mr. Delorey in Judge Smith's department, he went to Judge Smith's department, where he met Mr. Delorey and Mr. Barrington. As the attorney for the city, with the attorneys for Mr. Verghis, he participated in the consideration of the motion for a new trial, and on behalf of the city stipulated that the same might be granted. Thereupon the trial was had and a judgment rendered in Mr. Verghis' favor for the sum of \$2,500 damages. As far as Mr. Francis' testimony shows, and we have read it in its entirety, he made no inquiry as to whether Judge Wilson had been consulted regarding the motion for a new trial being made before Judge Smith, or why the motion was made before Judge Smith instead of Judge Wilson. Neither does he seek to justify his participation in said motion before Judge Smith by any claim that he supposed that Mr. Delorey, or any one else, had obtained the consent of Judge Wilson to the making of said motion before Judge Smith. In fact, his entire conduct shows that he was not relying upon any such consent by Judge Wilson to the hearing of the motion for a new trial before Judge Smith. This state of facts, in our opinion, justified the conclusion of the trial court that petitioner Francis deliberately participated in the making of the motion for a new trial before Judge Smith with full knowledge that the former trial had been had before Judge Wilson, and without making any effort whatever to have Judge Wilson pass upon said motion or to inform himself why said motion was not made before Judge Wilson.

Section 661 of the Code of Civil Procedure provides that: "The motion for a new trial shall be heard and determined by the judge who presided at the trial." There is a proviso or exception to this general requirement in case the judge who presided at the trial is absent from the county where the trial was had, or is otherwise unavailable for the purpose of hearing the motion. We are not concerned with these exceptions, as both the affidavit of Edward S. Shattuck and the evidence before us show that Judge Wilson, on the day when the motion for a new trial was made before Judge Smith, was sitting in his department and was available for his usual duties. It is contended by petitioners that this provision of section 661, Code of Civil Procedure, is merely directory, and that it was so construed by this court in the case of *Pappadatos v. Superior Court*, 209 Cal. 334, 287 P. 342. We do not so understand the decision in that case. The provision quoted above was not involved in that decision, but a subsequent provision of the section was construed which required that a motion for a new trial, when made before a judge other than the trial judge, "shall be submitted * * * not later than ten (10) days before the expiration of the time within which the court has power to pass on the same." Requirements relating to the time within which acts are to be done are frequently held to be directory only. *City of Los Angeles v. Hannon*, 79 Cal. App. 669, 251 P. 247, 23 Cal. Jur. 615.

[2-4] However, in the provision of section 661, we have a positive requirement that a motion for a new trial shall be heard and determined by the judge who presided at the trial. Prior to this enactment, there was no statute or other provision of law requiring a motion for a new trial to be made before the judge who tried the case. *Campbell v. Genshlea*, 180 Cal. 213, 216, 180 P. 336. In *Gallup v. Smith*, 59 Conn. 354, 22 A. 334, 335, 12 L. R. A. 353, in determining whether a particular statute there under review was mandatory or directory, the court stated the rule as follows: "It is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory, and when mandatory or imperative, but, of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matter material or immaterial,—to matters of convenience or of substance." This rule appears to have met

general approval in this state, as well as elsewhere. 59 Cor. Jur. p. 1074; 25 R. C. L., p. 767; 23 Cal. Jur. 613. Another rule equally well recognized in the construction of such a statute is that whether a statute is mandatory or directory depends upon the legislative intent as ascertained from the consideration of the whole act. 23 Cal. Jur. p. 613. Applying these rules to the construction of the provision of section 661, Code of Civil Procedure, requiring that a motion for a new trial shall be made before the judge who presided at the trial, if the judge who presided at the trial is available, we think that the very essence of this enactment is that the motion for the new trial shall be heard and determined whenever practicable by the judge who had heard the evidence at the trial of the case, and who was therefore best prepared and qualified to pass upon the merits of the motion. As we have seen, prior to the adoption of this section of the Code in its present form, such a motion could be made before any judge of the court in which the action was pending. Such a procedure no doubt often produced confusion or resulted in a failure of justice in many instances. For it needs no argument, we think, to prove that a judge who has heard the evidence, examined the witnesses, and made a study of the law applicable to the facts in a case is best qualified to rule upon the weight and value of the testimony of such witnesses, as well as upon other questions presented by the motion and which were involved in the trial of the action and to which the trial judge in most instances has given his attention and studious consideration. To have the motion for a new trial heard by a judge familiar with the facts and law of the case, rather than by one totally unfamiliar with such facts, and who has made no special study of the law applicable to those facts, was the very essence of section 661 of the Code of Civil Procedure. Its requirements were therefore mandatory, according to the well-established rule announced above. To leave it optional with litigants to observe or disregard its provisions would defeat the very purpose and object of its enactment. This section of the Code was first enacted in 1929 (St. 1929, p. 842, § 6). The Legislature provided that such motions "shall be heard and determined by the judge who presided at the trial." There is no mistake as to the meaning of this language. It is true that "shall," used in a statute, does not always import that its provisions are mandatory, although in most cases it does, but, when taken in connection with the subject-matter of section 661, and the

purposes to be accomplished by its enactment, we think the clear intent of the Legislature was to use it in its mandatory sense. For, as we have already pointed out, to construe this provision of the section as directory merely would be to defeat the very purpose of its enactment. It was therefore the duty of petitioners in making said motion for a new trial, after judgment had been rendered by Judge Wilson, to present the same to Judge Wilson.

[5] The finding of the trial judge was that petitioners, and each of them, intended to evade further proceedings in the condemnation action with respect to the interest of Simon Verghis before the Honorable Emmet H. Wilson, judge of said superior court, and to willfully disregard and evade his order and judgment entered therein on May 23, 1932. His conclusion from this finding was that said petitioners were, and each of them was, guilty of contempt of court. We have already reviewed the evidence introduced before said trial judge and held that the same was sufficient to show that petitioners, and each of them, with full knowledge that Judge Wilson had made his order and judgment of May 23, 1932, in which the defendant Verghis was awarded nothing in said action, deliberately went before Judge Smith and made a motion for a new trial in said condemnation action, in so far as it concerned the defendant Verghis' interest in property involved in said action, stipulated that said motion ought to be granted, and then retried said action before Judge Smith, with the result that a judgment was rendered by Judge Smith awarding said defendant Verghis the sum of \$2,500. The conclusion from these facts is irresistible that the purpose and intent of petitioners in going before Judge Smith was to evade the order and judgment of Judge Wilson of date May 23, 1932. No other reasonable construction can be placed upon their acts taken before Judge Smith. In fact, petitioners, at the hearing of the contempt proceedings, made no denial that such was their intent and purpose in having the motion for a new trial heard by Judge Smith, except possibly the petitioner Barrington, who as stated above, claimed that he took no part in the proceedings before Judge Smith.

[6] The fact that all parties to the condemnation proceedings stipulated that the matter might be taken up by Judge Smith and that the motion for a new trial might be granted does not, in our opinion, relieve the petitioners from the contempt charge, in face of the explicit direction of section 661 of the Code of Civil Procedure, that the motion

should be made before the judge who presided at the trial. If petitioners are right in their contention that the stipulation afforded them protection in this matter, then we might have a situation where, if parties are dissatisfied with the judgment rendered by a particular judge, they could leave his courtroom and go from one judge to another until they had found one of the fifty judges of the superior court of Los Angeles county who would agree with them as to a proper judgment to be rendered. We hardly believe that such practice comports with the orderly dispatch of business in a court of justice, or that in the end it would result in meting out justice to the parties concerned. Petitioners give no reason or excuse for not bringing the motion for a new trial before Judge Wilson. Had they any legal reason for asking for a new trial, undoubtedly Judge Wilson would have entertained their motion, and, if his former judgment was erroneous or worked any injustice to Mr. Verghis or the city, would have been glad to correct the error by rendering a proper judgment, but, as we have stated before, no attempt was made to bring the matter before Judge Wilson. It seems to us that a clear case of contempt of court has been made out against petitioners. Their action in going before Judge Smith was a willful violation of their duty as attorneys and officers of the court (subdivision 3, § 1209, Code Civ. Proc.), and was furthermore an unlawful interference with the proceedings before Judge Wilson (subdivision 9 of said section 1209, Code Civ. Proc.; *Falloon v. Superior Court*, 79 Cal. App. 149, 157, 248 P. 1057).

[7, 8] The claim is further made that the affidavit of Edward S. Shattuck is insufficient to form the basis of contempt proceedings against petitioners, in that it does not state that Judge Wilson was not fully advised of the intention of petitioners to make said motion for a new trial before Judge Smith, or that the proceedings before Judge Smith were not all done with his consent and approval. The fact that Judge Wilson might have been advised of petitioners' intention to make said motion for a new trial would not be available to petitioners as a defense unless he consented to such proceedings. He might have received such advice and objected to another judge hearing said motion. If he had consented to the making of such a motion before Judge Smith, such consent, to be effective, would undoubtedly have been made a matter of record in the proceeding before him in said action. The affidavit of Mr. Shattuck shows that Judge Wilson was available at the time for his usual duties, which would

have included the duty of hearing said motion for a new trial. The affidavit further shows that the records of the condemnation action disclose that no further action of any kind or character was taken with reference to the interest of defendant Verghis in said action, except those which were taken before Judge Smith. If it was necessary for the affidavit to show that Judge Wilson did not consent to the hearing of said motion before Judge Smith, the fact alleged that the records do not disclose that any further proceeding in said action was taken before Judge Wilson is a sufficient negation that Judge Wilson ever consented to the hearing of said motion by transferring said action to Judge Smith's department. *Selowsky v. Superior Court*, 180 Cal. 404, 181 P. 652; *Ex parte Ah Men*, 77 Cal. 198, 19 P. 380, 11 Am. St. Rep. 263; *In re Jarvis*, 57 Cal. App. 533, 207 P. 494; *Ex parte Creely*, 8 Cal. App. 713, 97 P. 766.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.



4 Cal.App.2d 581

WALTERS v. WEST AMERICAN INS. CO.

et al.

Civ. 9253.

Supreme Court of California.

April 15, 1935.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

On petition for hearing in Supreme Court. For prior opinion, see 41 P.(2d) 355.

Chapman & Chapman, of Los Angeles, for appellant.

Holland & Holland and Kenneth D. Holland, all of Los Angeles, for respondent.

PER CURIAM.

The petition for hearing in this cause is denied upon the ground that the evidence, as held by the District Court of Appeal, Second District, Division 2 [41 P.(2d) 355], fails to establish the existence of an oral contract of insurance. We expressly withhold approval, however, from that portion of the opinion

which tends to indicate that an oral contract of insurance, even if shown to exist, would not inure to the benefit of a person injured by the insured and holding an uncollectible money judgment recovered for such injuries. This latter conclusion was unnecessary to the disposition of the cause, and we therefore refrain from approving the same and express no opinion thereon.



5 Cal.App.2d 452

**CORPORATION OF AMERICA v. HARRIS
et al.**

Civ. 5013.

District Court of Appeal, Third District,
California.

March 22, 1935.

1. Appeal and error ☞1012(1)

Judgment can be reversed only where there is a total absence of competent evidence to sustain material findings and not merely because preponderance of evidence may appear to be against finding.

2. Principal and agent ☞136(3)

Disclosed principal may be held liable on contracts made in name of agent unless circumstances or terms of contract show other party intended to contract with agent alone.

3. Frauds, statute of ☞116(5)

Rule that a disclosed principal may be held liable on contracts made in agent's name, unless circumstances or terms of contract show other party intended to contract with agent alone, may not be invoked in violation of statute of frauds which prohibits leasing of real property by an agent for longer than a year unless agent's authority is written and subscribed by principal (Civ. Code, §§ 1624, 2309).

4. Corporations ☞406(2)

President of a corporation by virtue of his office alone does not have authority to bind corporation by contract.

5. Frauds, statute of ☞116(5)

Business agent of corporation, in violation of statute of frauds, cannot execute note on behalf of corporation without a resolution of board of directors authorizing him to do so (Civ. Code, §§ 1624, 2309).

6. Frauds, statute of ☞116(5)

Agent of corporation without written authority cannot bind corporation on a lease of real property for a term longer than a year (Civ. Code, §§ 1624, 2309).

7. Estoppel ☞52

"Ratification" and "estoppel" are not interchangeable terms, the former being strictly governed by Code provisions, while the latter is of equitable cognizance.

[Ed. Note.—For other definitions of "Estoppel" and "Ratification," see Words & Phrases.]

8. Frauds, statute of ☞144

Corporation which accepted benefits of lease on real property, made by agent without written authority as required by statute, may be estopped to deny validity of lease when sued for rent due, notwithstanding acceptance of benefits in itself did not constitute ratification (Civ. Code, §§ 1624, 2309).

9. Frauds, statute of ☞158(4)

In action against corporation on lease made by corporation's agent without written authority as required by statute, evidence sustained finding that corporation was estopped to deny validity of lease (Civ. Code, §§ 1624, 2309).

Evidence disclosed that corporation's president told lessor that corporation was being organized; that agent was its local representative; that due to corporation's legal incapacity lease should be executed to agent; that corporation had status of a foreign corporation before lease was executed; that corporation took possession and dealt with lessor as lessee, paid rent, received rent receipts and rebates as a lessee; and that the account was carried on lessor's books in name of corporation as lessee.

10. Principal and agent ☞171(1)

Principal who accepts benefits of a transaction is not usually estopped to plead lack of agent's authority unless principal was cognizant of all the facts and of his rights when benefits were accepted.

11. Principal and agent ☞171(1)

Long acquiescence with respect to benefits and obligations of a contract may serve as a substitute for knowledge of facts at the outset, under rule that principal who is not cognizant of all the facts and of his rights when he accepts benefits of a contract made by agent without authority is not estopped to deny lack of authority.

12. Frauds, statute of ☞144

Corporation subsequently organized which occupied premises, leased by corporation's president and secretary prior to or-

ganization, for over a year and a half subsequent thereto *held* estopped to deny validity of lease, notwithstanding president and agent did not have written authority to execute lease as required by statute (Civ. Code, §§ 1624, 2309).

13. Estoppel ⇨52

Estoppel does not depend on precedent, deceit, a corrupt motive, or evil design.

14. Estoppel ⇨107

Rule which requires pleading of estoppel as a defense, where there has been an opportunity to do so, does not apply to plaintiff's pleadings.

15. Estoppel ⇨121

Court, which bases decision on estoppel, must make a finding thereon, notwithstanding it was not pleaded, but finding which recites facts from which an estoppel necessarily follows is sufficient.

16. Appeal and error ⇨1010(1)

In action by lessor to recover rent, judgment for seven months' rent, entered after parties stipulated that rent for seven months was due and unpaid, was not reversed notwithstanding reasonable construction of lease might require finding that only six months' rent was due.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by the Corporation of America against A. Harris and the Berry Investment Company. From a judgment in favor of plaintiff, the Berry Investment Company appeals.

Affirmed.

Herbert Choynski, of San Francisco, and Anson H. Morgan, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, and Keyes & Erskine, of San Francisco, for respondent.

Mr. Justice pro tem. WOODWARD delivered the opinion of the court.

The sole question presented by this appeal is whether the appellant Berry Investment Company, a corporation, is liable for unpaid rentals under the terms of a written lease wherein respondent is named as lessor and A. Harris as lessee. Appellant's name does not appear in the instrument, nor is Harris designated therein as an agent or trustee. The trial court found, however, that Harris had acted for himself and also as an agent of appellant corporation. Judgment was ac-

cordingly entered against both defendants for accrued rentals and possession of the premises. Harris did not appeal.

While novel in several of its aspects, the case is not factually involved. Following oral negotiations, which we will presently discuss, the lease was executed by the parties on July 16, 1929, the property described being situate in the city of Sacramento and informally referred to at the trial as the "Hotel Senator Garage." The term was for four years and the rentals \$1,000 a month up to July 16, 1930, and \$1,100 a month thereafter for the remainder of the term. Appellant corporation immediately took possession of the premises, conducted a general garage business therein, and paid the rentals provided for until February 16, 1931, at which time there was a default. Thereafter respondent commenced the present action for unlawful detainer and appellant appeared and defended on the single ground that it was not a party to the lease but merely a subtenant of Harris.

Findings of the trial court as to Harris' representative capacity are based largely, if not entirely, on the testimony of Hilliard E. Welch, who was vice president of the Bank of America and admittedly possessed of the requisite authority to act for respondent corporation. In view of this fact, Welch's version of conversations with B. S. Berry and A. Harris, president and secretary respectively of the Berry Investment Company, during the period when negotiations were in progress, should be noticed with some particularity.

According to this witness, he talked with W. W. Polley and learned that "the Berrys" were interested in taking over Polley's lease on the garage. "Three or four days later," testified the witness, "I talked with Mr. Berry about it and negotiations going backwards and forwards, and finally one morning I was called down to the Berry Hotel; Mr. Polley, Mr. Berry and Mr. Harris were there. Mr. Berry introduced Mr. Harris as his local representative. I am not sure whether I had met Mr. Harris prior to that morning or not; I had talked with Mr. Berry a number of times. * * * In a general way, the arrangement I made with Mr. Berry was, Mr. Berry stated that they were forming a corporation to whom the lease would run and that as we were all desirous of closing the matter up in as quick time as possible the best way would be to have the lease run to Mr. Harris with the assurance that they would be able to transfer to the Berry Investment Company as soon as the corporation papers had been filed and the for-

mation of the corporation completed. They wanted the lease to run to Mr. Harris and it was understood that it would be assumed by the Berry Investment Company as soon as the corporation was formed—I don't know what the legal term is, but until the thing could be brought to life, or could be made legal. I had not investigated Mr. Harris as to his desirability as a tenant and I did not know anything about the Berry people except casually. I did know of their local operations and of the properties they were interested in at Sacramento." On cross-examination the witness admitted the terms of the lease were agreed upon before there was any serious or other discussion of the Berry corporation.

Contemporaneously with the transaction, cash in the sum of \$1,604.03 was exacted by the bank. Welch testified that the money was paid with two checks of the Berry Investment Company; that thereafter appellant paid the monthly rental with checks issued under the corporate name and signed by Harris. The account was carried on the books of the bank in the name of Berry Investment Company and the Corporation of America. After the execution of the lease, it seems that there were immediate discussions concerning a reduction in the rent. These negotiations, so Welch testified, were carried on by Berry and Harris with several officers of the bank. Ultimately the bank agreed to a monthly rebate of \$200 and gave a cashier's check for said amount upon the payment of each installment of rent. The rebate checks were made payable to the Berry Investment Company and were usually handed to Harris personally. Receipts for the rent were also made out to appellant corporation. Harris made no objection, so far as the witness knew, to the form of the checks or receipts, nor in his dealings with the bank did he ever claim to be the actual tenant.

[1] G. L. Pape, an officer of respondent corporation in 1929, testified that Berry had conferred with him concerning a reduction in the rent and that the discussion grew heated; that all his negotiations were with Berry. Said this witness: "I never knew Mr. Harris in the matter at all. We made some repairs for Mr. Berry, put in an office and rest room under his directions entirely and conferred with him on rental reductions. Mr. Berry used to come in to see me quite frequently on matters in connection with the lease." Both Berry and Harris denied there had been any discussion with Welch concerning an arrangement under which Harris was to be a figure-

head in the transaction. Harris claimed he had leased the garage solely for his individual benefit and later sublet it to appellant corporation. He denied that the Berry Investment Company was in existence when he executed the lease, or that the company made the first payments under the lease—claims which, it seems, were refuted by documentary evidence. In substantiation of his assertion that appellant corporation had occupied the premises only as a subtenant, he produced a certain writing bearing date of August 21, 1929, and purporting to be a partnership agreement between himself and the Berry Investment Company. The writing was in the form of a letter signed by Harris with an acceptance indorsed thereon by the Berry Investment Company, "by B. S. Berry, president." Under the terms of this agreement Harris turned over to the corporation all personal property "on hand at said garage," and agreed that appellant should manage and conduct the business, paying to him one-third of the net profits. The agreement was revokable "by either party at any time" and there was no mention therein of the lease. The trial court refused to consider the writing as an assignment of the lease and made a specific finding to that effect. Furthermore, the court accepted the testimony of Welch and rejected that of appellant's witnesses. It is scarcely necessary to add that a judgment cannot be reversed on appeal merely because the preponderance of the evidence may appear to be on the side of one party or the other, but only where there is a total absence of competent evidence to sustain a material finding. *Jennings v. Weibel*, 204 Cal. 488, 268 P. 901; *Thoele v. Thoele*, 102 Cal. App. 387, 282 P. 1051.

For reversal of the case appellant urges, among other things: (1) "That there is no evidence of authorization or subsequent ratification by appellant of the acts of B. S. Berry or A. Harris; (2) that appellant is not bound by a lease in the absence of either authority in writing or subsequent ratification in writing."

Assuming as we must, since the trial court so found, that Harris executed, or attempted to execute, the lease as an agent of appellant corporation as well as for himself, we are now confronted only with the question of his legal capacity to perform such act. Berry, it may be observed preliminarily, denied emphatically that the board of directors of his corporation (consisting of himself, his wife, and Harris) had ever passed a resolution authorizing him to negotiate the lease in question. The record shows that appellant was incorporated in Nevada on July 12, 1929, the

incorporators and directors being B. S. Berry, Clara G. Berry, and A. Harris. The articles of incorporation do not appear in the record, nor is there any evidence therein as to the authority of Berry and Harris concerning matters pertaining to the corporate business.

[2-6] It is true, as pointed out by respondent's counsel, that a disclosed principal may be held liable on contracts made in the name of the agent unless the circumstances, or terms of the contract, show an intent by the other party to take the agent alone as his debtor. The contrary rule, found in the case of *Ferguson v. McBean*, 91 Cal. 63, 73, 27 P. 518, 14 L. R. A. 65, is seemingly no longer followed in this state. *Geary Street, etc., R. R. Co. v. Rolph*, 189 Cal. 59, 207 P. 539; *Pacific Ready-Cut Homes v. Seeber*, 205 Cal. 690, 272 P. 579; *Restatement of the Law, Agency*, § 140. But the doctrine may not be invoked in violation of the statute of frauds. Sections 1624 and 2309 of the Civil Code prohibit the leasing of real property by an agent, for longer than a year, unless the authority of the agent is in writing subscribed by the party sought to be charged. In the instant case it is not contended that either Berry or Harris had written authority to bind the corporation. Respondent urges, however, that there are two exceptions to the requirement: One when the execution of the instrument by the agent is in the presence of the principal, in which event it is deemed the act of the latter; and the other, when the agent is an executive officer of the corporation for which he attempts to act. The first so-called exception need not be noticed since appellant is a corporation and could not be deemed to have been present. The second is found in 1 California Jurisprudence, at page 730, and seems to be based on the case of *McCartney et al. v. Clover Valley Land & Stock Co. (C. C. A.)* 232 F. 697, 701, wherein we find this language: "In our judgment section 2309 of the California [Civil] Code, requiring an agent's authority to execute a contract in writing to be itself in writing, does not apply to the executive officers of a corporation." The court added, however, but not necessarily in qualification of the rule, that it should be established that the making of such contract was within the scope of the officer's authority. On the other hand, it has repeatedly been held in California that the president of a corporation has no authority, by virtue of his office alone, to bind the corporation by contract. This, it was declared in *Black v. Harrison Home Co.*, 155 Cal. 121, 126, 127, 99 P. 494, 497, "is an elementary principle of corporation law." Nor may the business agent of a corporation, in violation

of the statute of frauds, execute a note on behalf of his principal without appropriate resolutions of the board of directors authorizing him so to do. *Wood Estate Co. v. Chancellor*, 209 Cal. 241, 249, 286 P. 1001; see, also, *Standard Livestock Co. v. Bank of California*, 67 Cal. App. 381, 227 P. 962; *Campbell v. Hanford*, 67 Cal. App. 155, 162, 227 P. 234; *Pacific Bank v. Stone*, 121 Cal. 202, 53 P. 634; *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 P. 1017, 45 P. 252. The weight of authority, we believe, supports the view that the agent of a corporation, whether he be an executive officer or not, may not, merely because of his office, bind his principal upon a lease of real property for longer than a year, unless he has written authority from his principal so to do.

[7, 8] But the crucial point in this case is not whether Berry and Harris were legally authorized to bind appellant corporation, but whether the latter, under all the facts and circumstances of the transaction, is in a position to avail itself of the statute of frauds as an avenue of escape from liability. Even in cases where the elements of ostensible agency are absent, or where the acceptance of the benefits of an unauthorized contract does not constitute ratification, a principal is sometimes estopped from using the statute as a shield. Ratification and estoppel, it may be observed parenthetically, are not interchangeable terms. The former is strictly governed by Code provisions, while the latter is of equitable cognizance. *Blood v. La Serena L. & W. Co.*, supra. In the instant case, while ratification of the lease could have been made only in the manner necessary to confer original authority for the act ratified (Civ. Code, § 2309), it does not necessarily follow that estoppel is inapplicable. In fact, it is only when the acts, such as a voluntary acceptance of the benefits, are legally ineffectual to constitute ratification that there is any necessity for invoking the doctrine of estoppel.

[9-12] Does the evidence sustain estoppel? Practically, Berry said to the bank's officer: "We are organizing a corporation and Harris is our local representative. We want to lease your garage but cannot do so because of present legal incapacity. In order to circumvent this difficulty and close the deal at once we propose that the lease should run to Harris until the corporation completes its organization." Whether the bank's officer asked questions about the status of the corporation immediately following the proposal or a few hours later is immaterial. Suffice it to say that the proposal was accepted and

the conduct of the parties thereafter is peculiarly consistent with the alleged arrangement. The evidence does not clearly reveal just how far the corporation had progressed in its organization at the time the lease was being negotiated, but it had attained the status of a foreign corporation when the contract was formally executed. Four days later it qualified to do business in California. Upon execution of said lease appellant immediately took possession of the garage and thereafter, through its president and secretary, dealt with respondent on the basis of the original understanding. Berry demanded and received certain alterations and improvements in the building, together with a substantial reduction in the rent. Rent receipts and rebate checks were issued to the Berry Investment Company and the account at all times was carried on the books of the bank in the name of appellant corporation. It is true, as suggested by appellant's counsel, that one who accepts the benefits of a transaction is not usually estopped to plead lack of authority on the part of the agent unless he was cognizant of all the facts, and also of his own rights in the premises. On the other hand, there is authority for the statement that long acquiescence with respect to the benefits and obligations of a contract may, in some instances, serve as a substitute for knowledge of the facts at the outset. Bigelow on Estoppel (6th Ed.) 765. And while the rule is encountered largely in boundary line disputes, it is not necessarily confined thereto. In the case of *New Blue Point Mining Co. v. Weissbein*, 198 Cal. 261, 269, 244 P. 325, 45 A. L. R. 781, wherein the validity of a trust deed was attacked on the ground that the resolution authorizing it was defective, the Supreme Court held that if timely objections to the deed had been made by the corporation, it would have been declared void, but that long acquiescence in the conduct of the trustees rendered the objection ineffectual. See, also, *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 P. 589; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 P. 527. Even if appellant corporation, as such, had no knowledge of the negotiations between Berry and Welch at the time of their occurrence, it does not seem probable, in the circumstance iterated, that it could have occupied the garage for more than a year and a half without being fully advised of what its president and secretary had done in the preliminary stages of the transaction.

[13] Appellant urges also that respondent does not claim to have been deceived in any manner, or that Welch was ignorant of the true state of facts. Estoppel is not dependent

upon precedent, deceit, nor upon a corrupt motive or evil design. *Seymour v. Oelrichs*, 156 Cal. 782, 796, 797, 106 P. 88, 134 Am. St. Rep. 154. Welch, the evidence discloses, accepted the proposal of Berry and changed his position by canceling the lease with Polley. It may be assumed that he considered the change advantageous to the bank or he would not have made it.

Factually the case is similar to *Feeney v. Clapp*, 126 Cal. App. 729, 15 P. (2d) 178, 180. There a lease was entered into by Margaret Feeney, as lessor, and W. O. Clapp, as lessee. The former believed that the firm of F. H. Woodruff & Sons was the real party at interest, a member of said firm having advised Mrs. Feeney's agent that it would be convenient to name Clapp as lessee and that the latter would be given written authority to act. The authority was not given and in a suit against the firm to recover installments of rent the plaintiff prevailed. The doctrine of estoppel was invoked to sustain the judgment and, in commenting on the subject, the appellate court says: "The firm members claim that the contract alleged was within the statute of frauds, * * * and consequently that they were not bound, but it is plaintiff's position that they were estopped to assert the statute. On this question the finding was that defendants Woodruff immediately after the execution of the lease entered into possession, paid the rent, and received the crops and other benefits thereunder; and this finding is also supported. Although a contract may be within the statute of frauds, yet if the conduct of the party relying thereon has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense." See, also, *Schlesinger & Sons v. Kohler & Chase*, 103 Cal. App. 195, 284 P. 244; *Wood Estate Co. v. Chanslor*, supra.

[14, 15] Appellant's claim that estoppel must be pleaded is without merit. It has been held that when the doctrine is relied upon as a defense, it must be pleaded if there is an opportunity to do so [*Peerless Motor Co. v. Sterling F. Corp.*, 139 Cal. App. 621, 34 P. (2d) 738]; but the rule does not apply to a plaintiff's pleadings [*McCreery v. Charlton*, 185 Cal. 37, 195 P. 670; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986]. The court, however, must make a finding on estoppel when its decision is based thereon, which finding is sufficient if it recites facts from which an estoppel necessarily follows. *Zenos v. Britten-Cook Land, etc., Co.*, 75 Cal. App. 290, 242 P. 914. In the instant case, ev-

idence of estoppel was received, seemingly without objection, and the findings of the court, while not as explicit on the subject as could be desired, set forth the fact that immediately upon the execution of the lease appellant entered into and took possession of the garage and paid the rent therefor as lessee "under the terms and provisions of the lease." Impliedly, if appellant took possession and paid the rent, it received the benefits of the contract.

[16] Lastly, appellants contend that the court erred in computing the amount of rent, in that appellant is charged with seven and a fraction installments when only six could have been due under the terms of the lease. In this connection it is urged that a reasonable construction of the lease would require a finding that each installment was payable in advance. Although the contract is somewhat ambiguous and therefore may be susceptible to the construction contended for, we do not feel at liberty to consider the point for the reason that the parties stipulated during the trial "that the installments of rent which matured under the terms of the lease on the 16th days of February, March, April, May, June, July, and August, were each of them unpaid."

For the reasons stated, the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 721

LAUGHARN v. BRYANT.

Civ. 8813.

District Court of Appeal, Second District,
Division 1, California.

April 2, 1935.

Rehearing Denied May 1, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Specific performance §28(1)

Courts of equity do not decree specific performance of contracts which, in their essential features, are uncertain.

2. Specific performance §28(2)

Agreement to give note to be "secured by trust deed upon such of the property involved in said action, as may be properly required as security therefor," held too uncertain to authorize specific performance, where prop-

erty consisted of 27 lots in six different tracts and three parcels of acreage.

3. Assumpsit, action of §32

Relief that will be denied under complaint for specific performance, setting forth all the facts, cannot be granted in action in assumpsit depending upon the same facts.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Hubert F. Laugharn, trustee in bankruptcy of the estate of J. F. Bryant, bankrupt, against W. J. Bryant. Judgment for plaintiff, and defendant appeals.

Reversed.

A. Clarence Routhe, of Los Angeles, for appellant.

Edwin J. Miller, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by defendant from a judgment in favor of plaintiff in action for specific performance.

The complaint in this action alleges the appointment of plaintiff as trustee of the bankrupt estate of one J. F. Bryant; that a judgment was recovered by plaintiff as trustee, in the United States District Court, against W. J. Bryant, defendant herein, brother of said bankrupt, for the recovery of a large number of parcels of real property, which, by the judgment, were declared to have been fraudulently conveyed by the bankrupt; that the judgment declared the title to the property to be in the trustee in bankruptcy and awarded him some \$600 in costs; and that thereafter defendant herein offered to settle said judgment and compromise said proceedings by the payment of \$7,500, of which \$5,000 was to be paid in cash and \$2,500 by a note payable in one year at 7 per cent. per annum, to be secured by the real property recovered in the action in the United States District Court, in consideration for which the judgment for money was to be satisfied and such conveyances made to said W. J. Bryant, by the trustee, as should be necessary to carry out the terms of the settlement. It is alleged that the offer was accepted by the referee in bankruptcy and by the plaintiff, as trustee, and notice of said acceptance given to defendant, and that the defendant, although frequently promising so to do, has never paid the purchase price of the property, or any part thereof. A separate cause of action alleges an indebted-

ness of the defendant in the sum of \$7,500, for money had and received, and for and on an account stated and for money had from the defendant "on account of a settlement and compromise" made between plaintiff and defendant.

The prayer of the complaint was for \$7,500 damages, and interest, on the first cause of action, and for \$7,500, and interest, on the second cause of action, and for general relief.

Although the prayer of the complaint under the first cause of action is for damages, yet we view the cause of action attempted to be stated as one for specific performance. No damage is alleged to have been sustained by plaintiff on account of the breach of the agreement, nor are any facts alleged from which damage may be inferred. The action was tried on the theory that it was for specific performance, at least it was not tried on any other theory, and in the trial the question of damages did not arise.

It may be noted that it is not alleged that the contract was just and fair, nor is the value of the property at the time of the contract alleged, nor any other facts from which it might appear that the contract was just and fair. There is no allegation that plaintiff offered to perform the contract on his part, or that he was ready, able, and willing to perform it. But these deficiencies of the complaint, in our view of the case, are not important.

The offer of the defendant was in writing. It was entitled in the action in the United States District Court, and read as follows:

"Proposition of Settlement.

"Comes now the defendant, W. J. Bryant, and without waiving right of appeal or other rights given him under the law, but expressly for the object and purpose of compromise and composition of the matters herein litigated and which are involved in said matter and offers the following:

"1. To pay into court, as soon as a contemplated loan can be put through, the sum of five thousand dollars (\$5,000.00).

"2. A note for two thousand five hundred dollars (\$2,500.00), at seven per cent. (7%), payable on or before one year, secured by Trust Deed upon such of the property involved in said action, as may properly be required as security therefor.

"3. The same above offer is submitted in full of all claims, demands, actions and accounts, against J. F. Bryant, or this defendant W. J. Bryant, and to effect and consti-

tute a full and complete settlement and payment of any and all accounts and demands, and counter claims and demands, of the respective parties hereto, and of the claims and demands, of the respective beneficiaries under said action; and the quit claim deed to me of all the property involved in this litigation in the same title and condition as they, the Trustee, received it.

"Respectfully submitted,

"[Signed] W. J. Bryant."

The uncertainties in the offer are conspicuous and are fatal to its sufficiency in an action of this character. Only one of them, we think, calls for special consideration and analysis, and that is the one providing that the trust deed shall be "upon such of the property involved in said action as may properly be required as security therefor." The agreement itself described the property as "all the property involved in this litigation," but by reference to the transcript we find that the property consisted of twenty-seven lots in six different tracts and three parcels of acreage. We regard the description of the property by reference to be sufficient, but have a different view regarding the provision for the trust deed security. There were no other writings between the parties except by correspondence which passed between them for a period of more than a year after the offer was made, during which time they continued, unsuccessfully, to negotiate the terms of their contemplated deal. The referee in bankruptcy made an order purporting to accept the offer of defendant, in which it was recited that the trustee, in the settlement, might accept as part of the consideration, the note of defendant for the sum of \$2,500, payable on or before one year, secured by a trust deed, "said trust deed to be secured by such of the real property involved in this action as has an equity value sufficient to the extent of said note," but this does not help the situation, for the order does not follow the terms of the offer, the defendant was not responsible for the terms of the order, and, furthermore, never made an agreement as to which parcels would have "an equity value sufficient to the extent of said note," nor did he ever agree that any specific parcels might "properly be required as security therefor." No such agreement was either alleged or proved. Who may determine and upon what basis is it to be determined which parcels of property may properly be required as security for the debt? Must the security meet the requirements of some person or some standard, and, if either, what person or standard? Is the court to usurp the

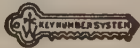
authority to make a contract for the parties where they have failed to agree with each other? Manifestly not.

[1] Courts of equity do not decree specific performance of contracts which, in their essential features, are indefinite and uncertain. Illustrations of such contracts will be found in Los Angeles, etc., *Association v. Phillips*, 56 Cal. 539; *Breckinridge v. Crocker*, 78 Cal. 529, 21 P. 179; *Marriner v. Dennison*, 78 Cal. 202, 20 P. 386; *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 35 P. 1000; *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 P. 689, 928; *Wineburgh v. Gay*, 27 Cal. App. 603, 150 P. 1003.

[2, 3] We conclude, therefore, that the contract in question was too uncertain to furnish a basis for the judgment appealed from. Likewise, there could be no recovery upon what may be termed the common count, or common counts, pleaded in the second cause of action. All of the rights of plaintiff are predicated upon the contract. Relief that will be denied under a complaint for specific performance, setting forth all the facts, cannot be granted in an action in assumpsit depending upon the same facts. Moreover, the facts of the case would not support a recovery on the second cause of action under a theory of implied contract.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



5 Cal.App.2d 591

MARTIN et al. v. MARTIN.

Civ. 9339.

District Court of Appeal, Second District,
Division 1, California.

March 28, 1935.

1. Descent and distribution ☞32

Under contract whereby son agreed to pay reduced amount of his debt to mother's estate out of his share of income of real estate of which mother died seized, such reduced amount of debt held payable only out of fund specified, and not absolutely.

2. Contracts ☞346(1)

Party to contract may absolutely limit his liability to pay certain sum to funds to

accrue to him from certain source, and recovery cannot be had without pleading and proof that funds became available to debtor from source which he specified.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Wilton B. Martin, as executor and trustee under the last will and testament of Hattie A. Martin, deceased, and others, against Ethelyn B. Martin, administratrix of the estate of Elmer B. Martin, deceased. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Pottle & Pottle, of Hollywood, for appellants.

Edgar K. Brown and Leo B. George, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The sole question presented by this appeal is whether a contract sued upon provided for payment conditioned upon receiving the money from a specified source or was not so limited.

Hattie A. Martin died, leaving three sons, one of whom, as executor and trustee of her estate, appears here as a plaintiff. Another son died and this action is against his estate for money alleged to be due and payable to the estate of his mother under a contract made by him after her death. The complaint recited the execution and delivery of this contract, which is set out in full, and demanded judgment thereon. The defendant's demurrer to the complaint was sustained and the plaintiffs have appealed from the judgment entered against them following the order sustaining the demurrer.

[1] The contract was made between the plaintiffs in this action on the one hand and Elmer B. Martin on the other. It recites that the distributive share of Elmer B. Martin from the estate of his mother was \$142,864.19, but that he had received advances from her during her lifetime of \$159,268.85, represented by his promissory notes in the hands of the executor of her estate. It further provides that \$16,404.66, the amount in excess of his distributive share of her estate, "is now due and owing from the said Elmer B. Martin to the said Wilton B. Martin as Executor of the last will and testament of said Hattie A. Martin, deceased, for the benefit of Wilton B. Martin, Marion Martin Zar-

ing, nee Dixon, George W. Dixon, Jr., and Walter I. Martin in the proportions and amounts hereinafter set forth." The parties then agree that the amount owing by Elmer B. Martin shall be reduced to \$14,888.02 and further provide: "That the said Elmer B. Martin does hereby agree to pay said sum of \$14,888.02 without interest thereon out of his share of the income, rents, profits, avails and proceeds of the real estate of which said decedent died seized, and it is agreed that said sum is and shall be a charge and lien upon the entire interest of said Elmer B. Martin in the real estate of which said decedent died seized and which is described as follows * * *. That Wilton B. Martin, as Trustee under the last will and testament of Hattie A. Martin, deceased, is hereby duly authorized and directed by the said Elmer B. Martin to apply all of the net income derived from said real estate to which the said Elmer B. Martin may from time to time be entitled, to the discharge, payment and reduction of said sum of \$14,888.02, and in the event of the sale of any or all of said real estate hereinbefore described, to apply the net proceeds derived therefrom to which the said Elmer B. Martin may or might be entitled to, to the reduction of said principal amount of \$14,888.02, and the charge upon the lands and premises hereinbefore described created by this instrument, for the payment of said sum of \$14,888.02, shall continue until said sum has been paid in full without interest thereon, when this instrument shall be released and discharged."

[2] We think that the contract provides in words so plain as to leave no room for construction that payment was to be made only from the specified fund, that is, "out of the income, rents, profits, avails and proceeds of the real estate of which said decedent died seized." The trustee by the contract is "authorized and directed by the said Elmer B. Martin to apply all of the net income derived from said real estate to which the said Elmer B. Martin may from time to time be entitled, to the discharge, payment and reduction of said sum." Nowhere in the contract did Mr. Martin agree to pay the amount absolutely and in all events. A party to a contract may absolutely limit his liability to pay a certain sum to funds to accrue to him from a certain source (*Lynch v. Keystone Consol. Mining Co.*, 163 Cal. 690, 126 P. 968; *Warman Steel Casting Co. v. Redondo Beach C. of C.*, 34 Cal. App. 37, 166 P. 856; *Morrison v. Sycamore, etc., Gravel Co.*, 102 Cal. App. 536, 283

P. 84; 6 Cal. Jur. 452), and under such circumstances a recovery cannot be had without pleading and proof that funds became available to the debtor from the source which he specified. *Hayes v. O'Marr*, 81 Cal. App. 210, 253 P. 749.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 588

ANTHONY MACARONI CO. v. NUNZIATO.
Civ. 8804.

District Court of Appeal, Second District,
Division 1, California.

March 28, 1935.

1. Contracts ⇨58

Contract signed by only a portion of the parties between whom it purports to be made cannot be enforced against signers, where by parol stipulation or by the writing contract was not to be complete until rest of parties signed.

2. Landlord and tenant ⇨182

Lessee held not liable for payment of rent under lease executed by only one of two lessors named in lease, where trial court found that lessee agreed to accept lease only upon condition that both lessors signed.

3. Appeal and error ⇨1011(1)

Finding, based on conflicting evidence, that lessee agreed to accept lease only upon condition that both lessors signed as lessors, held conclusive.

Appeal from Superior Court, Los Angeles County; H. B. Landreth, Judge.

Action by the Anthony Macaroni Company against Salvatore Nunziato, individually, and Salvatore Nunziato, doing business under the fictitious firm name and style of the Los Angeles Macaroni Company. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Arthur Lasher, of Los Angeles, for appellant.

Lavelle & MacKinnon, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff sued for \$6,000 rent for the period from October 1, 1930, to July 1, 1931, on a written lease, made in July, 1928, between Ralph Raulli and Anthony Bizzari, as lessors, and respondent, Salvatore Nunziato, as lessee. Only Raulli and Nunziato signed this lease, and the case presents the question of the liability of a lessee under a lease executed by only one of the two named lessors. The complaint alleges that at the time the lease was made Raulli and Bizzari were owners as tenants in common of the property leased, that thereafter Raulli transferred his interest to Bizzari, and that Bizzari and his wife afterward transferred the lease to appellant.

Among other defenses pleaded in the answer, it is alleged that respondent in July, 1928, purchased a macaroni business from Raulli under an agreement which provided that Raulli would assign to respondent an existing lease on the premises in which the business was carried on; that thereafter Raulli requested respondent to accept a new lease between him and Bizzari, as lessors, in lieu of an assignment of the existing lease; that respondent agreed to accept such lease, provided that it was signed by both Raulli and Bizzari; that respondent had entered into possession of the premises under Raulli's agreement to procure the assignment of the first lease, and executed the lease sued upon only on condition that it would be signed by Bizzari; that Bizzari never signed it, but that respondent was willing until March, 1930, to accept either the assignment of the lease as originally agreed upon, or the new lease executed by both Raulli and Bizzari, but that he could not obtain either, and that he removed from the premises in October, 1930.

The trial court found all of the foregoing facts to be true, and gave judgment for defendant.

The principal ground urged by the appellant on its appeal from the judgment is that the respondent is bound by the terms of the lease, although only one of the two owners of the property ever signed it. It is contended that the findings of the trial court that the lease was never executed or delivered are not supported by the evidence.

[1] In the case of *Winter v. Kitto*, 100 Cal. App. 302, 279 P. 1024, 1026, the court considered a contract which had not been executed by all of the parties between whom it purported to have been made and said: "It has been held that, where an instrument has been executed by only a portion of the parties between whom it purports to be made it cannot be enforced against those who have executed it (*Tewksbury v. O'Connell*, 21 Cal. 60; *Barber v. Burrows*, 51 Cal. 404; *Jackson v. Torrence*, 83 Cal. 521, 23 P. 695; *Olson v. Lovell*, 91 Cal. 506, 27 P. 765); but, as the court said in *Cavanaugh v. Casselman*, 88 Cal. 543, 549, 26 P. 515, 517: 'It is not the rule that a contract which on its face purports to be inter partes must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held in many of the cases that an agreement is not to be operative upon one until it has been signed by another, is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument.' The court in the same connection quoted with approval the following from *Bishop on Contracts*, § 348: 'If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed it; but if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draughtsman.' The same rule is stated in *Kurtz v. Forquer*, 94 Cal. 91, 29 P. 413."

[2, 3] The finding of the trial court, based on conflicting evidence, that Nunziato agreed to accept the second lease only upon the condition that Raulli and Bizzari both signed it as lessors, cannot be challenged on appeal, and it supports the judgment that the defendant is not bound by the terms of the lease.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

5 Cal.App.2d 528

PEOPLE v. BRADSHAW.
Cr. 1831.

District Court of Appeal, First District, Division 1, California.
March 27, 1935.

1. Criminal law ⇨825(4)

Instruction that defendant has burden of proving defense of insanity by preponderance of evidence held correct as far as it went, and defendant could not complain thereof, having requested no instruction concerning burden of proof on whole case.

2. Criminal law ⇨872½

In felony prosecution for escaping from prison, where defendant pleads insanity, jury's verdict as to defendant's sanity must be unanimous.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Elion Bradshaw was charged with the felony of escaping from the state prison, and from the judgment on an adverse verdict on his plea of insanity, he appeals.

Reversed, and remanded for a new trial.

Cyrus B. King and Joseph J. Yovino-Young, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged by information with the commission of a felony, to wit, that, being a prisoner lawfully committed to the state prison at San Quentin for a term less than life, he escaped therefrom. Upon arraignment he entered a plea of not guilty, and also a plea of "not guilty by reason of insanity." He subsequently withdrew the first of these pleas and was tried upon the latter before a jury, which returned a verdict that he was sane on the date of the commission of the offense with which he was charged. He was thereupon sentenced to imprisonment in the state prison, and has appealed from the judgment.

[1] As grounds for his appeal he complains of two instructions. The first reads as follows: "Although it is true that generally the burden of proof is on the prosecution, yet to this rule there is this exception: where insanity is relied upon as a defense the burden of proving the existence of such insanity is on the defendant. It is not incumbent upon the defendant to prove his insanity to a moral

certainty and beyond all reasonable doubt, but it is incumbent upon him to establish by a preponderance of evidence that he was insane at the time of committing the act charged, and the evidence of mental derangement must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he is insane. In short, insanity must be established by the defendant by a preponderance of the evidence."

It is claimed that the instruction erroneously states the rule with respect to the burden of proof upon the defense on a plea of insanity.

It has been declared in numerous cases that the burden rests upon the defendant to establish his insanity by a preponderance of the evidence, and that it is not sufficient for him to merely raise a reasonable doubt as to his sanity. *People v. Loomis*, 170 Cal. 347, 149 P. 581; *People v. Miller*, 171 Cal. 649, 154 P. 468; *People v. Reid*, 193 Cal. 491, 225 P. 859; *People v. Gilberg*, 197 Cal. 306, 240 P. 1000; *People v. Ellis*, 206 Cal. 353, 357, 274 P. 353. Defendant claims that notwithstanding the above decisions, the burden of proving his sanity rested upon the prosecution, and that the trial court erred in not so stating. In *People v. Hickman*, 204 Cal. 470, 268 P. 909, 912, 270 P. 1117, the court, in passing upon the constitutionality of sections 1016 et seq. of the Penal Code as amended in 1927 (St. 1927, p. 1148 et seq.), said: "The rule requiring the defendant, where insanity is interposed as a defense, to prove it by a preponderance of the evidence, does not affect the other rule that the burden of proving sanity is on the prosecution. That burden has always been on it and is met in the first instance by the presumption of sanity which the law raises and which must prevail until it is overcome. The rule relating to the defense of insanity does not shift the burden of proof from the people to the defendant, but only shifts the burden of introducing evidence and declares the amount or quantum of evidence which he must produce to overcome the presumption and show his insanity." See *People v. Harris*, 169 Cal. 53, 55, 145 P. 520. Whether in cases of this character the people have the burden of ultimately establishing the sanity of the defendant, or the burden in this sense rests upon the latter, as the party having the affirmative of the issue, to prove insanity at the time of the commission of the offense charged, is not clear from the decisions; but the question is of little practical importance so long as the defendant's plea must be es-

tablished by a preponderance of all the evidence. On this question, see *State v. Quigley*, 26 R. I. 263, 58 A. 905, 908, 67 L. R. A. 322, 3 Ann. Cas. 920; *State v. Lawrence*, 57 Me. 574, 581.

In the present case the instruction was correct as far as it went, and defendant requested no instruction with respect to the burden of proof on the whole case. Under such circumstances he cannot complain. 24 Cal. Jur., § 74, p. 796.

[2] The second instruction of which he complains reads as follows: "When you retire to the juryroom you will elect one of your members foreman. After you have concluded your deliberations—and if nine of your members agree upon a verdict, that will be the verdict of the jury—it will then be the duty of the foreman to sign the verdict and return it into court."

It appears that the jury was polled and that but ten of their number voted for the verdict, two being against it. The people admit that the last instruction was erroneous, and that, as declared in *People v. Troche*, 206 Cal. 35, 273 P. 767, and *People v. Lamey*, 103 Cal. App. 66, 283 P. 848, the verdict of the jury must be unanimous in cases of this character. This necessitates the reversal of the judgment.

The judgment is accordingly reversed, and the cause remanded for a new trial on the issue presented by defendant's plea of "not guilty by reason of insanity."



1 Cal.App.2d 463

GRAY v. WHITE et al.

Civ. 5278.

District Court of Appeal, Third District,
California.

March 22, 1935.

1. Pleading ⇨18

Taxpayer's complaint against county supervisors, auditor, and treasurer to recover county money alleged to have been illegally expended by defendants *held* specially demurrable for uncertainty, where alleged misappropriations of over \$300,000 were set out in 508 separate paragraphs, and dates of alleged illegal payments, parties to whom pay-

ments were made, and manner in which supervisors voted on claims were not specified.

2. Pleading ⇨18

Taxpayer's complaint against supervisors to recover county money alleged to have been illegally expended by supervisors *held* specially demurrable for uncertainty, where complaint charged some of supervisors with misappropriations during period when other supervisors were not county officers, did not charge misappropriations of specified items to any particular supervisor or group of supervisors, and did not charge supervisors with allowing or directing payment of illegal claims, or with misappropriating funds as a board of supervisors.

3. Counties ⇨196(7)

Taxpayer's complaint against supervisors to recover county money alleged to have been illegally expended *held* required to specify dates, purposes of challenged allowances of claims, and recorded manner in which each supervisor voted on claims, since records of board of supervisors were public and accessible to taxpayer and he was charged with knowledge thereof, and it was insufficient to allege merely that records were in possession of defendants and not readily accessible to plaintiff.

4. Pleading ⇨14

Facts contained in public records should be alleged in pleading when they constitute necessary elements of good cause of action.

5. Counties ⇨196(7)

Taxpayer's complaint to recover county money alleged to have been illegally expended stated no cause of action against county auditor and treasurer, where complaint did not allege that either of them had any knowledge that any of challenged items constituted illegal claims, or that any of such claims were presented, audited, or paid in improper form or in illegal manner.

6. Counties ⇨196(6)

Where district attorney with adequate knowledge of illegal expenditure of county funds by county officers refuses to institute action to recover money, citizen taxpayer may institute such action in name of county for benefit of county, but cannot maintain suit in name of any one other than county and cannot properly join county as party defendant (Code Civ. Proc. §§ 367, 526a; Pol. Code, § 4005b).

7. Counties ⇨196(7)

Where statute makes it imperative duty of specified officer to maintain actions in behalf of county to recover county funds illegally expended, taxpayer cannot maintain such actions in behalf of county except on specific allegations and proof that officer,

with adequate knowledge of misappropriations, refuses or neglects to institute action (Pol. Code, § 4005b).

8. Counties ⇨ 196 (7)

Taxpayer's complaint against county officers to recover county money alleged to have been illegally expended by defendants *held* insufficient to charge district attorney with wilfully refusing to prosecute action, where complaint merely stated that taxpayer pointed out that items of expenditure set out were illegal and demanded that district attorney bring action, since this was mere statement of conclusions (Pol. Code, § 4005b).

Appeal from Superior Court, Butte County;
H. S. Gans, Judge.

Action by John Gray, a taxpayer, against Henry W. White and others. From an adverse judgment, plaintiff appeals.

Affirmed.

John Gray, in pro. per.

Charles A. Walker, Dist. Atty., of Oroville, and J. Oscar Goldstein and Bond & Price, all of Chico, for respondents.

Mr. Justice THOMPSON delivered the opinion of the Court.

The plaintiff has appealed from a judgment which was rendered against him for failure to amend his complaint after demurrers thereto had been sustained. The action is a taxpayer's suit against five supervisors and the auditor and treasurer of Butte county to recover county money alleged to have been illegally expended by those officers. The county of Butte is also made a party defendant in the action. Separate demurrers were filed on behalf of the county of Butte, the treasurer, and the supervisors and auditor, on the grounds of misjoinder of parties, failure to state facts sufficient to constitute a cause of action, failure to separately state the causes of action with respect to the various officers and uncertainty and ambiguity of the allegations. The demurrers were sustained on the ground of uncertainty. The plaintiff refused to amend his pleading, and judgment was rendered accordingly. From that judgment, an appeal was perfected.

[1, 2] We are of the opinion the demurrers were properly sustained. The suit was instituted by the plaintiff, who represents himself in proper person, as a taxpayer of Butte county, in behalf of the taxpayers of that county, on the theory that the district attorney failed and refused to prosecute the action. The

complaint alleges in that regard that "prior to filing this action plaintiff pointed out to * * * such District Attorney that the several items of expenditure hereinafter mentioned were illegal * * * and demanded that he bring an action against the above named official defendants * * * which (he) wholly failed and refused to do." The complaint further alleges that all five of the supervisors acted as such officers during the last year in which it is charged that "on various dates during said year, the exact times * * * (and) the exact record thereof * * * not readily accessible to and not known to plaintiff," they appropriated and unlawfully expended the "items and amounts of money" specified. The alleged misappropriations are set out in 508 separate paragraphs aggregating the sum of \$320,194.13. None of these items specify the dates of the alleged illegal payments or the parties to whom they were paid or the manner in which any supervisors voted upon such claims. Many of the items fail to state the purpose of the expense. Most of them fail to allege facts from which it can be determined whether they were legal or illegal payments. Frequently the mere conclusion of the plaintiff is stated to the effect that the particular expenditure "was not authorized by law." In effect, the complaint is a sort of a demand for an accounting on the part of the board of supervisors. It is apparent from the allegations of the complaint that only three of the supervisors who are made defendants in this action were county officers of Butte county during the entire period of time covered by the pleading other than "the third year mentioned." The specific years during which particular misappropriations of funds are alleged are not designated. The complaint merely refers to the years in the following language: "During each of the years mentioned said county was the owner of * * * certain moneys," etc. It is apparent that an action is not stated against all of the supervisors for alleged misappropriations during any period of time except "last year." A separate cause of action should have been alleged against the two supervisors who were not officers of the county prior to the last year mentioned. In other words, three of the supervisors are charged with misappropriations during a period of time when it is alleged that the defendants Sam Marks and R. E. Fields were not county officers, and therefore not liable for such illegal expenditures. It is impossible to determine from the complaint just which items are charged as misappropriations of any particular super-

visor or group of supervisors, or how it is assumed that they misappropriated county money. Clearly it would require separately stated causes of action against separate groups of officers all of whom were not charged with having been involved in all of the same alleged irregular transactions. Moreover, the supervisors are not charged with allowing or directing the payment of illegal claims. While it is alleged that they were the duly elected members of the board of supervisors, they are not charged with misappropriating funds as a board of supervisors. All that the complaint states in that regard is: "The said defendants, acting together and in concert, took from said county funds * * * amounts of money, and took the same away * * * and thereupon wrongfully converted the same * * * to their own use."

Clearly it was not the intention of the pleader to charge the officers who have been made defendants in this action with embezzlement. No acts constituting embezzlement have been alleged. If it was the purpose to charge the supervisors with misappropriations by voting as officers to illegally allow and pay particular items, it is not so alleged. The recitations of the complaint with respect to the alleged misappropriations on the part of the supervisors are uncertain and ambiguous. The demurrers were therefore properly sustained. *Hedges v. Dam et al.*, 72 Cal. 520, 14 P. 133.

[3, 4] Since the records of the board of supervisors were public and accessible to the plaintiff, he is charged with knowledge thereof and it was therefore necessary for the plaintiff to specify the dates, the purposes of the various challenged allowances of claims, and the recorded manner in which each supervisor voted, whether for or against the claims. It was insufficient to merely allege that the records thereof were "in the possession of, and under the control of defendants, and not readily accessible to * * * plaintiff." It is a well-established rule that public records from which necessary facts may be ascertained may not be denied, but upon the contrary they should be alleged in the pleading when such facts become necessary elements of a good cause of action.

[5] Likewise the demurrers which were filed on behalf of the auditor and the treasurer were properly sustained for the same reason. We are of the opinion that no cause of action is stated against either of the last-mentioned officers. It is not alleged that either of them had any knowledge that any of the challenged

items constituted illegal claims. It is not asserted that any of these claims were presented, audited, or paid in an improper form constituting unlawful demands or in an illegal manner. These defendants are left to speculate as to just what particular unlawful acts they are charged with performing which render them liable for conversion or misappropriation of county money. They are entitled to that information before they may be required to answer in the cause.

[6-8] In a proper case, when a district attorney with adequate knowledge of the illegal expenditure of county funds by supervisors or other county officers, refuses to institute an action to recover the money, such an action may be commenced, in the name of the county, by a citizen taxpayer therein, for the benefit of the county. Section 526a, Code Civ. Proc.; *Hansen v. Carr*, 73 Cal. App. 511, 238 P. 1048; 6 McQuillin's Mun. Corp., p. 680, § 2747; 44 C. J., p. 1375, § 4550. This suit was not brought in the name of the county. The county of Butte was improperly joined as a party defendant. For the reason that a municipality may be subject to a multiplicity of suits and unnecessary expense at the caprice of individuals, it has been held that where a statute makes it the imperative duty of a specified officer to maintain such actions in behalf of the county, a taxpayer may not do so in behalf of the county except upon specific allegations and proof that the officer, with adequate knowledge of the misappropriations, refuses or neglects to institute the action. Even under such circumstances, the action should be brought in the name of the county, which is the real party in interest. Section 367, Code Civ. Proc. Section 4005b of the Political Code vests the authority to maintain such an action with the district attorney and provides that it shall be brought in the name of the county. That section provides:

"Whenever any board of supervisors shall, without authority of law, order any money paid as salary, fees, or for any other purposes, and such money shall have been actually paid; or whenever any county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is hereby made his imperative duty, to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent damages for the use thereof; and no order of the board of su-

pervisors therefor shall be necessary to maintain such suit. When the money has not been paid on such order or warrants, it is hereby made the imperative duty of the district attorney of such county, upon receiving notice thereof, to commence suit, in the name of the county, to restrain the payment of the same; and no order of the board of supervisors shall be necessary in order to maintain such suit."

In attempting to charge the district attorney with willfully refusing to prosecute the action, it is merely stated in the complaint in this action that "plaintiff pointed out * * * that the several items of expenditure hereinafter mentioned were illegal and not authorized by law, and demanded of said district attorney that he bring an action." This is a mere statement of conclusions to the effect that the expenditures were illegally paid. The allegations are uncertain and insufficient.

The special demurrers were properly sustained and the judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 501

STARKWEATHER v. MINARETS MINING CO. et al.
Civ. 9512.

District Court of Appeal, Second District,
Division 2, California.

March 25, 1935.

Hearing Denied by Supreme Court
May 24, 1935.

1. Judgment ☞461(1)

In direct attack on judgment for plaintiff, no fact essential to court's jurisdiction over defendant is presumed, but verity of judgment in all matters of which it contains record will be presumed, in absence of contradicting evidence.

2. Appeal and error ☞562(2)

Judgment against defendant, reciting that cause came on for trial after service of due notice of date thereof on defendant's counsel, held not vulnerable to attack on appeal for want of proof that defendant had five days' notice of trial, with which court proceeded in defendant's absence (Code Civ. Proc. § 594).

3. Trial ☞6(1)

Service of notice of trial on one who acted as defendant's attorney on former trial and appeal and until year before month in which notice recited that trial was set, without any notice of his discharge or substitution having been given plaintiff, held proper and proof of previous five days' notice by affidavit of mailing thereof to such attorney sufficient to authorize court to proceed with trial in defendant's absence (Code Civ. Proc. §§ 594, 1015).

4. Judgment ☞363

Statute authorizing vacation of judgment for mistake, surprise, or excusable neglect is remedial one, to be liberally construed and applied, so as to dispose of cases on their substantial merits and give party, claiming in good faith to have substantial defense, opportunity to present it (Code Civ. Proc. § 473).

5. Judgment ☞368

Defendant, neglecting to move for continuance because of mistaken statement by plaintiff's attorney that remittitur after reversal of judgment for defendant, was filed over month earlier than true date, so that case must be tried before date prior to which court set case for trial, resulting in judgment against defendant without opportunity to present defense, held entitled to vacation of judgment.

Appeal from Superior Court, Los Angeles County; William J. Palmer and Lester Wm. Roth, Judges.

Action by J. W. Starkweather against the Minarets Mining Company and F. J. Eddy. From an order denying defendant Eddy's motion for a continuance, a judgment against him and an order denying a motion to vacate and set aside such judgment, he appeals.

Appeal from order denying continuance dismissed, order denying motion to vacate judgment reversed, and cause remanded with directions.

F. J. Eddy, in pro. per.

William M. Morse, Jr., and C. S. Mauk, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

In this action the sole defendant, F. J. Eddy, has appealed from an order denying his motion for a continuance of the date of trial, from a judgment entered against him for damages and from an order denying his motion to vacate and set aside said judgment.

[1, 2] On October 5, 1933, the attorney of record for respondent filed a memorandum

setting forth the matter required by rule 1 of the judicial council, regulating the business of superior courts. On the same day the judge of the calendar department set the case for trial on October 13, 1933. On October 6 a notice in writing addressed to "F. J. Eddy, defendant, and to his attorney, F. E. Davis," stating that the case described by title and number was set for trial in the calendar department on October 13, 1933, at 9:30 a. m., was sent by mail to F. E. Davis at an office address in Hollywood, and proof of such service by mail was filed October 6, 1933. On October 13, 1933, the case was called for trial in the calendar department in accordance with the rules, and transferred to department 16 for trial, Judge William J. Palmer presiding. On the same date a judgment for \$3,000 damages against appellant was signed and filed, reciting that the "cause came on regularly for trial on the 13th day of October, 1933, C. S. Mauk and Wm. M. Morse, Jr., appearing as counsel for plaintiff, the said defendant having answered, and after due notice of the date of trial was served upon counsel for said defendant, the defendant failing to appear for trial."

Upon the direct attack of a judgment there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record its verity, in the absence of any contradicting evidence, will be presumed. *Sichler v. Look*, 93 Cal. 600, 29 P. 220. Herein it was essential to jurisdiction of the trial court in proceeding with the trial in the absence of the defendant that proof must first be made to the satisfaction of the court that the defendant had had five days' notice of such trial. Code Civ. Proc. § 594. This essential is furnished us by the record of the judgment itself, and on the face of the record it must be held that the judgment is not vulnerable to attack on appeal.

[3] On October 20, 1933, appellant served and filed a motion to vacate and set aside the judgment on the grounds, among others, that the same was entered through mistake, inadvertence, surprise, and excusable neglect of defendant, that neither defendant nor any attorney representing him, nor his attorney of record, received five days' notice of trial or any notice in excess of two days, and that no notice of motion to set the cause for trial was ever given. The motion was heard on October 25, 1933, Judge Lester Wm. Roth presiding, on affidavits and counter affidavits, and on that date denied, appellant noting an exception to the order denying the motion. These affidavits show that on October 6, 1933, respondent's attorney mailed to F. E. Davis at Hollywood the notice reciting that trial was set for October 13, 1933; that F. E. Davis received the notice through forwarded mail delivery on October 7th; that he also received by mail, just prior to receipt of said notice, a postal card notice from the clerk of the court stating that the case was set for trial; and that on October 12, 1933, appellant called on him. On the call of the case in the calendar department on October 13, 1933, appellant appeared in person without any attorney and orally requested a continuance, stating he had only received notice of the trial on October 11 and had no attorney at the time, and desired time to prepare for trial and secure attendance of witnesses. Continuance was denied and the cause assigned to department 16 for immediate trial. Appellant left the calendar department and declined to attend at the trial, and trial proceeded in his absence. The record reveals that one George P. Cook was the original attorney of record for defendant in this action, and nowhere therein appears any notice or order of substitution of F. E. Davis as attorney of record, but it clearly appears that the latter had acted as attorney for defendant at the former trial and on appeal, and up to one year before October, 1933, and that no notice of his discharge or substitution had been given respondent. Under the proofs herein, as far as the notice or knowledge of respondent and his attorneys extended, F. E. Davis was the attorney for defendant in this action and the notice of trial served on such attorney was in accordance with the law (Code Civ. Proc. § 1015), and proof of such previous five days' notice by the affidavit of mailing thereof in the record was sufficient under section 594 of the Code of Civil Procedure to authorize the court to proceed with the trial in defendant's absence.

In respect to the point that no notice of motion to set the cause for trial was given, we note a peculiar situation herein, arising from a mistake of respondent's attorneys in respect to the date of filing of the remittitur in the office of the clerk of the trial court, which mistake directly resulted in the omission to give previous notice of motion to set. The rules of the judicial council regulating the business of superior courts provide the manner of setting civil causes for trial. By rule I it is provided that for the purpose of setting a civil cause for trial there shall be filed by a party a memorandum setting forth certain information, and that prior to the filing thereof a copy shall be served upon the attorneys for all parties, accompanied by affidavit showing such service unless admission of service is en-

dorsed thereon, and that no cause shall be set for trial unless the memorandum shall have been served and filed. Rule VII provides that nothing in the rules shall prohibit setting for trial at any time any case which can be tried within a period of time not exceeding one hour. It appears from the affidavits used on the motion that on August 25, 1933, respondent's attorneys had caused another case between the same parties, but with a different number, to be set for trial on October 5, 1933, in the belief that they were setting this case; but on appearing on the latter date it was discovered that the wrong case had been set, as the one set had been previously terminated. Thereupon the attorneys for respondent made and filed a memorandum for setting this case, and therein stated that the time of trial thereof would not exceed one-half hour, and indorsed thereon the statement that "remittitur came down from the Supreme Court on the 17th day of October, 1933, [sic] and filed by the clerk of the superior court on the 19th day of October, 1930, and this case must be tried before October 17, 1933." On this showing and by reason of the provisions of rule VII above mentioned, the court set the case forthwith to be tried on October 13, 1933, without previous notice to appellant of motion to set. The order setting the case without previous notice was therefore in accordance with the rules as applied to the information set forth in the memorandum.

[4] The foregoing conclusions narrow this appeal down to the question whether there was an abuse of discretion in denying the relief sought by appellant by his motion to vacate the judgment on the ground of mistake, surprise, or excusable neglect, as authorized by section 473 of the Code of Civil Procedure. This section is a remedial provision and is to be liberally construed and applied so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. *Weck v. Sucher*, 96 Cal. App. 422, 274 P. 579.

[5] A former judgment in this case in appellant's favor was reversed on appeal on October 17, 1930. Remittitur was filed in the office of the clerk of the trial court on November 19, 1930. Respondent's attorneys had by mistake set another case for trial on October 5, 1933, believing it to be this case of malicious prosecution. On discovering the mistake when the case was called on October 5, the attorneys entertained the mistaken belief that unless this case was brought to trial before October 17, 1933, it would be subject to

dismissal under the mandatory provisions of section 583 of the Code of Civil Procedure. In this dilemma they stated in their setting card that the cause could be tried in one-half hour, and that the remittitur had been filed on October 17, 1930, and therefore the case must be tried before October 17, 1933. On this statement the court set the case for October 13, 1933, and thus placed the appellant in a dilemma. The scene of the acts constituting the cause of action was in Mono county, and the acts occurred some twelve years before. It is obvious that appellant was taken by surprise, and it is patent that he could not very well prepare for trial within two days. Appellant as well as the court was misled by the statement that the remittitur was filed on October 17, 1930, and it is apparent that the court, in denying the request for a continuance, relied on the statement that unless the case was tried prior to October 17, 1933, it would be subject to dismissal. If the court had known, or if appellant had known or been advised, that there was still another month within which to try the case, the dilemma of each of the parties could have been cured by a continuance. Had appellant possessed the services of an attorney or had had sufficient knowledge of procedure in courts, and had not been misled by the statement of respondent's attorneys as to the date of filing of remittitur, he might have made an appropriate and successful motion for continuance. His neglect to make the motion in the manner required by law and to call the court's attention to the mistake as to date of filing the remittitur was, under the circumstances, excusable. As a direct result of the two consecutive mistakes of respondent's attorneys, appellant was placed in a corner from which he failed to escape, and a judgment of \$3,000 was entered against him without the opportunity of presenting a defense. Considering the case in the light of all these circumstances, which are manifest in the record used on the motion to vacate this judgment, we are of the opinion that the court erred in denying that motion. We reach these conclusions and grant this relief to appellant under the urge of a sense of strict and impartial justice, despite his intemperate disquisition on the subject of administration of justice in courts and his diatribe on the subject of lawyers and law practice which he mistakingly imposed upon this court in his briefs, prepared and filed by him in propria persona.

The appeal from the order denying a continuance is dismissed for lack of subject-matter. The order denying the motion to vacate the judgment is reversed, and the cause re-

manded with directions to enter an order vacating the judgment.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 426

RUBENSTEIN v. SOLK et al.

Civ. 5330.

District Court of Appeal, Third District,
California.

March 21, 1935.

Husband and wife ☞271

Divorced husband's deed to third party of community property executed without wife's consent conveyed husband's undivided half interest, but was voidable as to wife's interest (Civ. Code, § 172a, as added by St. 1917, p. 829).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Fannie Rubenstein against Clara Solk and Samuel Rubenstein. From a judgment in favor of plaintiff, defendants appeal.

Reversed, with directions.

Golden & Kaufman, of Los Angeles, for appellants.

Harry Sherr and Isaac Landsberg, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, Fannie Rubenstein, and defendant Samuel Rubenstein were husband and wife, and defendant Clara Solk is their daughter.

In May, 1932, an interlocutory decree of divorce was entered in an action between plaintiff and defendant Rubenstein, holding, among other things, that a certain piece of real property situated in the city of Los Angeles, which had been acquired in 1919, was community property, and decreed that the same be divided equally between the parties.

In September, 1932, defendant Samuel Rubenstein attempted to convey the whole of this property to defendant Clara Solk by a grant deed, which was at the request of the

grantee named therein recorded in the office of the recorder of the county of Los Angeles. Thereupon Fannie Rubenstein, the wife, brought this action to set aside the purported conveyance and to have it decreed that the real property in question was community property, and that defendant Clara Solk had no right, title, or interest therein.

Upon the trial, the court found the property was the community property of plaintiff and defendant Rubenstein; that it was conveyed to defendant Solk without consideration in an attempt to defraud plaintiff of her rights therein, of which defendant Solk had knowledge. It was also found that in the interlocutory decree the community real property here in dispute was to be divided equally between the parties thereto, but that such division had not, prior to the attempted transfer, been made, and declared the deed from Rubenstein to Solk to be null and void. From the judgment based upon these findings, defendants appeal.

The question here presented, namely, whether a deed to community property executed by a husband to a third person, without the consent of the wife, is void in its entirety or only voidable as to the wife's undivided one-half interest, has been considered by our courts in several instances; the most recent review thereof by our Supreme Court being the case of Trimble v. Trimble, 219 Cal. 340, 26 P.(2d) 477, 480, where the earlier cases are collected and analyzed. In that case the husband attempted to convey by deed of gift certain community property which has been acquired, as had the property here in question, subsequent to the enactment in 1917 (St. 1917, p. 829) of section 172a of the Civil Code, and it was there held "that the deeds executed by the deceased (husband) without consideration and without the consent of his wife are valid conveyances as to one-half of the property sought to be conveyed, but may be avoided by his wife as to her half of said community property. This action was instituted for that purpose, and it must, therefore, be held that * * * she is the owner of one-half of said two parcels of land and the defendants are the owners of the other half."

The judgment here is therefore reversed, with directions to the trial court to enter judgment in accordance with the foregoing, respondent to recover costs.

We concur: THOMPSON, J.; PLUMMER, J.

BETTY v. KNAPP et al.

Civ. 5334.

District Court of Appeal, Third District,
California.

March 25, 1935.

Hearing Denied by Supreme Court

May 24, 1935.

1. Appeal and error ⇨1058(2)

Error, if any, in sustaining objection originally made to testimony of one defendant as to codefendant's property, in action to set aside conveyance as fraudulent, *held* cured by witness's subsequent testimony as to property owned by codefendant.

2. Evidence ⇨271(1)**Fraudulent conveyances ⇨286(1)**

Conversation between debtor and her grantee relating to alleged oral contract for transfer of debtor's property *held* properly rejected as self-serving and for failure to show relevancy or materiality thereof, in action by creditor to set aside debtor's conveyance as fraudulent.

3. Frauds, statute of ⇨139(2)

Marriage is not such performance of oral antenuptial agreement as to take agreement out of operation of statute of frauds (Civ. Code, § 1624, subd. 3).

4. Fraudulent conveyances ⇨300(2)

That \$10 was given for debtors' conveyance of property worth several thousand dollars and that deed recited "other valuable consideration" *held* insufficient to show that valuable consideration was given, in action by creditor to set aside conveyance as fraudulent, since recitation as to other valuable consideration was mere conclusion.

5. Appeal and error ⇨714(5)

Offer of proof set forth in brief cannot be considered on appeal where not contained in transcript.

6. Fraudulent conveyances ⇨272

Defendant debtors, in action to set aside conveyance by them as fraudulent, had burden to show sufficient property remained to satisfy claims of creditors, where conveyance was voluntary.

7. Fraudulent conveyances ⇨297

Evidence, in action by creditor to set aside conveyance by debtors as fraudulent, *held* sufficient to sustain finding that conveyance rendered debtors insolvent.

Action by Lorn H. Betty against June Knapp and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellants.

Marion P. Betty and Proctor K. Perkins, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action brought to set aside a conveyance of certain property, made, executed, and delivered by the defendants E. W. Knapp and Ellen B. Crowder to June Knapp, on the ground that said conveyance was made to defraud creditors. From this judgment the defendants appeal.

The record shows that on or about the 31st day of August, 1928, the plaintiff commenced an action in the superior court of Los Angeles county, numbered 260222, against the defendants Ellen B. Crowder and E. W. Knapp, and on May 6, 1929, the plaintiff recovered judgment against said defendants for the principal sum of \$3,000 and costs in the sum of \$374.05; that several executions were thereafter issued on said judgment against the defendants Ellen B. Crowder and E. W. Knapp; that the plaintiff was wholly unable to find any property upon which said executions could be levied, and the sheriff, to whom said executions were delivered, returned every execution unsatisfied.

The record shows, and the court also found that subsequent to the commencement of action numbered 260222, and prior to the entry of the judgment therein, but after the indebtedness on which said judgment was rendered had been incurred, the defendant Ellen B. Crowder, for the purpose of defrauding the plaintiff and preventing him from collecting the said indebtedness, conveyed to the defendant June Knapp, by a grant deed, substantially all of the real property owned by her and her son, E. W. Knapp, which stood in the name of the said Ellen B. Crowder.

The complaint also alleges, and the court likewise found, that the defendant June Knapp knew of the indebtedness of the defendants Ellen B. Crowder and E. W. Knapp to the plaintiff herein, and that she received the conveyance just mentioned with the intent and purpose of defrauding the plaintiff, and preventing the plaintiff from collecting the indebtedness represented by the judgment obtained in action numbered 260222.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

The court further found that the transfer referred to left the said defendants Ellen B. Crowder and E. W. Knapp insolvent; also, that the conveyance made by the said Ellen B. Crowder and E. W. Knapp was without consideration, and in contemplation of insolvency at the time of making said transfer; that after the conveyance so referred to there was an insufficient amount of property standing in the names of the defendants, or of either of them, to satisfy, either in whole or in part, the judgment entered in favor of the plaintiff in action numbered 260222. The court also found that the sureties given on an undertaking to stay judgment in action numbered 260222 were insolvent, and that proceedings taken against them had resulted in nothing being recovered. Judgment was accordingly entered, holding the conveyance made by the defendants, Ellen B. Crowder and E. W. Knapp to the defendant June Knapp void, and therefore subject to the lien of the plaintiff's judgment heretofore referred to.

Upon this appeal the defendants allege as grounds for reversal that the court erred in sustaining an objection to the question propounded to E. W. Knapp as to property owned by the defendant Ellen B. Crowder; that the court erred in not permitting Mrs. June Knapp to testify to the consideration passing to Ellen B. Crowder for the transfer of the property sought to be set aside in this section; that the court erred in finding that the defendants E. W. Knapp and Ellen B. Crowder transferred the property described in the complaint without consideration; that the transfer left said defendants insolvent, and was made with intent to hinder and delay creditors; that there was no evidence in the record to prove that the defendants E. W. Knapp and Ellen B. Crowder were insolvent; that there was no evidence to show that the defendants were not possessed of sufficient property to satisfy the judgment; that there was no evidence showing that June Knapp had accepted the conveyance referred to in the complaint, with knowledge of the insolvency of the defendants Ellen B. Crowder and E. W. Knapp.

[1] As to the first objection urged by the appellants, the transcript shows that E. W. Knapp was allowed to testify as to such property; his testimony relating to a list of property he had testified to on supplementary proceedings showing the property owned by Mrs. Crowder and himself in Los Angeles and other counties. The testimony appears to have been admitted for the purposes of the record only. The question propounded to witness Knapp

covered ownership, location, and value. The record shows that the appellants made no definite offer of specific proof of any record title, and no other evidence of ownership of other property through the testimony of the defendant, Knapp. The question and offer, as stated by respondent, stated a compound question. The rule is well settled that an owner of property may testify as to its value. There is no showing in the offer that the witness knew anything about the value of the property owned by his codefendant. The record shows, however, that the witness Knapp did testify as to the personal property he owned, and also as to the real property owned by Mrs. Crowder. Hence, if any error was committed by sustaining the objection of respondent in the first instance, it was cured by the testimony subsequently admitted.

[2] That the second objection urged by the appellant that the court erred in not permitting Mrs. June Knapp to testify as to the consideration passing to Ellen B. Crowder for the transfer of the property sought to be set aside is not well taken, is shown by the following excerpt from the bill of exceptions, which shows all that took place before the trial court in relation thereto, to wit: "June Knapp was sworn and testified as follows on direct examination, that she was one of the defendants and the wife of E. W. Knapp, and the grantee named in the deed referred to in the above entitled action. Defendants thereupon made an offer of proof by conversations between June Knapp and Mrs. Crowder had prior to June Knapp's marriage to Mr. Knapp in September, 1920, of an oral contract with Mrs. Crowder relating to the transfer of half of Mrs. Crowder's property to her in return for her personal services and marriage to E. W. Knapp, as the consideration of the execution of said deed from Mrs. Crowder to June Knapp. Counsel for defendants again asked Mrs. Knapp for the conversation had between herself and Mrs. Crowder some time in 1920, relating to said contract, to which objection was made and sustained." This conversation, of course, was self-serving, was not in the presence of the plaintiff; there was no showing that it had any relevancy whatever to the issues involved in this action, nor was any offer made showing the materiality or competency of the testimony.

In argument, the counsel for the appellants sets forth that the conversation involved the marriage of June Knapp to E. W. Knapp, and took place prior to the marriage. The conveyance was not made until many months after the marriage which took place between

E. W. Knapp and June Knapp, and attempted to convey the whole title, and not a one-half interest in the real property referred to.

[3] The contention of the appellant in relation to the marriage which took place after the conversation referred to, as constituting a consideration for the transfer made after the marriage, is completely answered in the case of *Sudbrock v. Kroener et al.*, 136 Cal. App. 624, 29 P.(2d) 435. It is there held that marriage is not such performance of an oral antenuptial agreement as to take the agreement out of the operation of the statute of frauds Civ. Code, § 1624, subd. 3, requiring all such agreements to be in writing.

We find nothing in the record where the defendants attempted directly to show the consideration for the conveyance. All that does appear is an attempt to show a conversation had preceding the marriage referred to, relative to one-half of the property. As the record appears before us it shows a transfer of real property without any valuable consideration; that it was made voluntarily, and that upon its conveyance it left the defendants, E. W. Knapp and Ellen B. Crowder, insolvent, or so nearly so as to be unable, in any degree whatever, to meet the indebtedness owing to the plaintiff in this action.

[4] That \$10 is not a valuable consideration for the transfer of property worth several thousand dollars needs no discussion. The recitation in the deed, "other valuable consideration," is merely a conclusion and not a statement of any fact showing valuable consideration.

The case of *Sudbrock v. Kroener et al.*, supra, is so complete in covering all the questions tendered for consideration in this action that we can only refer to the opinion in that case as being conclusive against the objections to the findings of the court urged by the appellants in this action.

[5, 6] The purported offer of proof relative to the oral contract entered into between June Knapp and Ellen B. Crowder prior to the marriage of June Knapp and E. W. Knapp, set forth in appellants' brief, is not contained in the transcript, and therefore cannot be considered by us for any purpose upon this appeal. The conveyance referred to, as shown by the record, being voluntary, the burden rests upon the defendants to show sufficient property remaining to satisfy the claims of creditors.

In *Schwartz v. Brandon*, 97 Cal. App. 30, 35, 275 P. 448, 452, we find this language: "A

grantor who sets up a voluntary conveyance, knowing that he has pre-existing creditors, is required to prove that he had means to satisfy the creditors, at the time of the transfer, over and above the value of the transferred property."

[7] Objection No. 3 urged by the appellants is that there is no showing made that the transfer of the property rendered the defendants E. W. Knapp and Ellen B. Crowder insolvent. As called to our attention by the respondent, appellants, on page 20 of their brief, conceived that a prima facie showing of insolvency was made by the plaintiff's evidence. We think the record shows much more than a prima facie evidence of insolvency, and the admission by the defendants of insolvency could not very well be avoided, as there was no showing of any other property of value. We may, in this connection, however, call attention to the record which shows that E. W. Knapp did have an interest in a certain tract of land; that a witness by the name of E. H. Bennett testified that this property was worth from \$7,000 to \$8,000. In rebuttal of this testimony a witness by the name of Ralph Marshall, a deputy county assessor, testified that the same property was not worth more than \$250. The court heard the testimony of the two witnesses, and accepted, as appears by the findings, the testimony of the deputy county assessor.

While not following the remainder of the points which are to some extent reiterations of what we have referred to as being urged by the appellants, the record shows that June Knapp was present at the trial of action numbered 260222 and testified as a witness for Ellen B. Crowder and E. W. Knapp, that she was the wife of E. W. Knapp, and that all three lived together under one roof, and at all times prior to the rendering of the judgment in case numbered 260222, knew of the claim of Betty. It was during the trial of action numbered 260222 that the property involved in this action was transferred by E. W. Knapp and Ellen B. Crowder to the defendant June Knapp. The record shows, as we have stated, that several executions, to wit, five in number, had been returned unsatisfied, and there is an entire absence in the record as to any property belonging to either of the defendants, E. W. Knapp or Ellen B. Crowder, sufficient to satisfy the judgment held by the plaintiff.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

5 Cal.App.2d 702

POTTER v. AGAJANIAN et al.**MORRIS v. SAME.**

Civ. 9459, 9460.

District Court of Appeal, Second District,
Division 2, California.

April 1, 1935.

Pleading Ⓒ36(3)

In actions for injuries received in collision with truck, judgment against defendant would not be disturbed on ground evidence did not establish that ownership of truck in defendant, where defendant in pleadings admitted that ownership of truck and that truck driver was operating truck with defendant's consent as his agent.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Actions by George Potter, and by Jerome O. Morris, a minor, by John Bunyan Calloway, his guardian ad litem, against James T. Agajanian and others. From judgments for the plaintiffs, the named defendant appeals.

Affirmed.

Elmer I. Moody, of Los Angeles, for appellant.

Clifton A. Hix, of San Pedro, for respondents.

CRAIL, Justice.

Plaintiffs above named sued the defendant, in two separate actions which were tried together in the superior court and obtained judgments against the defendant James T. Agajanian. He appeals therefrom. The litigation arose out of injuries received in a motor vehicle collision.

Said defendant (appellant) first complains that plaintiffs did not establish ownership of the truck concerned in the collision in James T. Agajanian. There was no denial of such ownership in the defendant's answer, and such ownership having been admitted was not in issue at the trial. However, plaintiff calls our attention to evidence which does tend to establish such ownership.

Defendant next contends that the plaintiffs failed to establish that the driver of defendant's truck was operating the same with the consent of the defendant. This was admitted in the pleadings and was not in issue. He next contends that the plaintiffs failed to establish that the driver was acting as the agent, servant, or employee of the defendant.

This also was admitted in the pleadings. He also contends that the evidence discloses, if anything at all, that the driver was acting as the servant, agent, and employee of Agajanian Bros., but as we have already said the defendant admitted otherwise. The defendant also contends that if there was any liability of the defendant, it was a joint liability as a copartner with his brothers and not an individual liability. The defendant's answer denied that there was any such copartnership and the jurors appear to have so found. Lastly he contends that the court erred in not granting defendant's motion for a new trial, but for the reasons already given we find for the plaintiffs on this point.

Judgments affirmed.

We concur: **STEPHENS, P. J.; WILLIS,**
Justice pro tem.



5 Cal.App.2d 537

PEOPLE v. SHEKELL.

Cr. 2661.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1935.

Hearing Denied by Supreme Court
April 25, 1935.

1. Criminal law Ⓒ1168(1)

Error, if any, in refusal to advise jury to acquit accused of offenses charged in certain counts of information *held* cured by subsequent granting of new trial and dismissal as to such counts.

2. Criminal law Ⓒ1168(4)

Denial of motions to strike portions of testimony of prosecuting witness under counts of information which were subsequently dismissed *held* not prejudicial.

3. Criminal law Ⓒ1158(1)

It is for jury and trial judge, on hearing motion for new trial, to determine issues of fact, and their decisions are conclusive.

4. Criminal law Ⓒ1172(1), 1173(1)

Error, if any, in giving and refusal of instructions relating to witness as accomplice or principal, *held* not grounds for new trial, where court granted new trial as to charges with reference to which witness testified and

may have been accomplice and such counts were subsequently dismissed.

5. Criminal law *§*772(4)

Instruction that it was immaterial on what date offense was committed, provided jury believed it was committed within three years prior to filing of information, *held* not error, where offenses were proved to have occurred on dates charged in information and jury was instructed that any verdict reached must express individual opinion of each and the unanimous agreement of all.

6. Criminal law *§*1144(15)

Reviewing court must presume that jury followed correct instructions given by court.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Walter C. Shekell was convicted of an offense, and he appeals.

Affirmed.

William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

FRICK, Justice pro tem.

Appeal from the judgment and order denying motion for new trial.

Appellant was charged in an information with a violation of sections 288 and 288a of the Penal Code. Counts 1 and 2 charge the offense as being committed upon Florence Cobb. Upon motion for new trial, the conviction upon counts 1 and 2 was set aside and those charges were dismissed. Appellant was convicted of the offenses charged in counts 3, 4, 5, and 6 and appeals from the judgment and order denying a new trial thereon.

[1] Appellant contends it was error for the trial court to deny a motion to advise the jury to acquit as to counts 1 and 2. The motion was based upon the alleged unreliability of the testimony of the prosecutrix, that she was an accomplice as a matter of law, that her testimony was without the required corroboration, and that there was insufficient evidence to warrant a conviction. Whatever error there may have been in the refusal of the court to advise the jury to acquit appellant of the offenses charged in counts 1 and 2, it has been cured by the subsequent granting of a new trial and a dismissal as to those counts. Appel-

lant urges, however, that the verdicts of guilty as to the last four counts in the information must have been influenced by the evidence as to the first two counts. This assertion is only a theory of counsel, without support in the record, and presumes that the jury did not fairly perform its duties, a presumption in which we cannot indulge.

[2] The denial of motions to strike portions of the testimony of the prosecuting witness under counts 1 and 2 was applicable to those counts alone and could not have prejudiced appellant, as those counts have been dismissed.

[3] Appellant's main contention is that the evidence does not warrant his conviction. We have read the testimony, which we omit stating because of its revolting nature, and do not find it to be so inherently improbable as to warrant the granting of a new trial. Though conflicts and contradictions exist, there is ample evidence to warrant the verdicts. It was for the jury and the trial judge on hearing the motion for a new trial to determine the issues of fact, and their decisions are conclusive on this court.

[4] Appellant complains of the giving and refusal of certain instructions. As to those instructions relating to the witness Hazel Cobb as an accomplice or principal, error, if there be any, would not be ground for a new trial, since the court granted a new trial as to the charges with reference to which she testified and may have been an accomplice, and subsequently those counts were dismissed.

[5, 6] Error is assigned because the court instructed the jury that it was immaterial on what date the offense was committed provided the jury believed that it was committed and that it was committed within three years prior to the filing of the information. Cases cited by appellant (*People v. Hatch*, 13 Cal. App. 521, 109 P. 1097, and *People v. Williams*, 133 Cal. 165, 65 P. 323) holding as erroneous instructions to the effect that the jury could convict if an act in violation of law, of the kind charged, was proved as having been committed by defendant at any time within the three-year period, are not in point. The vice of the instructions in the cases cited is that they authorized the jury to convict if any such unlawful act was proved to have been committed within three years. The instruction here is that it is immaterial on what day the offense charged was committed, provided the jury believed

that *the same* was committed within three years. Furthermore, as to the crimes of which appellant now stands convicted, the offenses were proved as having occurred on the dates charged in the information, and the jury was instructed that "any verdict that you reach must express the individual opinion of each as well as the unanimous agreement of all." If the jurors followed the latter instruction, as we presume they did, it follows that as to each verdict they found defendant guilty as to the same act. The case does not, therefore, fall in that class of cases in which it might be said that as a result of the instruction the individual jurors may each have based his verdict upon a different occurrence.

Other errors claimed by appellant in the giving of instructions alleged misconduct of the prosecutor and rulings by the court on objections during the taking of testimony have been examined by us and we find no prejudicial error.

The judgment and order denying a new trial are affirmed.

We concur: STEPHENS, P. J.; ORAIL, J.



5 Cal.App.2d 717

BEHYMER v. G. CAVAGLIERI MORTGAGE CO.
Civ. 8838.

District Court of Appeal, Second District,
Division 1, California.
April 2, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

Usury  140

Trustee could sue to recover usurious interest which he was required to pay for protection of property he was administering, under declaration of trust executed by borrower and lien claimants, for benefit of borrower (Gen. Laws 1931, Act 3757, § 3).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Glen Behymer against the G. Cavaglieri Mortgage Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Julius V. Patrosso, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff sued for treble interest alleged to have been paid in violation of the usury law, and recovered judgment. The defendant has appealed on the judgment roll alone, asserting that the amended complaint does not state a cause of action, and that the findings of fact, which follow the allegations of the amended complaint, are insufficient to support the judgment. The entire dispute concerns the right of the plaintiff to maintain the action. The following facts alleged in the complaint and found by the trial court to be true are not denied by appellant.

In 1925 the defendant agreed to loan the Edwin R. Rockwell Company \$105,000 as a building loan, to be advanced as a certain building was erected. This agreement was made June 17, 1925, and with the intention of violating the usury act, the defendant required that the loan be repaid six months thereafter, together with the sum of \$5,000 as a bonus. For the purpose of disguising the transaction, a promissory note for \$110,000 and a deed of trust securing it were made payable to Malcolm Smith, and indorsed and transferred by him to appellant. Smith paid no consideration therefor, and was at no time a bona fide owner or holder. The Rockwell Company became involved in financial difficulties in connection with the construction of the building for which the loan was secured, and owed over \$42,000 for material purchased and labor performed, and mechanic's liens were filed to secure these claims. A second deed of trust securing a number of notes aggregating \$50,000 was also outstanding. Some of these notes were in the hands of the lien claimants. In April, 1926, the Rockwell Company entered into a contract with Malcolm Smith and Malcolm Smith Company, a corporation (the latter as the holder of the second trust deed on the property), and the lien claimants by which it agreed to convey the property to respondent as trustee. This contract provided that the second trust deed and all of the mechanic's liens were to be released of record, and that the property should be held for the benefit of the Rockwell Company and the mechanic's lien claimants in accordance with the terms of a declaration of trust to be executed by the plaintiff.

This declaration of trust, which was afterward executed, provides that the plaintiff paid no consideration for the conveyance and holds title to the property for the benefit of the lien claimants and the Rockwell Company, subject to the liens of the unpaid taxes, street assessments, and the deed of trust for \$110,000. The trustee by the instrument agrees to distribute the balance of the money due from the defendant (all of the amount agreed to be loaned by it not having been paid at the time the contract and declaration of trust were executed) among the beneficiaries or, if so directed by the advisory committee designated in the instrument, to use it for the benefit of the property. The trustee is also authorized to operate the property and to divide any net income from it among the lien claimants "in proportion to the amount of their respective claims * * * such payments, however, not to be in reduction in the amount of such claims, but to be a profit to be enjoyed by the said beneficiaries (other than the said Edwin R. Rockwell Co.) as one of the considerations moving to said beneficiaries in exchange for the assistance heretofore accorded by them to the Edwin R. Rockwell Company in connection with the release of their respective mechanic's liens or other claims heretofore held by them against or in connection with the trust property."

The trustee is further authorized to sell the property and to pay the expenses of the sale; the fees of the trustee and "liens or encumbrances against said property unless said property be sold subject to such liens or encumbrances." He is directed to pay the lien claimants from the net proceeds of any sale the amounts of their respective claims in full, if sufficient is realized for that purpose, otherwise to ratably apply the money to the claims. Any balance remaining after payment of the lien claims in full is to be paid to the Rockwell Company. The instrument also provides that if at any time the Rockwell Company shall pay the beneficiaries of the trust the amount of their claims in full, together with all expenses of the trust, then the trustee shall convey the property to the Rockwell Company.

The trustee during the administration of the trust paid \$22,746.18 interest to the defendant and brought this action to recover treble the amount. He contends that in making such payment he was the personal representative of the Rockwell Company; that he was forced to make the payment in order to prevent the interest of the Rockwell Company in the property from being foreclosed,

and in order to protect its interest in the property. The defendant takes the position that respondent is either a trustee or an assignee for the benefit of creditors of the Rockwell Company, or a grantee of the property which was conveyed subject to the deed of trust, and that in either of such positions he cannot recover.

The Usury Act provides: "Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or by his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery." Deering's Gen. Laws, 1931 Ed., Act 3757, § 3.

The trial court found that the interest paid to the defendant by the plaintiff had been paid by him "as such trustee under and pursuant to said declaration of trust and agreement for the uses and benefit of said Edwin R. Rockwell Company, a corporation," and, further, that the defendant took the usurious interest from the plaintiff "as such trustee and personal representative." The facts as alleged in the complaint fully support these findings. The usual action by a receiver, trustee, or personal representative to recover usurious interest is where the payment has been made by the borrower. In this case the plaintiff sued to recover usurious interest he was required to pay for the protection of the property he was administering for the benefit of the borrower. If plaintiff cannot recover, no one can, and there is a wrong for which there is no remedy.

In holding that a federal equity receiver may maintain an action to recover usurious interest paid, the Supreme Court held: "It is true that in *Esposti v. Rivers Bros.*, supra [207 Cal. 570, 279 P. 423], this court held that a cause of action for the penalties provided by the Usury Law was not assignable. In *Peterson v. Ball*, 211 Cal. 461, 296 P. 291, 74 A. L. R. 187, this court followed the *Esposti* Case and held that a cause of action or claim arising out of section 309, Civil Code (imposing liability against directors who have suffered debts to be created in excess of the subscribed capital stock of a

corporation), is not assignable because the liability, although remedial so far as the creditor is concerned, is highly punitive as to the directors. There, however, there was an assignment. These cases, therefore, are not controlling in the matter before us for here there is no attempt to assign the cause of action." *Scott v. Hollingsworth*, 215 Cal. 314, 318, 9 P.(2d) 836, 838, 82 A. L. R. 995. It may be noted that the case of *Peterson v. Ball*, supra, which is principally relied upon by the appellant, is authority on the capacity to maintain an action, only as to the effect of an assignment of the mere naked right to sue directors of a corporation for a statutory penalty, and has been so limited. *Western Mortgage & Guaranty Co. v. Gray*, 215 Cal. 191, 8 P.(2d) 1016, 80 A. L. R. 866.

Plaintiff here is not suing on any assigned cause of action. The Usury Law, supra, clearly includes plaintiff among those entitled to prosecute an action to recover interest paid in violation of its terms.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 644

GOODWIN v. GOODWIN et al.

Civ. 9571.

District Court of Appeal, Second District,
Division 2, California.

March 29, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Automobiles ⇨181(1)

"Gross negligence," as used in statute relating to actions by automobile guests, means want of slight diligence, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, or that want of care which would raise a presumption of the conscious indifference to consequences (St. 1929, p. 1580, § 141¼).

[Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

2. Automobiles ⇨245(5)

Whether automobile driver was guilty of gross negligence is for trier of facts, where evidence is conflicting or different inferences

may be drawn therefrom, and is question of law only where evidence points unerringly to but one conclusion (St. 1929, p. 1580, § 141¼).

3. Automobiles ⇨245(24)

Where automobile driver was guilty of gross negligence so as to render driver and owner liable for injuries sustained by guest held for jury (St. 1929, p. 1580, § 141¼; Civ. Code, § 1714¼).

4. Automobiles ⇨181(1)

Statute relating to liability for injuries of automobile guests did not create statutory liability for negligence under circumstances related therein, but merely restricted existing common-law liability of driver for injuries sustained by guest to circumstances which amount to gross negligence (St. 1929, p. 1580, § 141¼).

5. Automobiles ⇨192(1)

Owner of automobile driven with his consent held liable to guest for driver's gross negligence (St. 1929, p. 1580, § 141¼; Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Oscar B. Goodwin against Robert H. Goodwin and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Mark F. Jones, of Los Angeles (W. L. Engelhardt, of Los Angeles, of counsel), for respondent.

WILLIS, Justice pro tem.

This is an appeal from a judgment for damages entered in favor of a guest on a finding of gross negligence in the operation of an automobile.

On February 12, 1931, in the forenoon, appellant Robert B. Goodwin was driving an automobile, of which appellant Nellie Goodwin was the owner and with her permission, southward on a state highway a few miles south of the city of San Jose. With him as his guest was his uncle, Oscar B. Goodwin, respondent herein. The automobile was being operated on its right side of the road at about twenty-five miles per hour, in a fog which obscured the general view and caused moisture to impair the view through the windshield, except where a wiper was working. Under such circumstances appellant, the driver, first saw another automobile approaching

from the opposite direction on its right side of the road, at a distance of about 100 feet and between 2 and 4 feet from the white center line of the highway; these two vehicles being the only ones using that part of the highway at the time. To appellant, the other automobile appeared to be weaving in its course on its right side of the road, and thinking that it would come over on his side, he turned his automobile to the left, across the other side, intending to run off among some trees on that side and thus avoid a collision. He testified that he did this because he could see to his left but could not see anything on his right on account of the fog and moisture on the windshield on that side. The other car kept on its course on its right side, with a resulting collision on the east half of the road, the right front part of the opposing automobile striking the right rear corner of appellant's car. As a consequence, respondent was seriously injured, and from the ensuing judgment for damages this appeal is taken.

The complaint charged appellant Robert B. Goodwin with gross negligence under the provisions of section 141½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580), as it then read, and sought to place responsibility also on appellant Nellie Goodwin as owner, under the terms of section 1714¼ of the Civil Code. Appellants raise two points on this appeal: First, that the evidence is insufficient to justify the finding of gross negligence; and, second, that no vicarious responsibility of an owner is created by section 1714¼ for injuries to a guest of the driver due to gross negligence of the latter in operating the owner's automobile under permission.

[1-3] Gross negligence has been defined as "want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences." *Krause v. Rarity*, 210 Cal. 644, 655, 293 P. 62, 66, 77 A. L. R. 1327. When liability attaches only for gross negligence it is for the trier of facts to pass upon the question of whether such negligence exists. *Krause v. Rarity*, supra. How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define. Generally speaking, the degree of care requir-

ed under any given circumstances is a question of fact for the court or jury and not a question of law. *Meighan v. Baker*, 119 Cal. App. 582, 6 P.(2d) 1015. This is true even where there is no conflict in the evidence, if different conclusions upon the same subject can be rationally drawn therefrom. *Malone v. Clemow*, 111 Cal. App. 13, 295 P. 70. It is only where the evidence points unerringly to a conclusion as to whether one is guilty of gross negligence or not that the matter becomes a question of law within the power of an appellate court to decide. Herein the evidence appears to be free of conflict, but it is such that reasonable minds may differ on this question, and in our opinion is sufficient to show an entire failure to exercise care—a complete lack of even slight diligence to avoid injuring others.

[4, 5] Appellants' second point in extenso embraces the contention that section 141½ of the California Vehicle Act, as originally enacted, limited responsibility for injuries suffered by a guest to the driver of the automobile, in the absence of independent proof of gross negligence of the owner, and that recovery might be had only against the particular person whose gross negligence proximately contributed to the accident, and not against an absent owner. This section and section 1714¼ of the Civil Code were enacted in 1929 and became effective at the same time. Section 141½ in its pertinent parts provided: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle.

* * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle." This act did not create a statutory liability for negligence under the circumstances related therein, but merely restricted or limited the existing common-law liability of the driver of an automobile for injuries sustained by a guest to circumstances which amount to gross negligence. *Walters v. Du Four*, 132 Cal. App. 72, 22 P.(2d) 259, 23 P.(2d) 1020. Section 1714¼ of the Civil Code provides that: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting

from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." The motor vehicle statute deals with the rights of guests and limits the liability of those negligently responsible for his injuries to cases of gross negligence. The Civil Code section deals with the imputed liability of the owner of a motor vehicle for negligence in the operation of his automobile by another with his permission, with certain limitations in respect to the maximum of damages. Construing the two statutes together, it must be held that the Legislature had thereby determined that where the injured party is a guest, the actionable negligence imputed to the owner under section 1714½ of the Civil Code is limited to gross negligence by section 141¾ of the California Vehicle Act, as those sections existed at the time of the accident herein. And it must be further held that if the operation of the automobile is negligent, regardless of the degree, whether ordinary or gross, the negligence is imputed to the consenting owner by the terms of section 1714½ of the Civil Code and constitutes the basis of the owner's responsibility, with the limitation for liability in the case of a guest to gross negligence as distinguished from negligence, as those terms are defined in our California law, and with a further limitation in respect to amount of damages recoverable.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 469

Ex parte PEART.

Cr. 1415.

District Court of Appeal, Third District,
California.

March 22, 1935.

1. Habeas corpus ☞85(3)

Evidence in habeas corpus proceeding for release from custody under judgment of contempt in failing to appear as witness before grand jury held sufficient to support trial court's finding that petitioner was phys-

ically able to appear and testify at time and place designated.

2. Statutes ☞194

Generally, enumeration in statute of persons or things affected by its provisions impliedly excludes all others.

3. Grand jury ☞1, 25

Grand jury is not adjunct of district attorney's office, but independent judicial body solely responsible for inquiring into and presenting to court public offenses committed or triable in county, and hence empowered to institute and initiate, as well as manage and control, such inquiries.

4. Grand jury ☞36

District attorney has no power to issue subpoena for appearance of witness before grand jury without latter's direction (Pen. Code, § 920; § 1326, subds. 2, 3; Pol. Code, § 4153).

5. Grand jury ☞36

Failure to appear as witness before grand jury in response to subpoena issued when no investigation was shown to be pending does not constitute contempt (Pen. Code, § 920; § 1326, subd. 2).

6. Contempt ☞67

Habeas corpus ☞92(3)

Sole purpose and function of either writ of habeas corpus or writ of review on behalf of one in custody under judgment of contempt is to determine court's jurisdiction to adjudge relator guilty of contempt.

7. Contempt ☞67

Habeas corpus ☞30(1)

Writ of habeas corpus or review, applied for by one in custody under judgment of contempt, must be discharged, if court had jurisdiction to render such judgment, though record shows error of law in passing on and deciding matter.

8. Habeas corpus ☞26

Habeas corpus held appropriate proceeding for release from custody of one committed to jail for refusal to obey subpoena, issued on sole authority of district attorney, for appearance as witness before grand jury.

Application by Maurice Peart for a writ of habeas corpus ordering his release from custody under a judgment of contempt.

Judgment of contempt set aside, and petitioner discharged.

Howe, Hibbitt & Johnston and O. F. Melton, all of Sacramento, for petitioner.

Ralph W. Rutledge, Dist. Atty., of Colusa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The petitioner, having been by the superior court of Colusa county adjudged guilty of contempt and ordered to pay a fine, or in default of payment thereof, to be imprisoned in the county jail until the fine was satisfied in full, was committed in accordance with said order and judgment, and now applies to this court for a writ of habeas corpus.

The alleged contempt of petitioner consisted in his failure to appear before the grand jury in response to a subpoena served upon him for that purpose. The subpoena was directed to petitioner, commanding him to appear before the grand jury of the county of Colusa at a time and place therein specified, as a witness in an investigation pending before said grand jury, and was signed by Ralph W. Rutledge, as district attorney of the county of Colusa. Indorsed upon said subpoena was an order of the judge of the superior court for the attendance of petitioner, which was made upon the affidavit of the district attorney, stating he believed the evidence of the petitioner material and his attendance at the examination necessary. This subpoena, so indorsed, was duly served upon the witness in San Francisco. Upon the failure of the witness to appear as directed, an attachment was issued and petitioner was arrested and brought before the court, when the judgment hereinbefore set forth was pronounced.

[1] Petitioner claims that he is unlawfully confined in that there was no proof made of a valid and legal subpoena for the reason the subpoena was issued by the district attorney of the county of Colusa, he having no power or authority to issue the same, there being no order of the grand jury to the district attorney to issue such subpoena, and that there was in fact no investigation then pending before the grand jury, and also that the court exceeded its jurisdiction in making the order of commitment in that the testimony showed that petitioner was unable, by reason of illness, to respond to the alleged subpoena on the day fixed therein.

As to the latter point we find ample proof in the record that petitioner was able, physically, to appear before the grand jury at the time and place designated. From the transcript of testimony taken upon the hearing of the order to show cause why petitioner should not be punished for contempt, it appears that he was served on September 12th with a subpoena directing him to appear in Colusa before the grand jury on September 27, 1934. For

some time prior thereto he had been an outpatient of the University Hospital in San Francisco, but about September 1st, petitioner was able to make a trip to Oakland from San Francisco, remaining overnight. On September 20th, petitioner attended a dinner party given at a restaurant in the Latin Quarter of San Francisco, and from there accompanied the group to a cabaret or night club, remaining until a late hour, where he engaged in dancing with those of his party. Immediately following the service of the subpoena petitioner went to Sacramento, where he consulted an attorney, and then to Lodi, remaining two or three days, and then returned to San Francisco. On September 29th, he left San Francisco, going by train and auto stage to Amador county, where he remained until October 12th, then returned to San Francisco, where he remained until arrested and brought to Colusa. Regardless of the testimony of the doctors that in their opinion petitioner was not in a condition to appear before the grand jury in Colusa on September 27th, we believe the trial court was amply supported in finding that petitioner was able to have appeared and testified.

However, the more serious question here presented is as to the authority of the district attorney to issue the subpoena in question. The determination of this question depends upon the construction of subdivisions 2 and 3 of section 1326 of the Penal Code, which read as follows: "The process by which the attendance of a witness before a court or magistrate is required is a subpoena; it may be signed and issued by: 1. * * * 2. The district attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct. 3. The district attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried. * * *"

[2] It is the general rule of statutory construction, and we see no reason here for the application of a special rule, that the enumeration by a statute of persons or things affected by its provisions impliedly excludes all others. It is thus expressed in 23 California Jurisprudence, at page 740: "The maxim or rule (*expressio unius est exclusio alterius*) is applicable to a statutory provision which confers a power or right—especially to one which grants the power or right originally—with the effect that the power or right exists only in the cases under the circumstances, and to the extent specified, and must

be exercised in the manner and within the time prescribed," wherein cases in support thereof are cited. Various instances illustrating the application of the rule may be cited.

Construing section 581a, Code of Civil Procedure, the court, in *Johnston v. Baker*, 167 Cal. 260, 139 P. 86, 89, said: "The declaration that the court had power to * * * dismiss an action upon the conditions prescribed implied the negative of the power to dismiss unless such conditions existed."

In *Favorite v. Superior Court*, 181 Cal. 261, 266, 184 P. 15, 8 A. L. R. 290, the court, construing section 170, subd. 1, Code of Civil Procedure, held that a trial judge was not disqualified to hear and determine an action in which he was related to a stockholder of a corporation, the section prohibiting him so to do only when related to an officer of a corporation. To the same general effect the rule was applied in *Standard Auto Sales Co. v. Lehman*, 43 Cal. App. 763, 186 P. 178; *Talcott v. Hurlbert*, 143 Cal. 4, 76 P. 647; *People v. O'Donnell*, 37 Cal. App. 192, 193, 174 P. 102; *McGahey v. Forrest*, 109 Cal. 63, 41 P. 817.

When, therefore, it is provided that a subpoena may be signed and issued by a district attorney "for such witnesses as the grand jury upon investigation pending before them may direct," the logical construction of the section would seem to preclude such issuance by the district attorney unless so directed by the grand jury.

[3] The grand jury is not an adjunct of the office of the district attorney, but is an independent judicial body, members of which are officers of the court. Upon them alone is placed the responsibility of inquiring into all public offenses committed or triable within the county and of presenting them to the court. Inasmuch, therefore, as that responsibility is placed upon the grand jury, it appears that the law left with that body the power to institute and initiate such inquiries as well as the management and control thereof. If such authority were divided between the grand jury and the office of the district attorney, there might result such a difference as to methods of procedure or scope of the investigation that nothing would be accomplished, and the responsibility for the default or failure of such inquiry would be divided. It would therefore appear that the office of the district attorney and that of the grand jury are not interdependent, but each supreme in their respective spheres.

[4] In examining the duties of the district attorney as enumerated in section 4153

of the Political Code, we do not find him charged with instituting proceedings before the grand jury, but merely to attend upon and give advice to them upon pending matters.

As opposed to these views, it is argued that in subdivision 3 of section 1326 of the Penal Code, the district attorney is authorized to subpoena witnesses "in support of an indictment or information, to appear before the court in which it is to be tried," consequently, so it is argued, subdivision 2 was not intended to cover or pertain in any way to the subpoenaing of witnesses for trial after the return of an indictment but was intended to include the subpoenaing of witnesses to give testimony before the grand jury. It is contended that the clause "in support of the prosecution" in subdivision 2, used the word "prosecution" in the same way that during the trial of a case reference is made to the district attorney and to the people as "the prosecution." It is also urged that the provision "for such other witnesses as the grand jury, upon an investigation pending before them, may direct," was inserted for the purpose of incorporating within section 1326 of the Penal Code that which is provided in section 920 of the Penal Code dealing with the powers and duties of grand jurors. Section 920 of the Penal Code reads as follows: "The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses"; it being argued that if the evidence is to be submitted to the grand jury the district attorney must have the power to produce evidence, and where such evidence is not in his possession, he may compel its production, whether the evidence be a writing, a thing, or the testimony of a witness. However, such argument fails to convince us, and even a reading of section 920 of the Penal Code seems to bear out our view and leave with the grand jury the duty of directing the district attorney to issue the process for the necessary witnesses.

Having in mind, therefore, the general rule of statutory construction, as stated above, and believing that the Legislature would not have left to implication the granting of such a broad power to a district attorney as is here claimed, we are constrained to hold that the power of issuing a subpoena upon behalf of a grand jury without their direc-

tion is an excess of jurisdiction by a district attorney.

[5] Another point urged by the petitioner is that there is no showing that there was an investigation then pending before the grand jury at the time of the issuance of the subpoena. This question was before the Supreme Court in the case of *Rogers v. Superior Court*, 145 Cal. 88, 78 P. 344, 346, where the respondent ordered petitioner to answer certain questions before the grand jury in relation to a matter that had been disposed of by such grand jury, and was no longer pending before that body. The court there saying: "A witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue before a tribunal, and for a refusal to answer questions that are not pertinent to the issue being tried he cannot be adjudged guilty of contempt. Code Civ. Proc. § 2066; *Ex parte Zeehandelaar*, 71 Cal. 238, 12 P. 259; *Overend v. Superior Court*, 131 Cal. 280, 286, 63 P. 372; *In re Rogers*, supra [129 Cal. 468, 62 P. 47]. A grand jury, like a court, may ask only such questions as are pertinent to a matter then under investigation, and, if there be no matter under investigation, a refusal to answer questions cannot be made to constitute a contempt. 'When the contempt is a constructive contempt, namely, committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt; and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void.'" *Overend v. Superior Court*, 131 Cal. 280, 63 P. 372.

In the case of *Chambers v. Oehler et al.*, 107 Iowa, 155, 77 N. W. 853, 854, we quote the opinion therefrom as follows:

"The case made by plaintiff is substantially this: The defendant Oehler was a justice of the peace in and for Dubuque county. The other defendants, Wessel and Meyers, were deputized constables, whose connection with the matter will duly appear. On July 4, 1893, the justice issued a subpoena, commanding plaintiff to appear before him at 9 o'clock a. m. of said day, and testify in an action wherein one Sarah Jane Galloway was plaintiff and the Chicago, Milwaukee & St. Paul Railway Company was defendant. No such action was pending before the justice. This subpoena was served on plaintiff on that day by Wessel. Plaintiff did not respond. Thereupon the justice issued a warrant for his arrest for contempt of court. This warrant was served by defendant Mey-

ers, who on the same day arrested plaintiff and brought him into court, where he was fined for the alleged contempt the sum of five dollars and costs, which he then paid. It is charged in the petition in one count that the action of these officers was willful and malicious, and in another count a conspiracy to injure plaintiff is charged against them.

"2. Appellant claims that the subpoena was without force or virtue, for that he could not legally be compelled to attend court as a witness on the 4th day of July. * * * If, then, judicial business can be lawfully done on the 4th day of July, the subpoena was not void merely because it summoned plaintiff to appear on that day. Was it void because there was no such action as therein named pending before the justice; and, if so, was plaintiff justified in disobeying it? Section 3671, Code 1873, provides that 'the clerks of the several courts' (and a justice is expressly made clerk of his own court, section 3633) 'shall on application of any person having a cause or any matter pending in the court, issue a subpoena, etc.' We take it that the pendency of some proceedings in court is necessary in order to warrant the issuance of process for witnesses. There being no case pending in this instance, the justice had no authority to issue a subpoena for a witness. The subpoena having been issued without authority, plaintiff was justified in disobeying it. *Dudley v. McCord*, 65 Iowa, 671, 22 N. W. 920; *State v. District Court* [21 Mont. 155] 53 P. 272 [69 Am. St. Rep. 645]; *Clark v. Burke* [163 Ill. 334] 45 N. E. 235; *Railway Co. v. Wear* [135 Mo. 230] 36 S. W. 357 [658, 33 L. R. A. 341]; *In re McCain* [9 S. D. 57] 68 N. W. 163; *Ex parte Rowland*, 104 U. S. 604 [26 L. Ed. 861]; *Brown v. Moore*, 61 Cal. 432."

[6-8] Respondent further objects to the consideration of this matter at all upon habeas corpus, claiming the proper remedy is by certiorari.

The sole purpose and function of either a writ of habeas corpus or a writ of review on a matter such as is here presented is to determine jurisdiction. Either proceeding, therefore, would perform the same office, that is, whether the court in adjudging petitioner guilty of contempt upon the record before us exceeded its jurisdiction. If jurisdiction is found to exist, the writ must be discharged, although it may appear upon the record that the court in passing upon and deciding the matter committed some error of law. *Metzler v. Superior Court*, 54 Cal. App. 59, 201 P. 139. From the record before us, it appears that petitioner was directed to appear before

the grand jury by a subpoena issued upon the sole authority of the district attorney of the county of Colusa, and that upon petitioner's refusal to obey the same he now stands committed. We are therefore concerned here with questions of jurisdiction only, and habeas corpus is an appropriate proceeding.

In accordance with the foregoing, the judgment of contempt entered by respondent court is hereby set aside, and the petitioner is discharged.

We concur: THOMPSON, J.; PLUMMER, J.



5 Cal.App.2d 585

BERNHARD v. DELLUWAITANTE.

Civ. 9601.

District Court of Appeal, First District,
Division 2, California.

March 28, 1935.

Release 657(1)

Evidence held to support finding that defendant did not know that insurance carrier had been subrogated to rights of insured when defendant accepted release from insured in consideration of sum paid for damage done in collision between their automobiles, precluding recovery by assignee to whom carrier assigned its claim.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Paul Bernhard against William Delluwaitante. From a judgment for defendant, plaintiff appeals.

Affirmed.

Sandford, Burger & Barry, of San Francisco, for appellant.

Martinelli & Gardiner, of San Rafael, for respondent.

STURTEVANT, Justice.

Violet R. Patten, the owner and operator of one automobile, and the defendant, the owner and operator of another automobile, had a collision between their cars. The former settled with her insurance carrier. It assigned its claim to the plaintiff. The latter sued the other owner. The trial court made findings in favor of the defendant, and the

plaintiff has appealed from the judgment and has brought up the judgment roll and an abbreviated bill of exceptions.

The trial court found as a fact that Miss Patten executed and delivered to the defendant, for a consideration of \$500, a release which constituted a complete defense. The plaintiff contends it was wholly ineffectual because its assignor had been, at the time the release was executed, subrogated to all of the rights of Miss Patten. The defendant contends and the trial court found that at the time Miss Patten executed the release the defendant did not know she had been paid by her insurance carrier and that the latter had been subrogated to her rights, and therefore the release had the full force and effect expressed on its face. The question then arises as to whether certain findings are supported by the evidence. It is the contention of the plaintiff that the release was accepted by the defendant and he paid to Miss Patten the consideration therefor after he had notice of the fact that Miss Patten's insurance carrier had been subrogated to her rights and that such notice was embodied in a letter written May 25, 1932, by said carrier to the defendant. Said letter was in words and figures as follows:

"California State Automobile Association

"Inter-Insurance Bureau, General Offices

"150 Van Ness Avenue

"Telephone Hemlock 3400

"San Francisco, California.

"In reply please address Inter-Insurance Bureau.

"May 24, 1932.

"Claims.

"Mr. William Delluwaitante, 210 Broad Street, San Francisco, California.

"Dear Sir: Re: Claim No. 288200 Miss Viola R. Patten. It has been reported to us that under date of April 24, 1932, your Ford coupe bearing license 1 J 2163 was in collision with the Chevrolet sedan of our assured at the corner of Church Street and First, Tomales, California.

"The facts thus far submitted indicate that you are legally liable for the damage done. If you intend to assume liability, kindly advise what arrangement you wish to make with reference to settlement of the damage. However, should you feel that you are not at fault, we will thank you to write or call and explain your version of the accident.

"Not hearing from you, we will assume that you agree with us as to the liability and shall

expect to receive your check for the amount of our claim when we submit invoices and advise you of the amount claimed under our rights as insurance carrier for Miss Patten.

"If you are insured for matters of this nature, kindly give us the name and address of your insurance company so that we may communicate with them.

"Yours very truly,

"George D. Horn,

"Adjuster."

The defendant claims the letter did not give him notice of the subrogation, and he also relies on his own testimony in which he positively denied having any notice thereof. The crucial question then arises as to whether said letter is so clear as to be determinative in plaintiff's favor. We think not. The accident occurred on April 24, 1932. The plaintiff alleged, and the trial court found, that the carrier paid to Miss Patten the amount of its liability to her and became subrogated to her rights, and on April 24, 1932, it assigned to this plaintiff all its rights. Assuming all of those facts to be true, it follows that this plaintiff, and not the carrier, was thereafter the holder of the claim, and that the adjuster for the carrier had no right to speak for this plaintiff. But the letter on its face does not even purport to state that the carrier had been subrogated to the rights of Miss Patten nor that the carrier had in turn assigned its claim to this plaintiff. Furthermore, the first words, "Re: Claim No. 288200 Miss Viola R. Patten," were, in connection with the context, a direct statement by the carrier to the effect that Miss Patten was making on May 24, 1932, a claim against the carrier. If the carrier, as alleged and found, paid Miss Patten April 24, 1932, and on that day the carrier assigned to this plaintiff, then Miss Patten had ceased to be a claimant or "our assured," as stated in the letter, but she had become in effect the assignor of the carrier (American Automobile Ins. Co. v. Clark, 122 Kan. 445, 252 P. 215, 217), and it in turn had become the assignor of this plaintiff. This defendant had the right to read the heading, body, and signature of the letter as a whole. Having done so, he might assume the carrier had not paid, and we see nothing on the face of the letter that purports to inform the defendant that on May 24, 1932, the day the letter was written, any subrogation or assignment had taken place.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCER, J.

SPANACH et ux. v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al. *

Civ. 10165.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1935.

Hearing Granted by Supreme Court
May 24, 1935.

1. Arbitration and award ⇨7

Agreement between medical group and relief association for furnishing medical service to association members, providing that complaints should be investigated by committee of both organizations and, in event explanation offered was not satisfactory, board of arbitration should be selected and its decision should be final, held not to require subscribers claiming damages for malpractice to submit to compulsory arbitration.

2. Torts ⇨1

A "tort" is a civil wrong not arising out of contract, and is subject of measurable compensation.

[Ed. Note.—For other definitions of "Tort," see Words & Phrases.]

3. Action ⇨68

Where trial court stayed proceedings in malpractice action until arbitration was had under agreement, plaintiff had right to have order staying proceedings set aside, on motion on ground that plaintiff acceded to arbitration under mistaken belief that arbitration provision of agreement covered malpractice action, and to have case placed on calendar and tried (Code Civ. Proc. § 473).

Petition for a writ of review by Steven N. Spanach and wife against the Superior Court of the County of Los Angeles and Walter S. Gates, Judge.

Writ granted.

Joseph L. Fainer, R. E. Parsons, and W. V. Anderson, all of Los Angeles, for petitioners.

Everett W. Mattoon and D. De Coster, both of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is a petition for a writ of review of a proceeding in the superior court which may be briefly stated as follows: Heretofore petitioners brought suit for damages alleged to have resulted from medical malpractice against certain physicians individually and as members of a copartnership of physicians designated as "Ross-Loos Medical Group," hereinafter referred to as "Medical Group."

Although the complaint alleges that petitioners are members of the Medical Group, a reading of the pleadings and exhibits reveals that, instead of being members, petitioner Steven N. Spanach was, at the times herein concerned, a member of a voluntary association known as "Los Angeles Police Relief Association." Such "Relief Association," as it will hereafter be designated, and "Medical Group" entered into a long and detailed "Memorandum of Agreement" by the terms of which the Medical Group became obligated to furnish certain medical and allied services to "subscribers" or members and their families of the "Relief Association." Elna Marie Spanach, the other petitioner, was the wife of Steven N. Spanach, and the alleged malpractice relates to treatment accorded her by a physician attached to the Medical Group.

The superior court action reached the point of taking testimony when defendants requested leave to amend their answers by alleging that said agreement provided that the alleged cause of action was subject to compulsory arbitration. The amendments were finally allowed, and plaintiffs (petitioners here) by their counsel orally acceded to arbitration. Before such accession, however, there was much discussion turning on the effect of the arbitration provision of the agreement and the court suggested that it was probably without jurisdiction to proceed with the case and that its jurisdiction could be tested by a writ of mandate. Thereafter the court made an order that all proceedings should be stayed "until arbitration might be had in accordance with the arbitration agreement."

Subsequently thereto, plaintiffs-petitioners moved the court under section 473, Code of Civil Procedure, to be relieved from the order of the superior court staying "proceedings until arbitration has been had in accordance with the terms of the arbitration agreement" (quoting from the order) and therein petitioned that said order and all other orders made by the court in relation thereto be set aside and that the court declare a mistrial of such action; the grounds of the motion were that counsel in acceding to arbitration, acted under mistake, believing at the time that the arbitration provision of the agreement covered the alleged cause of action but that in fact this was erroneous. The court denied the motion.

Petitioners here claim that the court was without jurisdiction to decline to proceed with the trial until after arbitration had been had. It is upon this claim that this proceeding depends.

Without question the court was within its jurisdiction when, after the plaintiffs acceded to arbitration, the proceedings were stayed. Equally clear is the proposition that the court was within its jurisdiction to entertain the motion under section 473, Code of Civil Procedure, and to rule thereon. Its ruling is subject to appeal but, being a discretionary matter, the ruling is not subject to review in this proceeding. But these matters are beside the point.

It is apparent that the plaintiffs desire their cause to be reinstated on the calendar for trial in due course. It will not be denied that the action should be back on the trial calendar and tried if the subject-matter of the action does not come within the terms of the arbitration clause referred to. In other words, if the arbitration paragraphs of the agreement do not cover the superior court action then the action is within the jurisdiction of the court. Yet the court not only refused to take jurisdiction, but continues up to the present moment to so refuse. This is not mere error in the course of the trial of a cause; it is a refusal to proceed with the cause at all.

[1, 2] If the said arbitration provision does not in fact bar the court's jurisdiction of the action, the writ herein prayed should issue. We shall examine the agreement inasmuch as it was before the court in its entirety. It contains a paragraph subtitled "Grievances," and is as follows: "Complaints made by either or any of the parties interested shall be forthwith investigated by the Committee of the Relief Association and of the Medical Group, and a full detail report in writing be filed, a copy of each such complaint and/or report to be filed with the Relief Association and/or officer appointed by the Board of Trustees of such association, and with the Medical Group." Immediately following this paragraph is another entitled "Arbitration," and is as follows: "In the event the explanation offered is not satisfactory, a board of arbitration shall be selected. Said board shall consist of one member appointed by the Relief Association, one by the Medical Group and a third selected by the two representatives thus appointed. Such Board shall meet in arbitration without unnecessary delay and their decision shall be final."

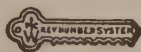
It is our opinion that these two paragraphs should be read together, and that they plainly refer to methods and conditions of contact between the contracting entities and their individuals members and do not at all include personal damage claims by individuals.

The only result contemplated by the arbitration paragraph is to inquire into a grievance which has first been submitted to a joint committee for explanation. A tort is more than a grievance answerable by an explanation. A tort is a civil wrong not arising out of contract, and is the subject of measurable compensation. See *Hallidie v. Enginger*, 175 Cal. 505, at page 507, 166 P. 1.

[3] We think the court's jurisdiction is clear and that the petitioners have a right to have their case placed upon the trial calendar and tried.

Let the writ issue providing therefor, and the order staying proceedings is annulled.

We concur: CRAWL, J.; SCOTT, Justice pro tem.



5 Cal.App.2d 704

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. GANDOLFO et al.

Civ. 9576.

District Court of Appeal, First District,
Division 2, California.

April 2, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Jury ⇐26

Trial court's order striking out defendants' demand for jury trial did not excuse defendants from thereafter complying with statute by depositing amount of one day's jury fees with clerk, and their failure to do so constituted waiver of jury trial (Code Civ. Proc. § 631; Const. art. 1, § 7).

2. Appeal and error ⇐762

New points, first stated in appellant's closing brief, need not be discussed.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Bank of America National Trust & Savings Association against Richard Gandolfo and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

O'Gara & De Martini, of San Francisco, for appellants.

Tobias J. Bricca and C. H. White, both of San Francisco, and Donahue, Hynes & Hamlin, of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to recover a judgment for the balance due on a promissory note. The defendants answered and also filed a cross-complaint. The plaintiff answered the cross-complaint, and after a trial before the court sitting without a jury the court made findings in favor of the plaintiff, and from the judgment entered thereon the defendants have appealed.

[1, 2] The defendants contend that the judgment should be reversed because their demand for a jury trial was denied. They assert that their constitutional rights have been taken from them. Const. art. 1, § 7. The point is based on the following facts: After the action was at issue, on March 7, 1933, the plaintiff served on the defendants a memorandum to set the cause for trial. It was not returned to the attorneys for the plaintiff until September 11, 1933. On that date it was filed in court. No demand for a jury trial was served until September 16, 1933. September 19, 1933, the plaintiff served and filed a motion to strike out the demand for a jury trial. That motion was granted on September 22, 1933. When the memorandum was filed, the cause was immediately put on the civil active list. On October 2, 1933, the cause was set down for trial on October 17, 1933. At no time did the defendants deposit or offer to deposit with the clerk one day's jury fees or mileage for the jurors. The defendants assert that the trial court attempted to follow rule I of the rules adopted by the judicial council for the superior court, and that in doing so it committed reversible error because said rule is invalid. Mutual Building & Loan Association of Long Beach v. Augusta Corum et al., 220 Cal. 282, 30 P.(2d) 509. The plaintiff replies that the parties were bound to comply with the valid rules of the court and the valid statutes, and the mere fact that rule I is invalid does not excuse the defendants from their failure to comply with the statutes. The plaintiff cites and relies on Section 631 of the Code of Civil Procedure, which is as follows: "Trial by jury may be waived by the several parties to an issue of fact in manner following: * * *

5. By failing to deposit with the clerk, ten days prior to the date set for trial, a sum equal to the amount of one (1) day's jury

fees payable under the law." The defendants do not contend that the statute is invalid because it has been directly ruled to the contrary. *Bennett v. Hillman*, 37 Cal. App. 586, 174 P. 362. We understand the defendants to contend, however that, because the trial court made the order hereinabove mentioned on September 22, 1933, they were excused from thereafter complying with the Code provisions. We think that position cannot be sustained and that their conduct constituted a waiver. *Adams v. Crawford*, 116 Cal. 495, 48 P. 488; *Naphtaly v. Rovegno*, 130 Cal. 639, 63 P. 66, 621; *Peter R. Gadd, Inc., v. Workman*, 200 Cal. 384, 253 P. 700; *Gray v. Craig*, 127 Cal. App. 374, 15 P.(2d) 762, 16 P.(2d) 798. In this connection the defendants assert: "The effect of a final order in an action before a court having jurisdiction to pronounce the order is conclusive upon the parties as to the right involved, no matter how erroneous the order may be." We think it is sufficient to state that the rule of law contended for has no application whatever to the order made by the trial court on September 22, 1933. 18 Cal. Jur. 659. No other points were made by the defendants in their opening brief. Under well-settled rules, new points stated for the first time in the closing brief need not be discussed.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



5 Cal.App.2d 534

**FREY v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.**
Civ. 10238.

District Court of Appeal, Second District,
Division 2, California.
March 27, 1935.

1. Indictment and Information §91(2)

Failure to allege that entry was made feloniously held not to render burglary information fatally defective.

2. Burglary §47

In burglary prosecution, verdict which failed to include the circumstances which constitute burglary of the first degree held not void.

3. Criminal law §991(1/2)

In burglary prosecution, judgment which failed to state factors which made case one of first degree burglary held not fatally defective.

4. Criminal law §1081

Filing of notice of appeal from an order denying motion to set aside judgment, prior to a ruling on the motion by the trial court, is of no effect.

5. Criminal law §1081

Convicted defendant imprisoned in state prison has no greater rights, as to time within which to file notice of appeal, notwithstanding he is acting as his own attorney, than if he were represented by an attorney.

6. Criminal law §1081

Requirements as to time for filing notices of appeal are mandatory and jurisdictional, and neither trial nor appellate court can permit filing of a notice after lapse of time permitted by statute, notwithstanding failure to file notice was due to inadvertence or mistake of party or his attorney.

Petition for writ of mandate by Ralph Frey against the Superior Court in and for Los Angeles County and Ruben S. Schmidt, Judge, respondents. On demurrer to the petition.

Alternative writ of mandate dissolved, and peremptory writ denied.

Ralph Frey, in pro. per.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Petition for writ of mandate to compel the trial court to reinstate and hear petitioner's motion to set aside the judgment and, in the event of a denial of such motion, to allow petitioner to file a notice of appeal. Respondents have demurred to the petition.

Petitioner was charged by information with the crime of burglary and with having suffered a prior conviction of a felony and having served a term of imprisonment therefor.

[1] Petitioner's contention that the failure to allege that the entry was made "feloniously" renders the information fatally defective is without merit.

[2] Likewise the contention that the verdict is void, because it fails to include the circumstances which constitute a burglary of the first degree, is untenable. *People v. O'Neal* (Cal. App.) 38 P.(2d) 430.

[3] Neither is there merit in the claim that the judgment is defective because it fails to set forth the factor or factors which made the case one of first degree burglary. *People v. Rhodes*, 137 Cal. App. 385, 30 P.(2d) 1026.

On November 9, 1933, the trial court denied petitioner's motion to set aside the judgment; the grounds relied upon being those presented above. It appears that, at the time of sending to the trial court the motion to set aside the judgment, petitioner, in anticipation of a denial, attached to his motion a notice of appeal. It appears, however, that the notice of appeal was not filed, and that no notice of appeal whatever was given after the denial of the motion, and no appeal was perfected. The case at bar is clearly distinguishable from that of *People v. Rameriz*, 137 Cal. App. 472, 30 P.(2d) 577, in which the notice of appeal similarly accompanied a motion to set aside the judgment, but which notice was filed and a transcription of the record ordered by the court.

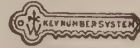
[4-6] The case before us is one of a large number in which prisoners in the state prisons have sent to the clerks of the courts motions to set aside the judgments in their cases and have sent along with such written motions a notice of appeal from the order denying the motion, with the request to the clerks that, if the motion be denied, the clerk should file for them the notice of appeal. The filing of a notice of appeal, if the physical receipt by the clerk could be conceived to be a filing, prior to a ruling on the motion, is obviously of no effect. Clerks of court are under no official duty, nor are they subject to the orders or directions from convicts in the state prison, to act as the attorneys for such prisoners. A convicted defendant serving a term of imprisonment in the state prison has no greater or additional rights because he is acting as his own attorney than if he were represented by a member of the bar. "The requirements as to the time for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions. * * * Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice." *People v. Lewis*, 219 Cal. 410, 27 P.(2d) 73, 74.

The petition herein is wholly without merit and absolutely frivolous, but the points raised have all been decided, not because of any need for a restatement of well-settled rules

of law, but with a desire to end the flood of similar petitions with which the trial courts are being afflicted.

The alternative writ of mandate heretofore issued is dissolved, and a peremptory writ is denied.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 623
PEOPLE v. BONNER et al.
Cr. 282.

District Court of Appeal, Fourth District,
California.

March 28, 1935.

1. Criminal law ⇨622(2)

Denial of motion for separate trial in prosecution for robbery *held* not error.

2. Criminal law ⇨673(4)

Admission of codefendant's confession that he had committed the robbery complained of *held* not error as regards other defendant where court carefully limited effect of confession to party making it.

3. Criminal law ⇨404(4)

Permitting identification of guns found at time of arrest of defendants charged with robbery *held* not error.

4. Criminal law ⇨423(5)

Admission of testimony that at time of arrest of defendants charged with robbery one of them had shot and wounded police officer *held* not error.

5. Criminal law ⇨528

Permitting to be read in evidence, in prosecution for robbery, codefendant's admission of guilt during defendant's preliminary examination, where codefendant was called by defendant as a witness *held* not error, particularly where such evidence exculpated defendant.

6. Criminal law ⇨1137(5)

Exclusion, in prosecution for robbery, of parts of testimony of codefendant given during preliminary examination *held* not error where parts excluded were objected to by counsel for one or both defendants.

7. Robbery ⇨23(3)

Where person was in possession of property involved shortly after robbery, slight

evidence of other inculpatory circumstances is sufficient to support conviction.

8. Robbery $\Rightarrow$ 24(1)

Conviction for robbery held sustained by evidence.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Clyde Bonner and another were convicted of first-degree robbery, and named defendant appeals.

Affirmed.

Edward B. Patterson, of El Centro, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer Heald, Dist. Atty., and R. I. French, Deputy Dist. Atty., both of El Centro, for the People.

JENNINGS, Justice.

The defendant Clyde Bonner and his brother, Earl Bonner, were tried before a jury and were convicted of the crime of first-degree robbery which was shown to have been committed near the city of El Centro, Cal., in the evening of August 26, 1934. Judgment in conformity with the verdict was rendered whereby it was ordered that Clyde Bonner be confined in the state prison at Folsom as punishment for the commission of the offense. From the judgment thus rendered and from the order denying his motion for a new trial, the defendant Clyde Bonner has appealed.

[1] Appellant's first contention is that the trial court erred in refusing to grant his application for a separate trial. No authorities in support of this contention are cited by appellant. The following authorities amply support the trial court's action in denying appellant's motion for a severance: *People v. Bringhurst*, 192 Cal. 748, 221 P. 897; *People v. Erno*, 195 Cal. 272, 232 P. 710; *People v. Anderson*, 59 Cal. App. 408, 211 P. 254; *People v. Rogers*, 60 Cal. App. 177, 212 P. 412; *People v. Remington*, 74 Cal. App. 371, 240 P. 526; *People v. England*, 140 Cal. App. 310, 35 P.(2d) 565.

Appellant's second contention is that the trial court erred in admitting in evidence the confession of appellant's codefendant Earl Bonner for two reasons, first, because the confession was not shown to have been free and voluntary, and, second, because it was peculiarly prejudicial to appellant in that it implicated him in the commission of the offense and was shown to have been given out-

side his presence and was therefore purely hearsay evidence so far as he was concerned.

As to the first of the above-mentioned grounds, it is obvious that the character of the confession depended on the circumstances which surrounded the giving of it. Examination of the record entirely fails to support the contention that it was not freely and voluntarily given.

[2] As to the second ground, while it is apparent that the evidence regarding the confession was dangerous to appellant, since it directly implicated him in the commission of the offense, it is also equally apparent that it was properly admitted as to his codefendant. The record shows that the trial court properly and carefully instructed the jury that it should not consider the confession in arriving at a determination of appellant's guilt or innocence. We must here assume, in the absence of any showing to the contrary, that the jury followed the court's advice and that it did not consider the confession as evidence which tended to prove appellant's guilt. Appellant's contention that the evidence regarding his codefendant's confession was improperly admitted as to him may not therefore be sustained. *People v. Trotter*, 120 Cal. App. 54, 62, 7 P.(2d) 731; *People v. Burd*, 95 Cal. App. 259, 268, 272 P. 816.

[3] Appellant's third contention is that the trial court erred in permitting respondent to exhibit to the jury certain guns which were not shown to have had any connection with the offense for whose commission appellant was being tried and in permitting respondent to introduce evidence which tended to show the commission by the defendant Earl Bonner of another offense subsequent in point of time to the robbery and not in any way connected with it.

With respect, first, to the objection that the trial court permitted certain guns which were not shown to have been used in the robbery to be exhibited to the jury, it should be observed that the record indicates that two guns were produced by the prosecution and were marked for identification. Neither of these weapons was admitted in evidence nor was any evidence produced which tended to show that either of them was used in the commission of the robbery. It was shown, however, that both of the guns were found at the place where appellant and his codefendant were arrested. It is settled that evidence of the circumstances attending the arrest of an individual who is charged with the commission of a public offense is admis-

sible at his trial on the theory that it has a tendency to establish guilt. *People v. Winthrop*, 118 Cal. 85, 91, 50 P. 390. Since it was shown that the robbery with which appellant was charged was accomplished through force and fear and that guns were used in its commission, it would not have been erroneous to have admitted in evidence the guns which were found at the place where appellant was arrested for the purpose of showing that appellant and his codefendant had the means available to commit the crime of first-degree robbery. *People v. Hale*, 81 Cal. App. 734, 735, 254 P. 639; *People v. Stoerckel*, 87 Cal. App. 336, 339, 262 P. 825; *People v. Mar Gin Suie*, 11 Cal. App. 42, 50, 103 P. 951. Certainly no error was committed by the trial court in permitting the weapons to be marked for identification.

[4] With respect to the objection that respondent was permitted to introduce evidence which showed that appellant's brother, the codefendant Earl Bonner, committed another offense at the time of appellant's arrest, which offense was in no manner connected with the robbery, the record shows that the prosecution was permitted to show that at the time appellant and his codefendant were placed under arrest, the codefendant shot and wounded a police officer. No error was committed by the trial court in admitting this evidence. It was a circumstance which occurred at the time the two men were being placed under arrest and, as such, was properly admitted. *People v. Wilson*, 86 Cal. App. 160, 165, 260 P. 330.

Appellant's fourth contention is that the trial court erred in permitting portions of the testimony given by the defendant Earl Bonner at the preliminary examination of the two defendants on the robbery charge to be read in evidence during the trial in the superior court without requiring that the whole of such testimony be introduced. With respect to this evidence, the record shows that appellant first objected to part of the testimony only being introduced and this objection being overruled he objected to the whole of it being read. This objection was likewise overruled. However, it does appear that not all of the testimony was introduced and that appellant and his codefendant interposed objections to the reading of certain extracts from the testimony and that such objections were sustained. It might be a sufficient answer to appellant's contention that the court erred in not requiring the whole of the testimony to be introduced to observe that appellant himself objected to the introduction

of certain portions and that therefore if the trial court did err in not requiring the whole of the testimony to be read, this error was committed at the instigation of appellant in objecting to the reading of certain extracts. No difficulty would be encountered in deciding that the appellant waived the objection which he now makes through his repeated objections to the introduction of certain parts of the testimony. However, we think that there is another more cogent reason for rejecting appellant's contention.

[5, 6] Examination of the record indicates that the evidence whose admission forms the basis of appellant's contention of prejudicial error which is now being considered was offered and admitted on the theory that it was a free and voluntary confession of guilt made by one of two defendants when on trial during the course of the preliminary examination of the two defendants before a committing magistrate. As such, the evidence was clearly admissible and no error was committed in its reception. *People v. Kelley*, 47 Cal. 125; *People v. Thourwald*, 46 Cal. App. 261, 267, 189 P. 124. Furthermore, with respect to the contention that the court erred in not requiring that the whole of the testimony of the defendant Earl Bonner given at the preliminary examination be read it should be noted that, so far as can be discovered, the only parts of such testimony which were not read consisted of answers of the witness on cross-examination to which objections were interposed either by counsel for the defendant Earl Bonner or by counsel who represented appellant or by both counsel and which objections were sustained by the trial court.

Finally, it must be observed that appellant has no cause for complaint with respect to the admission of this evidence. It was the testimony of a witness called by appellant to testify during the preliminary examination, at which neither of the two defendants was represented by counsel. The direct examination of the witness was therefore conducted by appellant who consistently propounded interrogations that were so patently leading that the testimony of the witness on direct examination reads precisely as though appellant himself were on the stand establishing a perfect alibi for himself on the night when the robbery was shown to have been committed. Neither on direct nor on cross-examination did the witness implicate appellant in the commission of the robbery. On the contrary, the witness consistently shielded and protected appellant at all times and in all respects material to the offense with which the

two were charged. The evidence therefore was directly beneficial rather than harmful to appellant who has therefore no reason to complain of it in any regard. It may further be noted that the evidence showed that the witness, after denying on direct examination at the preliminary hearing that he had committed the robbery, finally admitted under cross-examination that he was guilty of the offense by the following statement: "Well, I did hold up Mr. Freeman."

Appellant's fifth and final contention is the familiar contention of evidentiary insufficiency. He maintains that the only evidence produced during the trial which connected him with the commission of the offense consisted of the confession of his codefendant, wherein he implicated appellant in the perpetration of the robbery together with the circumstance that certain property taken from the person of the complaining witness during the commission of the offense was found in his possession after he was arrested. He points to the fact that the complaining witness did not attempt to identify him as one of the men who robbed him and that his possession of the articles taken from the person of the complainant during the robbery was fully and satisfactorily explained not only by his testimony but also by that of his codefendant who testified both at the preliminary examination and during the trial of the action that he gave them to appellant after their arrest and when the codefendant was on the operating table at the hospital. It is also pointed out that a number of witnesses called by appellant corroborated his testimony that he was in the city of Los Angeles at the time the robbery was shown to have been committed.

As to this final contention, it should be observed that the jury was properly instructed by the court that the evidence respecting the confession of appellant's codefendant, wherein he implicated appellant in the commission of the robbery, having been made without the presence of appellant, should not be considered by the jury in arriving at a determination of whether or not appellant was guilty of the offense. We must here assume that the jury followed the court's instruction in this respect. Therefore, in giving consideration to the contention of evidentiary insufficiency, we must eliminate this evidence. We are not, however, required to eliminate the significant circumstance of possession of the stolen property by appellant after his arrest, nor are we required to accept the testimony of appellant and his witnesses respecting his innocent possession of the prop-

erty nor to declare that the jury must have believed the testimony of these witnesses since it was in no respect contradicted or shown to be false by the respondent. The possession of the stolen property was of itself a circumstance which the jury was entitled to take into consideration in arriving at a determination of appellant's guilt or innocence. If the record showed that this circumstance was the only evidence which in any way tended to connect appellant with the offense, it might be argued that the verdict of guilt as to appellant was not warranted, particularly in view of the evidence which tended to show that appellant's possession of the stolen property was entirely innocent. However, it must be conceded that the circumstance of possession was not the only evidence which was produced which pointed to appellant's guilt. Respondent produced a witness who testified that he had a conversation with appellant at the police station in El Centro shortly after appellant's arrest during which appellant made the following statement: "We would not be bothered with him any more, we had found a case on him and he would be put away for a long time and we would not have any more trouble with him." This statement which was shown to have been made freely and voluntarily at the time the stolen property was found secreted in a shoe of appellant which he had left at the scene of his arrest and which was brought to the police station by a witness who testified that he had seen the articles in the shoe prior to its being delivered at the station is a circumstance which is strongly indicative of a consciousness of guilt by appellant. It must also be observed that respondent produced a witness who testified positively that he saw and talked with the appellant at a certain place in the city of El Centro between 5 and 6 o'clock in the afternoon of August 26, 1934, approximately five or six hours prior to the time the robbery was committed. Another witness called by respondent testified positively that he saw and talked with appellant in the city of El Centro between 7 and 8 o'clock in the evening of August 24, 1934. This evidence contradicted the evidence of appellant and his witnesses regarding the presence of appellant in the city of Los Angeles during the entire week preceding August 27, 1934, and the jury was at liberty to accept it and to find that, as a matter of fact, appellant was not in Los Angeles during the entire week preceding the above-mentioned date, but that, on the contrary, he was in El Centro on August 24, 1934, and on August 26, 1934.

[7, 8] It therefore appears that the circumstance of possession of the stolen property by no means stands alone as an inculpatory circumstance, but that it is merely one of several which point strongly to the correctness of the verdict. It is settled that when a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support a conviction. *People v. Gibson*, 16 Cal. App. 347, 116 P. 987; *People v. Cataline*, 54 Cal. App. 36, 200 P. 1060; *People v. Swanson*, 120 Cal. App. 173, 176, 7 P.(2d) 380. It is our opinion that the corroborative evidence produced during the trial of the action was ample to support the verdict of conviction.

For the reasons stated, the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



5 Cal.App.2d 564

SMITH v. MILLER et al.
Civ. 9079.

District Court of Appeal, First District,
Division 1, California.
March 28, 1935.

Rehearing Denied April 27, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Sales ⇨479(1)

Upon conditional buyer's default, conditional seller may retake possession of property or treat contract as absolute sale and rely solely on conditional buyer's personal liability for payment of balance of purchase price, and election once made is binding.

2. Warehousemen ⇨34(7)

In action against warehouseman for wrongful delivery to seller of goods originally purchased on conditional sales contract, finding that conditional seller had, upon conditional buyer's default, elected to treat contract as absolute sale, and relied solely on conditional buyer's personal liability for payment of balance of purchase price, held sustained by evidence (St. 1909, p. 438, § 9).

3. Warehousemen ⇨25(5)

Warehouseman delivering goods to one claiming to be, but who was not, in fact, own-

er of goods stored by another held guilty of conversion and liable to person storing goods (St. 1909, p. 438, § 9).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by M. C. Smith against C. Miller and another for conversion. From a judgment for plaintiff, defendants appeal.

Affirmed.

Franklin T. Poore, of San Francisco, for appellants.

A. Don Duncan, of San Francisco, for respondent.

OGDEN, Justice pro tem.

This is an action in conversion brought by the assignee of Mr. and Mrs. George Peak against defendants and appellants, a public warehouseman, for the value of certain items of household furniture stored with him by the Peaks and which he was unable to redeliver to them upon demand. Appellant admitted his failure to redeliver the goods and offered in excuse thereof that he had delivered them upon demand to the W. & J. Sloane Company, the true owner. The trial court gave judgment in the amount of \$550, found to be the value of the goods. The following are the circumstances of the case:

In 1922 Mrs. George Peak called upon a Mr. Jeffreys, the credit manager of the W. & J. Sloane Company, a firm engaged in the retail sale of home furnishings, to arrange for the selection and purchase of furnishings for her home to the estimated amount of \$3,000. After some preliminary discussion Mrs. Peak was advised that it would be necessary to secure her husband's consent and accordingly, on April 20, 1922, Mr. Peak wrote to the W. & J. Sloane Company the following letter:

"Mrs. Peak has selected a bill of furniture at your store and wishes to purchase the same. On account of the greater part of my finances being tied up * * *, I have suggested to Mrs. Peak that she take the matter up with you and see if we can have some time on the payment of the furniture. Appreciating any favor shown us, I am, yours very truly, George Peak."

A few days later Mrs. Peak made an initial payment in the amount of \$1,500 and the following written agreement was entered into:

"As to settlement for furnishings to be supplied by you for my account to be delivered to 479-17th Avenue which it is estimated will amount to approximately \$3,000.00, it is agreed that in addition to initial payment of \$1500.00 made herewith I will pay balance as follows:

"In consecutive monthly payments of \$200.00 each, commencing June 1, 1922, together with interest on deferred payments @ 7% per annum. Pending full settlement it is understood that the title to all goods supplied shall remain in you and shall pass to me only on final payment. Yours truly, Mrs. George Peak.

"Accepted: W. & J. Sloane

"By Herbert M. Jeffreys,

"Credit Manager."

Pursuant to the foregoing arrangements, Mrs. Peak selected, and there were delivered to her, numerous articles of furniture, over the period from April 28th to May 9th, of the total invoice value of \$4,916.71. Four monthly payments of \$200 each, as prescribed in the agreement, were made, the last one being paid on October 23, 1922, subsequent to which time no further payments were or have ever been made on account of the purchase price.

In the month of October, 1922, Mr. Peak called upon Mr. Jeffreys and advised him he would not be able to continue the payments at that time and that he wanted to return the furniture; that that was the best he could do. Mr. Jeffreys replied that his company would not take the furniture back but would look to him for payment; that sooner or later he would be in position to pay. Again in the summer or fall of the year 1924 a similar conversation was had, Mr. Peak again requesting that he be permitted to return the furniture and receive a credit for it, and Mr. Jeffreys again replying that he would not take it back but looked to him, Mr. Peak, for payment. Monthly bills for the balance due and many letters demanding payment of the account were mailed to Mr. Peak at his office address over the entire period. On March 18, 1925, Mr. Peak was adjudicated a bankrupt, the claim of the W. & J. Sloane Company being listed by him in the schedule of claims. No claim was filed in the bankruptcy proceedings, however, by the W. & J. Sloane Company.

On September 20, 1924, Mr. Peak, with the consent of his wife, stored with the appellant, at his public warehouse in the city of San Francisco, the items of furniture which are the subject of this suit and which are

part, but not all, of the furnishings hereinbefore referred to, and a nonnegotiable warehouse receipt in the usual form was issued to him evidencing the bailment. On May 26, 1926, upon the representation of the W. & J. Sloane Company, that it was the legal owner of the goods and entitled to the possession thereof, appellant delivered them to that company upon its payment of the accrued storage charges and giving an indemnity bond holding appellant harmless from any liability therefor. No notice of the demand of the W. & J. Sloane Company or of the delivery to it of the furnishings was given by appellant to either Mr. or Mrs. Peak, the first notice thereof had by them being a letter received on the following day from the W. & J. Sloane Company stating that it had taken possession of the goods and demanding possession of the balance of the furnishings purchased under the conditional sale agreement. On October 8, 1926, a written notice was mailed to Mrs. Peak by the company that the furnishings would be sold at public auction and the proceeds of the sale credited to her account. Such a sale was held and the furnishings were sold on October 14, 1926. Upon receipt of the notice of sale, demand for the possession of the goods was made by the Peaks upon appellant and tender made of all storage charges. Appellant being unable to comply, this action in conversion was brought by their assignee.

The trial court found that, at the time of delivery of the goods to the W. & J. Sloane Company, that company was not the owner of or entitled to the possession thereof and, in the language of the findings, "that on various occasions, prior to the month of May, 1926, George Peak and Ethel M. Peak offered to return the said personal property to W. & J. Sloane, and to permit said company to retake the same, and to have and accept the same as its exclusive property. That said W. & J. Sloane refused said offers and refused to and did not accept the return or possession of said property, or any part or parcel thereof, but insisted upon payment of the said purchase price and waived and wholly relinquished any and all right to retake or repossess or have possession of any of said property; and the court finds, that by its acts and conduct, said W. & J. Sloane elected to treat the contract of sale of said property to said Ethel M. Peak, as a contract of absolute sale to said George Peak and/or Ethel M. Peak, and not as a conditional sale, and to hold said Ethel M. Peak and/or George Peak personally liable for the unpaid balance of said purchase price with title to

said property vested in said Ethel M. Peak and/or George Peak. * * *

[1] The original transaction between the W. & J. Sloane Company and the Peaks was purely one of conditional sale, title to the goods having been expressly reserved in the former until full payment of the purchase price. Although, as pointed out by respondent, the written agreement does not specifically enumerate the items of furniture, title to which is to be reserved, the delivery to and acceptance by Mrs. Peak of the articles selected by her, as enumerated in the invoice received in evidence, leaves no uncertainty in that regard. That is certain which can be made certain. Section 3538, Civil Code. The transaction being one of conditional sale, the Peaks received only a conditional right of possession forfeitable upon any default in the payment of the purchase price. *Bice v. Harold L. Arnold, Inc.*, 75 Cal. App. 629, 243 P. 468. Upon such default occurring, as it did, in the month of November, 1922, the W. & J. Sloane Company had the right of election either to treat the contract as involving a conditional sale and retake possession of the furniture or treat it as one involving an absolute sale relying solely upon the personal liability of the vendee for the balance of the purchase price. *Johnson v. Kaeser*, 196 Cal. 686, 239 P. 324, and numerous authorities cited therein. These remedies being inconsistent, the vendor may elect which he would pursue, but he cannot have both, and an election exercised to pursue one forfeits his right to subsequently pursue the other. *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 P. 435; *Frankel v. Rosenfield*, 95 Cal. App. 647, 273 P. 122; *Martin Music Co. v. Robb*, 115 Cal. App. 414, 1 P.(2d) 1000, 1002; *Cocores v. Assimopoulos*, 127 Cal. App. 360, 15 P.(2d) 892.

This brings us to what we deem the principal question involved in this appeal, whether there was an election exercised by the W. & J. Sloane Company to treat the transaction as an absolute sale. It is said in *Hines v. Ward*, 121 Cal. 115, 53 P. 427, 428, "It is true that a party having inconsistent remedies may not pursue both, but must choose between them; and, having clearly elected to proceed upon one, will be debarred from invoking the other. But what amounts to such election is not always clear. * * * The doctrine of election, as applied to a choice of remedies, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory, that the inconsistent attitude of the party will

put his adversary to some disadvantage." In *De Laval Pac. Co. v. United C. & D. Co.*, 65 Cal. App. 584, 224 P. 766, 767, the rule is stated as follows: "Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in the pursuit of such remedy, whereby he has gained any advantage over the other party, or he has occasioned the other party any damage, he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right."

However, in *Martin Music Co. v. Robb*, supra, in determining whether the commencement of suit by the conditional vendor for the balance of the purchase price precluded him from subsequently, after dismissal of the action before judgment, pursuing the remedy of recapture, a more liberal rule than that based strictly upon the doctrine of estoppel is recognized as follows: "A waiver can be inferred whenever the conduct of the seller is inconsistent with the idea that he still intends to enforce a return of the goods if the conditions are not performed; whether or not such is the case is a question of fact. Any act on the part of the seller clearly manifesting an intention to treat and rely upon the unpaid purchase price as an absolute debt from the purchaser will be deemed an election to waive the conditions of the sale, resulting in title passing to the purchaser, and precluding the seller from thereafter retaking the property."

Thus, in the case of *Holt Mfg. Co. v. Ewing*, supra, the filing of a claim for the balance of the purchase price with the administratrix of the estate of the deceased conditional vendee was held to constitute such an election. And, similarly, in the case of *Boas v. Knewing*, 175 Cal. 226, 165 P. 690, L. R. A. 1917F, 462, it was held that a notice to the vendee threatening replevin proceedings manifested such an election as to preclude the right to subsequently sue for the purchase price after the property had been returned pursuant to such threat. It has been repeatedly held that the commencement of any litigation that can proceed only on the theory that title has passed constitutes an election that the seller may not revoke. *Martin Music Co. v. Robb*, supra. These authorities do not rely upon the existence of the elements of estoppel, but are determined rather upon a consideration of whether the seller has clearly evidenced and manifested a position inconsistent with the remedy there sought.

[2] The question as to whether an election was exercised in the instant case is, as before stated, one of fact, which was for the trial court to determine from all the circumstances of the case. We cannot say that the trial court's finding in this regard is entirely without support in the evidence.

It is true that in a contract of conditional sale the ultimate object of the seller is to obtain payment of the purchase price, and, of course, a defaulting vendee has no right to require his vendor to retake the goods or then and there forever lose his right to do so. Nor does the mere insistence by the vendor upon payment of the purchase price constitute a waiver of his alternative remedy. Nor would the liberality of the vendor in delaying enforcement of either remedy deprive him of any rights under the contract. *McConnell v. Redd*, 86 Cal. App. 785, 261 P. 506. Such circumstances, although not of themselves constituting an election might, however, be evidence of the fact that an election had been exercised, and from any or all such circumstances a waiver of the right of recapture be fairly inferred.

Here there was a delay of approximately three and one-half years after the first default in payment, a period in excess of that prescribed for the commencement of actions for the recovery of personal property. Section 338, subd. 3, Code Civ. Proc. During that entire period constant and insistent demands were made upon Mr. Peak for the payment of the account, no mention being made of the return of the goods except to refuse it whenever offered. All statements and demands for payment were addressed to Mr. Peak in whose sole name the account was, at least, from the year 1923, carried, and who was not a direct party to the conditional sales contract. In refusing to accept a return of the goods, Mr. Peak was expressly advised that they were looking to him for payment. No effort was made to retake possession until after the discharge of the debt in bankruptcy. Although no one of the foregoing circumstances might of itself be said to constitute an election, viewing the evidence in its entirety, a reasonable inference arises therefrom that by its conduct the W. & J. Sloane Company elected to treat the sale as an absolute one and confirmed title to the furniture in the Peaks.

[3] Such being the case, the delivery of the goods to the W. & J. Sloane Company constituted a conversion thereof. Although a warehouseman is justified in delivering goods

to their true owner upon demand (section 9, Warehouse Receipts Act, St. 1909, pp. 437, 438; *Travers v. Burdge*, 101 N. J. Law, 237, 127 A. 191; *Farmers' Union Warehouse Co. v. Barnett*, 214 Ala. 202, 107 So. 46), in purporting to do so he acts at his peril if such person is not in fact entitled to their possession. *Wetherly v. Straus*, 93 Cal. 283, 28 P. 1045; *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 P. 680; *Branch v. Bekins Van & Storage Co.*, 106 Cal. App. 623, 290 P. 146.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J



5 Cal.App.2d 491

LINDSAY et al. v. MACK et al.

Civ. 1165.

District Court of Appeal, Fourth District,
California.

March 23, 1935.

Hearing Denied by Supreme Court
May 20, 1935.

1. Guaranty ⇨77(2)

Purchaser's agreement undertaking to release vendor's trust deed and to reconvey property within 60 days held independent contract and not contract of guaranty of suretyship so as to preclude action thereon without foreclosure of trust deed, where purchaser did not become responsible for payment of note but merely promised to do within time stated what he was not otherwise bound to do within such time (Civ. Code §§ 2787, 2831).

2. Evidence 419(2), 419(11)

Actual consideration given for deed or contract may be proved by parol.

3. Evidence ⇨397(1)

Where parol evidence does not contradict written contract, such evidence may be admitted.

4. Evidence ⇨419(11)

In action by vendors on agreement by purchaser to release trust deed executed by vendors and to reconvey within 60 days, purchaser held entitled to prove by parol that part of consideration for subsequent agreement to quitclaim property was release of liability on prior agreement where agreement formed part of actual consideration.

5. Evidence ⇨441(1)

Rule that agreement in writing supercedes all prior or contemporaneous oral nego-

tiations or stipulations concerning its matter has no application to collateral agreement upon which instrument is silent and which does not purport to affect terms of instrument.

6. Appeal and error ⇨856(1)

In action on agreement whereby purchaser undertook to release deed of trust executed by vendors and to reconvey within 60 days, issue whether by oral agreement contemporaneous with subsequent written agreement to quitclaim property to vendors purchaser was released from liability on prior agreement did not justify affirming a judgment in purchaser's favor where trial court failed to find thereon.

7. Appeal and error ⇨1178(6)

Case may be remanded to trial court with directions to find upon single issue, leaving other findings to remain as part of record.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Charles W. Lindsay and another against J. A. Mack and another. From an adverse judgment, plaintiffs appeal.

Reversed, with instructions.

Hamilton, Lindley & Higgins, of San Diego, for appellants.

Ed. P. Sample and Charles A. Brinkley, both of San Diego, for respondent.

MARKS, Justice.

Plaintiffs brought this action to recover \$1,666.66 and the interest which they had paid to secure the reconveyance to them of property which they had sold to J. A. Mack and wife. This property was incumbered by a deed of trust which had been executed by plaintiffs. George S. Graves was not served and did not appear in the action. Therefore, we will refer to J. A. Mack as the defendant. Judgment went for defendant, and plaintiffs have appealed.

Plaintiffs were owners of acreage property near Lakeside in San Diego county. They entered into negotiations for the sale of this property to defendant and his wife. These negotiations resulted in the parties entering into an escrow on June 11, 1930, for the sale of the property to Mr. and Mrs. Mack. The purchasers were to take title subject to a mortgage to the California Joint Stock Land Bank executed by plaintiffs to secure their note upon which there was an unpaid balance of \$12,979.35; they were to pay plaintiffs \$16,000 in cash and to execute their mortgage

securing their note in the principal sum of \$32,270.65 payable in installments over a period of years. The escrow instructions were later modified by reducing the cash payment \$6,000 and increasing the mortgage by a like amount. A second modification was made about July 21, 1930, whereby the cash payment was reduced to \$8,333.34, and defendant gave plaintiffs the following instrument:

"July 21, 1930.

"We, J. A. Mack and George S. Graves, do hereby agree to cause to be released and reconveyed of record on or before SIXTY DAYS from date hereof that certain deed of trust executed by Charles W. Lindsay and Alice F. Lindsay, husband and wife, in favor of Union Trust Company of San Diego, a corporation, in the amount of \$1666.66, dated December 4, 1928, and filed for record December 12, 1928, in Book 1563, page 181, records of San Diego County, California.

"Dated July 21, 1930.

"[Signed] J. A. Mack

"George S. Graves

"El Cajon, Calif."

This was the first time the note for \$1,666.66 and the deed of trust securing it were mentioned in writing between the parties. Prior to July 21, it was the evident intention of the plaintiffs to discharge this incumbrance out of the cash payment made by the defendant. The escrow was closed by recording the deed and mortgage on or about August 4, 1930. The deed did not contain any agreement on the part of the purchasers to assume and pay the trust deed incumbrance, nor did it recite that the conveyance was made subject to any incumbrances.

Defendant went into possession of the property and remained upon it until about December 8, 1932. He did not cause the deed of trust to be released nor the property to be reconveyed to plaintiffs within sixty days, or at all. The note secured by the trust deed was not due until 1932, and plaintiffs waived payment until maturity.

Defendant paid interest on the \$1,666.66 note, made one payment of \$5,500 on the purchase price mortgage note, and paid installments of interest. When the \$1,666.66 note became due, plaintiffs paid it to prevent foreclosure of the deed of trust. Defendant defaulted on the 1932 installment of principal and interest and plaintiffs declared the entire amount of the balance of the purchase price mortgage due and payable under the acceleration clause and started suit to foreclose the mortgage probably early in August, 1932.

In the pleadings in that action no mention was made of the \$1,666.66 note or of the deed of trust securing it which plaintiffs had previously paid.

Some time after the foreclosure action was at issue the parties entered into negotiations to settle their difficulties. On November 27, 1932, Mr. Lindsay and Mr. Mack executed a written agreement whereby Lindsay agreed to dismiss the foreclosure action with prejudice and Mack agreed to execute a quitclaim deed to the mortgaged property and deliver its possession to Lindsay on or before December 3, 1932. The agreement also contained provisions concerning crops harvested from and growing upon the property, care of the property and payment of certain bills none of which are important here. A certified copy of the quitclaim deed is in the record, but its date of recordation does not appear. It is dated November 28, 1932, and was acknowledged by Mr. and Mrs. Mack on the same day. It quitclaimed a one-half interest in the property to plaintiffs and the other one-half interest to Annie E. Mitchell.

It is not questioned by the parties that they had at least one contemporaneous oral agreement which was not mentioned in the writing of November 27, 1932. This concerned personal property which defendant had placed on the land and which plaintiffs were willing to and did buy for the sum of \$750, which sum they paid him.

This action was filed on December 8, 1932, and a writ of attachment issued against defendant's property. After defendant had loaded his household goods on his truck, and while it was being driven away from the Lakeside property, the truck was attached. There is no evidence in the record showing that any demand had been made by plaintiffs for the payment of the \$1,666.66 and interest between the time the trust deed note was paid by them and the service of the writ.

The findings of fact and conclusions of law disclose that the sole theory upon which judgment was rendered for defendant was based upon the conclusion that the document of July 21, 1930, upon which this action was brought, made defendant a surety for the payment of the \$1,666.66 deed of trust note and that action could not be maintained against him on the agreement until the security had been exhausted. The trial court expressly refused to find on other issues raised by the pleadings because further findings were regarded as unnecessary.

[1] We are of the opinion that the writing of July 21, 1932, was neither a contract of

guaranty nor of suretyship. Section 2787 of the Civil Code provides that: "A guaranty is a promise to answer for the debt, default, or miscarriage of another person." The agreement did not bind defendant to do anything in case of default or miscarriage of any other person nor to pay the debt of such person if such person failed to do so. It bound him to pay the debt of such other person, not upon a default, but long after such default could take place and long before the due date of the obligation. Section 2831 of the Civil Code provides: "A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." The writing in question fails to measure up to the standard of suretyship for the same reasons that it falls short of creating a contract of guaranty. Defendant did not become responsible for payment of the note by plaintiffs. He agreed to discharge the note within sixty days, many months before plaintiffs had agreed to pay it.

Nothing we have here said conflicts in any way with the conclusions we reached in the case of *Birkhofer v. Krumm* (Cal. App.) 40 P.(2d) 553. There the defendant had already assumed and agreed to pay the indebtedness and had become surety for the payment of any deficiency remaining after the security was exhausted. There the agreement extended the time for making certain payments. It granted defendant an additional period of grace within which to make them and did not change his position as surety. In the instant case, the position of defendant is entirely different. He did not secure an extension of time within which to make payments. He promised to do, within sixty days, an act which he was not otherwise bound to perform within that time.

Appellants maintain that the agreement of July 21, 1930, which forms the basis of this action, is a separate independent contract in which defendant promised to cause the release of the deed of trust and a reconveyance of the property within sixty days and that they can recover their damages caused by his failure to perform, without foreclosure of the deed of trust. This interpretation of the contract is correct for the reasons already given. See *Crary v. Bowers*, 20 Cal. 85; *Wormouth v. Hatch*, 33 Cal. 121; *Turner v. Howze*, 28 Cal. App. 167, 151 P. 751.

[2-5] Plaintiffs complain of rulings of the trial court on their objections to the admissibility of evidence introduced by defend-

ant. Defendant alleged in his amended answer that he had a collateral oral agreement with plaintiffs, neither incorporated nor referred to in the written agreement of November 27, 1932, whereby his obligation to cause a release and reconveyance of the property described in the deed of trust was to be released upon his quitclaiming the property. When defendant sought to introduce evidence in support of this allegation plaintiffs objected on the ground that the evidence tended to vary and contradict the terms of a written contract.

Two well-recognized exceptions to the parole evidence rule are applicable to this situation. The first is that the actual consideration given for a deed or contract may be proved by parole. *White v. Schader*, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499. If a release of defendant's liability under the agreement of July 21, 1930, was made part of the consideration for the quitclaim deed of November 28, 1932, defendant was entitled to prove that fact by parole. The second exception to the parole evidence rule applicable here is clearly stated in *Greathouse v. Daleno*, 57 Cal. App. 187, 206 P. 1019, 1020, where it is said: "A well-understood concurrent rule is that, where the parole evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parole evidence may be admitted. *Harrison v. McCormick*, 89 Cal. [327], 330, 26 P. 830, 23 Am. St. Rep. 469; *Johnson v. [D. H.] Bibb Lumber Co.*, 140 Cal. 95, 73 P. 730. "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." See, also, *Sivers v. Sivers*, 97 Cal. 518, 32 P. 571; *Whittier v. Home Savings Bank*, 161 Cal. 311, 119 P. 92; *Crawford v. France*, 219 Cal. 439, 27 P. (2d) 645; *Henika v. Lange*, 55 Cal. App. 336, 203 P. 798. It is our conclusion that the objections to the introduction of this evidence were properly overruled.

[6] Defendant presents several grounds upon which he urges that the judgment should be sustained. We have considered all of them, but find it necessary to mention but one. He maintains that by a contemporaneous independent oral agreement which formed a part of the consideration for the quitclaim deed and which was not mentioned in the con-

tract of November 27, 1932, and which was not repugnant to its terms, he was released from the obligation created by his agreement of July 21, 1930, and all damages resulting from its breach. Evidence was presented by both parties on this issue, but the trial court failed to find on it. For this reason it cannot furnish a reason for affirming the judgment.

It is obvious that as the findings of fact and conclusions of law which place the defendant in the position of a surety where, until the security is exhausted, he cannot be required to respond in damages to plaintiffs because of the violation of his agreement to have the property described in the deed of trust released and reconveyed to plaintiffs, are not supported by the law applicable to the issue under the evidence before us, there remain no findings of fact or conclusions of law supporting the judgment. It is also obvious that the amended answer of defendant sets up a sufficient defense to the action of plaintiffs by pleading release by a contemporaneous, independent parole agreement if that defense be sustained by a preponderance of the evidence.

[7] In *Coleman v. Coleman*, 23 Cal. App. 423, 138 P. 362, 363, it was said: "The authorities support the view that a case may be remanded with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record. *Duff v. Duff*, 101 Cal. 1, 4, 35 P. 437; *Argenti v. City of San Francisco*, 30 Cal. [458], 459, 462." See, also, *Egan v. Crowther*, 74 Cal. App. 674, 241 P. 900; *Kenney v. Parks*, 137 Cal. 527, 70 P. 556.

The judgment is reversed, with instructions to the trial court (1) to amend the conclusions of law in accordance with the views herein expressed; (2) to make findings of fact and conclusions of law on the question of whether the defendant was released from the obligation created by his agreement of July 21, 1930, and from all damages resulting from its breach by him by an independent oral agreement not contained in the contract of November 27, 1932, and whether such oral agreement, if any, formed part of the consideration given for the quitclaim deed dated November 28, 1932; and (3) to enter judgment in accordance with such amended findings of fact and conclusions of law.

We concur: BARNARD, P. J.; JENNINGS, J.

5 Cal.App.2d 604

McGARVEY v. SOUTHERN PACIFIC

MILLING CO. et al.

Civ. 9696.

District Court of Appeal, Second District,
Division 2, California.

March 28, 1935.

Hearing Denied by Supreme Court
May 27, 1935.**1. New trial** ⇨137

Counsel could not complain of lack of notice for hearing of motion for new trial, where hearing of argument on new trial motion was set in open court for date specifically fixed to suit counsel's then expressed convenience, which consent was in effect a consent to shortening of time if greater time was required (Code Civ. Proc. §§ 656, 661).

2. New trial ⇨157

On motion for new trial, court was not obliged to hear argument (Code Civ. Proc. §§ 656, 661).

3. Courts ⇨66(1)

Adjournment of court to next day in absence of judge acts as a recess in court's sessions, and carries all calendar matters with it (Code Civ. Proc. §§ 74, 139).

4. New trial ⇨137

Attorney cannot through his own action in open court consent to date for hearing which does not permit of legal time of notice, and thereafter complain that time of service was not legally sufficient.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Dr. H. McGarvey against the Southern Pacific Milling Company and another. Judgment for plaintiff, and from orders granting new trial, plaintiff appeals.

Affirmed.

Fred A. Shaeffer and David F. Hart, both of Santa Maria, for appellant.

M. R. Van Wormer, of San Luis Obispo, and McCutchen, Olney, Mannon & Greene, of San Francisco, for respondents.

STEPHENS, Presiding Justice.

Judgment was had by plaintiff in the superior court and defendant sought and was granted a new trial. The plaintiff appeals. The motion was regularly called and continued on the 21st day of August, 1933, to the 28th day of August, 1933. On said last date the court was about to set the argument for the 8th day of September, 1933, whereupon Mr. Shaeffer, attorney for defendant, stated

that the date was not agreeable to him and the court fixed the date as the 6th day of September, 1933; this being a date which Mr. Shaeffer stated would be convenient for him. On September 2, 1933, defendant filed an affidavit of bias and prejudice against Hon. T. A. Norton, who had presided at the trial of the case, and motion was made to call in another judge to hear the new trial motion. Judge Norton filed a counter affidavit on the same day. Attorneys in the case stipulated that the motion as to the propriety of Judge Norton's hearing the motion for new trial should be heard on the 5th day of September, 1933, and that Judge Henderson of Ventura county should hear the motion.

On the 5th day of September, 1933, the motion to call in another judge to hear the motion of alleged disqualification of Judge Norton was regularly continued through stipulation of attorneys to the 7th day of September, 1933. On September 6th, 1933, Judge Norton did not appear and no judge appeared and the court clerk adjourned court until the next day in accordance with section 139, Code of Civil Procedure. On September 7, 1933, there appeared upon the court's calendar (1) plaintiff's motion to call in another judge to hear the motion for new trial, and (2) the argument on the motion for a new trial. Judge Henderson presided and called the motion to call in another judge, etc. All concerned were present except Fred A. Shaeffer, attorney for plaintiff. W. J. Minville, an attorney practicing in this state, appearing for a limited purpose, objected to the court's proceeding on the ground that Mr. Shaeffer was not present. Considerable argument ensued, but finally later in the day Mr. Shaeffer appeared and objected to any proceedings on the ground that he had not had legal notice of the time the motion had been set for.

We think the matter of time was entirely regular up to this point in the case. Mr. Shaeffer then stated in open court that he wished time to subpoena a witness, and he was thereupon informed that the witness was in court. Over the objection, the court heard the motion and determined that Judge Norton was not biased or prejudiced.

Judge Norton then took the bench, all parties present by counsel. Counsel for defendant was about to address himself to the motion for a new trial, whereupon counsel for plaintiff objected "upon the ground that there has been no notice whatsoever ever given to the plaintiff in this action as to the time and place of hearing this motion for a new trial."

He further stated: "I understand the law to be that the matter must be set down by the court and the clerk must give written notice at least five days of the time and place of the hearing of this motion."

Counsel now claims that he should have had twelve days' notice under section 1005, Code of Civil Procedure, as the place of hearing was thirty miles from his office. Five days' notice was given, and while it may be that section 1005, Code of Civil Procedure, does not apply here, we think we are not required to decide that question.

[1, 2] The objection seems to us to be without merit. The hearing of argument on the new trial motion was set in open court for a date specifically fixed to suit counsel's then expressed convenience. He, therefore, cannot now be heard to complain of lack of notice. It was in effect a consent to the shortening of time if a greater time were really required and the court's order was in effect a shortening of such time. It should be remembered, too, that the court was under no obligation to hear argument at all under sections 656 and 661, inclusive, of the Code of Civil Procedure.

[3, 4] Counsel had consented to the setting of the motion to disqualify Judge Norton from passing on the motion for new trial on the day following the day set for hearing it. He knew, therefore, that the argument on the motion for new trial could not be heard upon the date it was set and that it would have to be continued. It was his duty to know to what date it was continued. As we understand the law, an adjournment of court to the next day in the absence of the judge under section 139, Code of Civil Procedure, acts as a recess in the court's sessions (section 74, Code Civ. Proc.) and carries all calendar matters with it. Counsel, therefore, cannot successfully plead that he was without notice that the argument would be called up the next day, and after all, he was in court when the argument was made and was given the opportunity to indulge therein—certainly no prejudice was suffered by him or his client. We do not herein mean to hold that a setting in open court with counsel present necessarily waives notice. What we mean to say is that an attorney cannot through his own action in open court consent to a date for hearing which does not permit of the legal time of notice and thereafter complain that the time of service was not legally sufficient.

Plaintiff also asks us to consider the point that the pleadings do not properly present

an issue as to damages. Whether or not this point is properly before us, we have considered it and we think the pleadings taken as a whole put the issue of damages before the court at least as to whether or not there was *any* damage. There is also pleaded a cross-complaint and the motion for new trial encompasses the proceedings had thereunder as well as under the complaint.

The orders on the motions appealed from are affirmed.

I concur: CRAIL, J.



5 Cal.App.2d 639

GASTON et al. v. HISASHI TSURUDA.
Civ. 9509.

District Court of Appeal, Second District,
Division 2, California.

March 29, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Appeal and error ⇨996

Where facts are clear and undisputed, and susceptible of supporting but one rational inference, matter becomes one of law which appellate court has power to determine.

2. Automobiles ⇨242(4, 7)

Pedestrian had burden of establishing that speed of truck was negligence proximately causing collision between pedestrian and truck (St. 1931, p. 2120, § 113).

3. Automobiles ⇨244(35, 37)

Evidence held not to establish that speed of truck was negligence proximately causing collision between pedestrian and truck (St. 1931, p. 2120, § 113).

4. Automobiles ⇨216

Pedestrian can be so careless that his conduct is negligence as matter of law.

5. Automobiles ⇨217(3)

Pedestrian must exercise reasonable care for his safety, and in crossing between intersections must observe greater care than when using established crossing (St. 1931, p. 2127, § 131½).

6. Automobiles ⇨244(58)

Evidence held to show contributory negligence proximately causing collision between pedestrian and truck, in that pedestrian either failed to properly watch oncoming truck

or walked directly up against it when crossing street directly from safety zone (St. 1931, p. 2127, § 131½).

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Emma F. Gaston and F. E. Gaston, husband and wife, against Hisashi Tsurada. From a judgment in favor of plaintiffs, defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal from a judgment for damages arising from a collision between a pedestrian and an automobile truck. Plaintiffs charged negligence of defendant and the latter denied any negligence on his part and pleaded contributory negligence. The court, sitting without a jury, found that the collision and injuries were occasioned by the negligence of defendant without any negligence of plaintiffs contributing thereto. Appellant contends that the evidence conclusively shows that plaintiff Emma F. Gaston, the only plaintiff personally injured, was guilty of negligence proximately causing the accident, and that defendant was not guilty of any negligence proximately causing the same.

The evidence is without dispute or conflict as to all essential facts, except the usual variation in estimates of speed, and tells the following story: At about 5:45 o'clock p. m. of October 27, 1932, Emma F. Gaston, aged 72 years, active and with good sight and hearing, and her husband, F. E. Gaston, aged 74 years, stepped off the rear steps of a south-bound street car into a safety zone on Central avenue at its intersection with Eighty-Fourth street, in Los Angeles. At that point Central avenue was 66 feet wide and Eighty-Fourth street was 36 feet wide between curbs. The safety zone was 55 feet in length from the north property line of Eighty-Fourth street and extended northward beside the street car track. Its easterly line was 42½ feet from the curb on the east side of Central avenue. There was a pedestrian crosswalk marked with lines on the pavement at the north side of the intersection in question. When the street car moved away to the south, plaintiffs started, side by side, directly for the east curb of Central avenue. They saw headlights

of two automobiles approaching from the south about two blocks away. It was dusk and the street lights were lit. After progressing some 10 feet into the east half of the street beyond the double car tracks, plaintiffs saw the automobiles were then about a block away. At this point the husband spoke to his wife to wait and see which way the automobiles would go, but she appeared not to hear him. She was then about 3 feet in advance of her husband and was "looking all the time back and forth" and "kept watching the lights" of the automobiles. She thought she had plenty of time to cross in front of them, but as she was nearing the curb she saw they were coming so rapidly that she started to increase her speed so as to reach the sidewalk. She saw one of the machines change its course and go back of her on the street car tracks, and the next thing she knew she was struck by the other, it being the Chevrolet stake body truck operated by defendant, and found herself lying on the pavement. The impact of the truck with Mrs. Gaston carried her about 10 feet, and the truck stopped within 10 or 15 feet of the point of impact, the rear wheels opposite to Mrs. Gaston's position on the pavement. The point of impact of Mrs. Gaston was on the side of the left front fender of the truck, and she was walking at the time toward the curb.

The defendant's truck approached the scene of the collision, with headlights functioning, at a speed variously estimated from 25 to 40 miles per hour, on its right side of the road; and when in the center of the intersection defendant first saw the plaintiffs and cried out, "Stop," and, "There is danger," and turned the truck to its right, applied the brakes, and ran the right front wheel over against the curb, which prevented its going onto the parkway and sidewalk as he intended. The truck stopped with its rear wheels 64 feet north of Eighty-Fourth street. After the accident skid marks were measured from the rear wheels of the truck where it had stopped, that from the right wheel extending backward 25 feet, beginning 28 feet north of the north curb line of Eighty-Fourth street, and that from the left wheel extending 3½ feet, beginning 44 feet north of that line. The truck was equipped with two-wheel brakes. The territory in which the accident happened was open road, there being no evidence to show it was either residence or business district or that there was any obstruction to the view of a driver in approaching the intersection, or that there were any traffic signs or signals at that place.

[1-3] Where the facts relating to a subject of controversy are clear and undisputed, and

susceptible of supporting but one rational inference, the matter becomes one of law which an appellate court has power to determine. The evidence herein, considered in the light most favorable to respondents, fails to show any act or omission of appellant in the operation of his truck on the occasion in question which can be translated into negligence. The sole ground of such negligence containing any support whatever consists in the proof of speed. The speed shown did not exceed in miles per hour any of the limits fixed by the California Vehicle Act, and there is no evidence herein showing that the speed of the truck in approaching the intersection or crossing it, or in approaching plaintiffs' course across the street, constituted negligence. And the evidence shows without dispute that defendant had the right of way, to be exercised by him with due care (section 131½, California Vehicle Act, St. 1923, p. 517, § 131½, as added by St. 1931, p. 2127), and that upon seeing the plaintiffs and their impending danger he did everything reasonably required and possible to avoid injuring them. The burden was cast on plaintiffs to establish the fact that speed of the defendant's truck constituted negligence proximately causing the accident (section 113, California Vehicle Act, St. 1923, p. 553, § 113, amended by St. 1931, p. 2120), but there was a complete failure so to do.

[4-6] We are also of the opinion that the facts of this case show affirmatively that plaintiff Emma F. Gaston failed to use due care, and that her failure in this respect was the proximate cause of the injuries complained of. A pedestrian can be so careless that his conduct is negligence as a matter of law. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649. He must exercise reasonable care for his own safety, and in crossing between intersections must observe greater care than when using an established crossing. If he fails in the exercise of such care and thereby contributes proximately to cause the injuries, he may sustain at the hands of one having an equal right to use the highways, he has no ground for complaint. *De Nardi v. Palanca*, 120 Cal. App. 371, 8 P.(2d) 220. Section 131½ of the California Vehicle Act requires every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk to yield the right of way to vehicles upon the roadway. This cast a duty upon plaintiff herein which she failed to discharge. She testified that she watched the automobile approaching, yet she did not yield the right of way by stopping where she could

have been safe, but continued forward and actually walked into the side of the moving truck while its driver was vainly trying to avoid her. She and her husband started to cross the street under even circumstances. Each saw what the other saw. The husband was prudent and careful and escaped all harm. The wife was injured in the manner above described. The only conclusion that can be reached from the evidence is that she either failed to properly watch the oncoming automobile or that she did watch it and for some inexplicable reason walked directly up against it as its front crossed her course. Under either theory she failed to use due care, which precludes her right to a recovery. *Spring v. Tawa*, 49 Cal. App. 100, 192 P. 1051; *Horton v. Stoll* (Cal. App.) 40 P.(2d) 603.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 693

LEVENS v. STOCCO et al.

Civ. 9470.

District Court of Appeal, First District,
Division 1, California.

April 1, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Trial $\hookrightarrow$ 108½

In action for injuries sustained in automobile collision, inquiring of juror if he was interested in certain insurance company or held stock or bonds of such company held not prejudicial misconduct under circumstances disclosing that plaintiff's attorneys were warranted in concluding that insurance company was interested in outcome of suit and that plaintiff's attorneys did not know that such company had not issued stock or bonds.

Circumstances disclosed that, previous to trial, counsel for defendants stated that he represented the insurance company and that company would make payment to plaintiff as compromise settlement, that subsequently defendants' attorney stated that insurance company had authorized a payment not in excess of \$500 in settlement, but later said that the policy issued did not cover either of defendants, and that the plaintiff's attorneys stated in affidavit on information and belief that previous to trial agents

of the insurance company interviewed witnesses to the accident and employed counsel who represented the defendants.

2. Trial $\Leftrightarrow$ 108½

Prospective jurors may be asked if they are interested in any insurance company, if question is propounded in good faith, and, where trial court denies motion for new trial based upon ground of misconduct of plaintiff's attorney, trial court must be deemed to have concluded that questions were asked in good faith.

3. Damages $\Leftrightarrow$ 132(1)

\$2,800 for permanent disfigurement of face and painful internal injuries *held* not excessive.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Oscar Levens against Steve Stocco and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Cornish & Cornish, of Berkeley, for appellants.

Elliott Johnson, Jesse E. Nichols, and George R. Vaughns, all of Oakland, for respondent.

PER CURIAM.

Plaintiff was injured in a collision between an automobile, in which he was a passenger and a truck operated by defendant Stocco, who was then in the employ of defendant Frosini. The jury returned a verdict in plaintiff's favor in the sum of \$2,800. Defendants moved for a new trial, which was denied, and they have appealed from the judgment entered on the verdict.

As the ground for their appeal, they contend that plaintiff's counsel was guilty of prejudicial misconduct by inquiring of a prospective juror as to his interest in a particular insurance company.

[1] The juror was asked if he had any interest in the State Farm Mutual Auto Insurance Company or was a holder of the stock or bonds of that company, to both of which questions he replied in the negative. Defendants objected to any inquiries in that connection, and moved that the court declare a mistrial. The motion was denied, following which the court instructed the jurors that they were not concerned with the question of insurance, that there was and would be no evidence that either party was in-

sured, and that no insurance company was involved in the action. The alleged misconduct was made a ground for defendants' motion for a new trial, at which time one of plaintiff's counsel filed an affidavit, alleging in substance that previous to the trial defendants' counsel stated that he represented the insurance company mentioned, and that the company would make a payment to plaintiff as a compromise settlement of the latter's claim if a satisfactory amount could be agreed upon; that subsequently defendants' attorney stated that the insurance company had authorized a payment not in excess of \$500 in settlement, but later said that the policy of insurance issued by the company covered one Cesar Frosini and not the defendants. The affiant further averred on information and belief that, previous to the trial, agents of the company interviewed witnesses to the accident, and employed the attorneys who represented the defendants. These allegations were not controverted nor was bad faith charged, but it was averred in an affidavit filed by defendants that the company was a mutual company, having no outstanding stock or bonds, and that defendants were not insured therein at the time of the accident.

The above facts were sufficient to warrant the conclusion by plaintiff's attorneys that the company was interested in the outcome of the suit. If they so believed, they were justified in asking the questions of which defendants complain. There is nothing in the record to support the conclusion that they knew that the company had issued no stock or bonds or that their questions were not asked in good faith.

[2] It is the rule that prospective jurors may be asked if they are interested in a specified casualty company or generally in any insurance company, if the question be propounded in good faith (*Arnold v. Cal. Portland Cement Co.*, 41 Cal. App. 420, 426, 183 P. 171; *McVea v. Nickols*, 105 Cal. App. 28, 33, 286 P. 761; *Dermer v. Pistoiresi*, 109 Cal. App. 310, 293 P. 78); and, where the trial court denies a motion for a new trial, based upon the ground of misconduct of plaintiff's attorney, it must be deemed to have concluded that the questions were asked in good faith (*Aydrott v. Key System Transit Co.*, 104 Cal. App. 621, 286 P. 456; *Wieck v. Hockett*, 115 Cal. App. 600, 2 P. (2d) 476), and that no prejudice resulted therefrom (*Lafargue v. United Railroads*, 183 Cal. 720, 192 P. 538).

[3] The evidence clearly shows that plaintiff, in addition to a permanent disfigurement of his face, received painful internal injuries, and, in view of the facts, the damages awarded were not excessive.

The conclusions of the jury were fully sustained by the evidence, and nothing appears which would justify the conclusion that the denial of the motion for a new trial was an abuse of discretion.

The judgment is affirmed.



GERBERICH et al. v. SOUTHERN CALIFORNIA EDISON CO., Limited. *

Civ. 9468.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1935.

Rehearing Granted April 25, 1935.

Opinion Adhered to May 29, 1935.

Rehearing Denied June 20, 1935.

1. Trial ☞178

Directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support a verdict for plaintiff.

2. Automobiles ☞308(9)

Where automobile guest was killed when automobile collided with pole located on dirt portion of highway under franchise providing that location of pole should not interfere with use of highway for travel, whether pole was being negligently maintained at time of accident held for jury, in suit against owner of pole for death of guest.

3. Automobiles ☞308(10)

Where automobile guest was killed when automobile collided with pole located on dirt portion of forty-foot highway when driver in nighttime attempted to pass preceding automobile, whether driver was negligent and whether such negligence was proximate cause of accident held for jury, in suit against owner of pole for death of automobile guest.

4. Negligence ☞61(2)

Where original negligence continues and exists up to time of injury, concurrent negligent act of third person causing injury will not be regarded as an independent act of

negligence, but two concurring acts of negligence will be held to be proximate cause of injury.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Suit by George C. Gerberich and others against the Southern California Edison Company, Limited. From a judgment for defendant, plaintiffs appeal.

Reversed.

Leonard E. Thomas and Harold A. Jones, both of Los Angeles, for appellants.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiffs sued to recover damages for alleged wrongful death of their daughter. At conclusion of the testimony the trial court directed the jury to return a verdict in favor of defendant, and from judgment entered thereon plaintiffs appeal.

At about 9:30 o'clock on a Sunday evening in midsummer deceased was riding with a young man in the rumble seat of an automobile driven by one Renne. The party consisted of two couples from seventeen to nineteen years of age, on their way to the beach. They proceeded south on Alameda street to a point opposite the intersection of Gage avenue (which latter street was not cut through on the west side of Alameda where the accident occurred), and there collided with a pole erected and maintained by defendant in the dirt portion of the highway, causing injuries which resulted in the death of deceased.

Alameda street consisted of a concrete pavement 24 feet wide, flanked on each side by a 2-foot strip of macadam and unpaved the balance of the width of the highway, which was a total of 40 feet except for an added 20-foot strip on the west side, starting at a point opposite the north curb of Gage avenue and extending about 120 feet south. The pole was 1.3 feet in diameter and its center was placed 6 feet from the edge of the concrete, or 4 feet from the edge of the macadam shoulder, and slightly north of a point opposite the prolongation of the south curb of Gage avenue. The pole was black, unmarked, and bore no light. It was a "junction pole," erected to support wires running north and south on Alameda and east on Gage.

There was evidence that the dirt portion of the road, including the 20 feet additional width at that point, was frequently traversed

on both sides of the junction pole when traffic was somewhat congested. The nearest street light was at the next corner. The pole could ordinarily be seen at night by a driver going south, when within 25 to 30 feet of it. North of the pole a few feet was a post painted white and bearing a sign to direct motorists entering Alameda from Gage avenue.

As Renne's car, going south, approached the intersection of Gage avenue, he swung to the left to pass another south-bound car. As he came abreast of it, a third car entered Alameda from Gage, making a left turn to go south. To avoid hitting this third car, Renne swung back sharply to the right, then to the left, and back to the right, running onto the dirt shoulder on the west side of Alameda and going about 40 feet ahead on the dirt until he hit the pole.

Motion for directed verdict in favor of defendant was granted on the following grounds: "First: That the evidence shows no negligence on the part of the defendant Southern California Edison Company. Second: That the evidence shows, without conflict, that the death of plaintiffs' daughter was caused solely by the negligence of the driver of the car in which she was riding. Third: That the evidence shows, without conflict, that the defendant maintained the pole that was struck under an easement that was superior to the right of the public to use Alameda Street as a public highway, and that any use of that street as a public highway by the deceased, or by the driver of the car in which she was riding, was subject to defendant's right to maintain this pole at the place where it was located, and that, insofar as her death resulted from the automobile striking the pole, such a collision was in the nature of a trespass upon the property of this defendant, to-wit: the pole, at the place where the defendant had the unqualified right to maintain the pole. Fourth: That the evidence shows, without conflict, that the defendant was in the ownership and exercise of a franchise granted by the County of Los Angeles, permitting it to maintain poles along the county highways of said county, and that the pole struck by said Renne was maintained under and in accordance with the terms of said franchise, and therefore affords a complete defense to this action."

[1] "A directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a

determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given'. * * * Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." In re Estate of Flood, 217 Cal. 763, at page 768, 21 P.(2d) 579, 580.

[2] Evidence was presented showing that predecessors in interest of defendant had run lines over this land as early as 1904, the street being dedicated in 1907. A franchise was later obtained by defendant from the county of Los Angeles, and it was stipulated that they operated under it. The franchise provided among other things that in the maintenance of defendant's equipment "no part of said system or the appliances or attachments thereto shall be so located as to interfere with the use of the highway for travel." While it appears that the defendant under the franchise was lawfully entitled to run its lines over part of the highway, there is nothing in the evidence nor in the cases cited which would support its suggestion that it was enjoying its easement by virtue of a right "superior to the easement of the public for highway purposes." The question of law as to whether defendant was legally authorized to install and maintain such a pole could properly be determined by the court; but the issue as to whether or not the pole was being negligently maintained at the time of the accident was properly a question of fact for the jury. Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481. We cannot say as a matter of law that defendant was not negligent in the manner in which it maintained the pole, nor is it within our province to express an opinion as to the finding of fact which the jury might make on this issue. See Stewart v. San Joaquin L. & P. Co., 44 Cal. App. 202, 186 P. 160, and Lim Ben v. Pacific G. & E. Co., 101 Cal. App. 174, 281 P. 634.

[3, 4] The questions whether the driver Renne was negligent and whether such negligence, if any, proximately caused the accident are likewise for the jury. When "an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in de-

termining the proximate cause (45 O. J. 897-925)," and "whenever the standard of duty is not fixed and there is introduced substantial evidence on the subject of proximate cause it is a question of fact for the jury." Lacy v. Pacific G. & E. Co., 220 Cal. 97, 29 P.(2d) 781, 783. "Where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury." Lacy v. Pacific G. & E. Co., supra.

Since the questions as to the negligence, if any, of defendant and of Renne, and as to whether either or both constituted the proximate cause of the accident and the death of deceased were matters of fact which the jury should determine, the motion for a directed verdict should have been denied and the case submitted for their determination.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

On Rehearing.

After exhaustive reconsideration upon rehearing we adhere to our original opinion.



WALTON v. SOUTHERN PAC. CO. *
Civ. 9257.

District Court of Appeal, First District, Division 1, California.
March 22, 1935.

Rehearing Granted April 20, 1935.

1. Judgment ⇨585(3)

Judgment of nonsuit in action for injuries by employee against railroad under Federal Employers' Liability Act and Federal Boiler Inspection Act *held* not to bar subsequent action for wrongful death of employee by administratrix against railroad under same acts; causes not being identical as to measure of damage (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

2. Trial ⇨349(2)

Submission of special issues is within trial court's discretion.

3. Action ⇨48(2)

Commerce ⇨8(4, 6)

Causes of actions may be brought jointly under Federal Employers' Liability Act

and Federal Boiler Inspection Act, and such actions are governed by federal laws (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

4. Master and servant ⇨276(1)

Evidence *held* not to show that hostler's assistant was engaged in interstate commerce when injured while fueling engine preparatory to its use for switching purposes of interstate and intrastate character, precluding recovery for his wrongful death under Federal Employers' Liability Act (Federal Employers' Liability Act, 45 USCA §§ 51-59).

5. Statutes ⇨225

Federal Employers' Liability Act passed in 1908, and Federal Boiler Inspection Act passed in 1911 and amended in 1915, cannot be construed as in *pari materia*, as respects period of limitations applicable to action for wrongful death (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

6. Commerce ⇨8(6)

State statute of limitations, and not period of limitation in Federal Employers' Liability Act, *held* applicable to action for wrongful death under Federal Boiler Inspection Act which contains no period of limitation, where violation of Federal Employers' Liability Act was not shown because employee was not engaged in interstate commerce (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.; Code Civ. Proc. § 340, subd. 3).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Leila Mae Walton, administratrix of the estate of James C. Walton, deceased, against the Southern Pacific Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Arthur B. Dunne, Dunne & Dunne, all of San Francisco, for appellant.

Clifton Hildebrand and Thomas F. McCue, both of San Francisco (Erwin P. Werner, of Los Angeles, of counsel), for respondent.

McNUTT, Justice pro tem.

Plaintiff, the administratrix of Walton, deceased, sued in her own behalf and in that of her two minor children, for the wrongful death of the husband and father, resulting from injuries sustained by him as an em-

ployee of defendant, a common carrier in interstate transportation. Defendant has appealed from the judgment of \$12,500 entered upon verdict in her favor.

[1] Intermediate the institution of the instant action and the occurrence of the accident Walton had sued in the federal court for damages for the injuries sustained by him in the accident of March 25, 1930. This case was tried with a jury, the Hon. Frank H. Kerrigan, judge of said court, presiding. His complaint was in two counts: (1) Under the Federal Employers' Liability Act (45 USCA §§ 51-59); (2) under Federal Boiler Inspection Act (45 USCA § 22 et seq.). The defendant, by answer, made certain denials and pleaded affirmative defenses.

At the conclusion of plaintiff's presentation, defendant offering no evidence, it moved for a directed verdict.

Appellant herein contends that the record shows said motion to have been granted by the trial court and sustained by affirmance of the judgment, October 14, 1931, in *Walton v. Southern Pacific Co.*, 53 F.(2d) 63 (C. C. A. 9). Respondent urges, however, that the record reveals no more than the granting of a nonsuit, and hence, that there would appear to have been no meritorious adjudication.

At 599a, reporter's transcript, as a part of the judgment in the Circuit Court of Appeals, we find: "At the close of the appellant's case, the appellee moved for a directed verdict. The motion was granted by the trial court, and 'a judgment of nonsuit' was rendered accordingly on February 25, 1931. On that day the plaintiff—appellant—was allowed 30 days in which 'to settle and allow a bill of exceptions.'" It appears that in the trial of the instant case, appellant herein offered to put in evidence the record of the trial in the federal case. However, the record herein does not disclose what it may have contained other than the quoted excerpt from the appellate court opinion, which cannot be read as more than a judgment of nonsuit which is no bar to a subsequent action on the same case. *Mohn v. Tingley*, 191 Cal. 470-478, 217 P. 733.

Furthermore, the causes are not identical as to measure of damage; the instant differing from the original case. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417; *Louisville & N. Ry. Co. v. Holloway*, 246 U. S. 525, 38 S. Ct. 379, 62 L. Ed. 867.

The complaint in the suit at bar was in three counts, in each of which plaintiff sues

as administratrix of the estate of Walton, deceased, and the parties for whose benefit she sues and the defendant, respectively, are identical. Count No. 1 proceeds upon the Federal Employers' Liability Act and alleges that decedent and defendant were both engaged in interstate commerce at the time of the accident in question, and then sets forth with particularity the negligence of the defendant due to which the decedent was injured. Count No. 2, grounded upon a violation of the Federal Boiler Inspection Act, alleges with particularity the violations of such act it is alleged as occasioned the injury. Count No. 3, as amended, purports to charge violation of the Federal Employers' Liability Act, alleging negligence in more general terms, with a view to invoking the doctrine of *res ipsa loquitur*.

The answer admits the death as alleged, admits that as to some of its activities defendant was a common carrier by railroad engaged in interstate commerce, but denies that it was so engaged in respect to the matters referred to in the complaint; denies that the decedent was at any time or place as pleaded engaged in interstate commerce; admits the matter of his death; admits the control of the engine through its agents alleging decedent to have been one of them. Other material allegations as to the effects or casualty between them and the accident and the death are denied.

Motions for nonsuit and for directed verdict were severally made as to each count, and as to the theory upon which such count proceeded. These motions were severally denied.

[2] Appellant assigns error in the court's refusal to submit certain special issues; this lay within the trial court's discretion and no abuse appears.

The Federal Employers' Liability Act is a negligence statute and fastens upon a railroad engaged in interstate commerce liability in damages to a person injured while employed by a railroad in such commerce, and gives, in the event of his death, an action for the benefit of the surviving husband or wife and children of such employee, where such injury or death results in whole or in part, from the negligence of the carrier, or its agents, or by reason of any defect or insufficiency due to its negligence in, among other things, its engine, appliances and machinery. It deals as well with the effect of contributory negligence, assumption of risk and limitation of action.

The Federal Boiler Inspection Act (like the Federal Safety Appliance Act, 45 USCA § 1 et seq.) contains no provision dealing with actions for death, contributory negligence, or limitation of actions, nor does it require, in order that its violation may be invoked, that the employee be engaged in interstate commerce.

[3] Causes of actions may be brought jointly under the Employers' Liability Act and the Boiler Inspection Act, and it has been held that such actions are governed by federal laws. *Kidd v. Chicago, etc., R. Co.*, 310 Mo. 1, 274 S. W. 1079; *certiorari denied* 269 U. S. 582, 46 S. Ct. 119, 70 L. Ed. 424; *Gerow v. Seaboard Air-line Ry.*, 189 N. C. 813, 128 S. E. 345; *certiorari denied* 269 U. S. 584, 46 S. Ct. 121, 70 L. Ed. 425.

[4] At 4 o'clock in the afternoon, March 25, 1930, the decedent James O. Walton received injuries which resulted in his death when an engine which he as an employee of appellant was supplying with fuel at its roundhouse, at its yard in Colton, Cal., unexpectedly backed, throwing him from his position on the tender and against the cab. Walton was a hostler's assistant. The engine 2604 had been spotted by Lord, the hostler, at the oil column to take in fuel. Lord left the cab to supply the engine with water. At that time Walton saw one Roxie climb into the cab and take the fireman's seat. Roxie was an engine watchman. Walton, as his duty required, watched the oil flowing into the tender so as to prevent it running over. While so engaged the engine suddenly ran backwards as Walton testified on his first trial, 14 feet, and as Lord admitted, 10 feet. Walton was thrown against the oil column, back against the engine of the cab and injured. After a brief period of unconsciousness he was taken to the hospital, and died as a result of the injuries.

The witness German, for plaintiff, testified: That at the time of the accident he was employed in said yard, was one of the crew that took 2604 out at 11 o'clock p. m. of the day of the accident; that the first work the engine did that night was to switch a train known as 98, the Phoenix Manifest, which was bound for Tucson, El Paso, and Phoenix, Ariz.; that he switched cars that were marked to go through to Phoenix; that the next switching job performed by the engine was to break up and switch a train known as the "Pick-up," bound for Yuma, Ariz., and points east; that about 3 o'clock in the afternoon of the day of the injury the witness, on coming by the roundhouse, had

happened to notice on the bulletin board that 2604 was assigned for 11 p. m.; that the purpose of the switching crew is making up and breaking trains.

Counsel stipulated that Colton is a station on appellant's line and also a part of the main line running out of Los Angeles and across the Arizona borders; that it is a switch yard wholly within this state; that in the normal course of business switching movements are made of both interstate and intrastate character; that 2604 was assigned to such yard to be used indiscriminately in interstate and intrastate commerce; that on the day of the accident on the morning shift which had begun at 7 a. m. and was to finish at 3 o'clock but, due to a little overtime, finished a few minutes later, 2604 had handled indiscriminately interstate and intrastate switching operations, and, further, subject to appellant's objection that it was irrelevant, incompetent, and immaterial, that from 11 p. m. on March 25, 1930, until the end of that shift which would be 7 a. m. March 26th, 2604 was again engaged in similar, that is to say, in switching operations, indiscriminately interstate and intrastate.

Witness Schwartz testified that 2604 was used indiscriminately to switch cars coming into the state and cars going to points beyond the state and as well cars coming from points beyond the state. "It was used for general yard work."

"Q. Then that would include switching cars both interstate and intrastate in character? A. It would."

On the following morning, 25th to 26th, it switched a car east bound as far as Chicago; that engines of either trains are spotted for oil and water at the column in question and are inspected and refilled on track No. 2. It was further stipulated that at times the track in question is used as a highway for interstate commerce.

Lord, the hostler, testified that he was a Southern Pacific fireman; that Walton had several jobs, part of his duty being to assist the witness; that the witness was in charge of 2604 when Walton was hurt; that the witness, among others, excluding Walton, had authority to move engines, but before he spotted the engine and left the cab he shut off the throttle; that when the engine backed eight to ten feet no bell or whistle was sounded, and that he left the engine in charge of no one authorized to move it; that when the engine was so left the throttle was left so completely closed that no steam could get from the boiler to the cylinders and no

steam was coming from the boilers into the cylinders. This testimony of Lord, plaintiff's witness, is the only direct testimony in the case bearing upon the question as to whether steam could get from the boiler into the cylinders.

The testimony which Walton had given in the district court case was read over objections of appellant. He was first employed by the Southern Pacific Company August 15, 1929, as an extra about the Colton roundhouse doing whatever the foreman directed. About January 1st he was informed that he would be hostler's helper, in which capacity he worked until injured between 3:45 and 4 p. m. March 25, 1930. His duties were to take engines around the wye, fuel and water them, and fill lubricators. On March 25th he was preparing 2604 for the next shift it went out on. Lord was hostler in charge. Switching crew had used 2604 in switching operations that day. Walton got on front of engine, gave Lord signal to back, he spotted it at the sand dome, witness put in sand, then walked back across top of engine and cab to the oil tank, gave him signal to back and spot for oil and water. When Lord spotted the engine he was in engineer's seat pulling throttle. When spotted, witness pulled oil beam over, opened manhole, put telescope into manhole, and turned on the oil. Lord left nobody in charge of engine. Witness turned around and saw that Roxie climbed into cab and sat in fireman's seat. While oil was being taken the engine moved back cutting off the oil supply, oil beam struck witness in the chest and knocked him across the cab. He was unconscious for about a minute, and on coming to looked about, Lord was gone, he remembered no more. And that on March 22, 1930, and while the boiler was closed tight, 2604 moved backwards; that if throttle had been shut off, and the same and other parts were in proper condition and working order, and reverser on center engine would not have moved.

Respondent (brief, p. 7) asserts that the record shows 2604 was actually assigned to this interstate switching purpose at 3 o'clock p. m. on the day Walton was injured, and that this engine did interstate switching on that next assignment. This statement is not justified. The testimony of the witness German goes no further than does the stipulation of the parties, namely, that the engine was to go out at 11 p. m. in connection with switching operations.

One Loftus, a discharged fireman, testified that in March, 1930, and for nearly twelve

years, he had been an S. P. fireman, a hostler, and had worked in the roundhouse before becoming fireman. He knew engine 2604. In the early part of 1930, including March, he had worked on the extra board, did not witness the accident; had worked on 2604 the last time two or three days before Walton was hurt, and before that in March as fireman and hostler. Within a few days before March 25th the engine had a leaky throttle; that it had a leaky throttle after the accident; had a tendency to walk away of its own accord, to move, cylinders filled up with steam which leaked down into the pistons, causing them to work the driver; the steam having been exhausted through leakage, the engine would stop; imagines it walked twelve to fifteen feet; had seen it move of its own accord several times; moved because cylinder filled up with steam due to leaky throttle; condition of engine not different after the accident; if brakes were set they would hold it.

On cross-examination witness said he could not possibly be mistaken about these events; that the only times when he saw 2604 move of its own accord was when he was in the yard and as a fireman was working on it; that he worked two or three days before March 25th; that he does not believe that the last time he worked was March 7th. He said he was familiar with the main line register which (starting March 9th) was shown him. On that day he worked on 2616. It shows 2604 worked next day, and that he had signed the register which does not show that he worked on 2604. On March 9th he signed up on 2616, again on March 11th, again on March 16th. On March 9th, fireman on 2604 was Ward, the same on 10th. The book received in evidence shows no work for Loftus on 2604 from March 7th until late in April. Witness examines the book, does not find therein that he worked on 2604. He says at times he saw it move; contends that he was a fireman when he saw it move. His signature shows that he worked as fireman on 2681 on March 26th, 27th, 28th, 29th, and on 30th without engine number, and says that from the 26th to the 30th he was working on 2681 and did not work on 2604 after the accident within two or three days.

A statement that had been signed by him September 27, 1930, was exhibited to him. (Exhibit 5.) It shows, among other things: "I do not recall any defects on this engine. I do not remember any time that this engine moved off of its own accord. I never heard of this engine running away. I never had any trouble with this engine as to a defec-

tive throttle. I never heard of this engine or any other engine moving off of its own accord. * * * I have no recollection that this engine had a leaky throttle while I was working on it."

Many witnesses testified for defendant as to condition of the engine in question, the result of which shows that it had always been inspected before the accident, that its throttle had never leaked, that the inspection was made after the accident and no leaky throttle existed.

Was the deceased employee when injured engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it? He was not on the engine when it did any switching work on its night shift, because of his injuries. 2604 was not a regularly assigned interstate road engine. It was used indiscriminately for switching purposes of either character, and it was to be used that night in shifting cars in intrastate and interstate movements. It was being fueled preparatory to such general use when he was injured. Does the fact that the first car that it switched that night was one in an interstate movement give color to the purpose for which the engine was being prepared for use as one looking to interstate transportation; or, since it is a stipulated fact that the engine was being prepared for general use, either interstate, intrastate, or both, is its first actual later movement wholly adventitious? So far as this record is concerned it is circumstantial and accidental that the first car that it moved in switching operations that night was an interstate car.

If 2604 was not by predesignation an interstate engine it would not become such from the mere fact that the first car it switched that night was an interstate car; hence fueling engine was not employment in interstate transportation.

It follows that if the engine was not to go into interstate transportation because it was being prepared for general use, the inquiry is ended and there was no room for the operation of the Employers' Liability Act.

Minneapolis & St. Louis Railroad Company v. Winters, 242 U. S. 353, 37 S. Ct. 170, 171, 61 L. Ed. 358, Ann. Cas. 1918B, 54, presented a case in which plaintiff was injured while making repairs to an engine. The engine "had been used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." It had pulled

a freight train into the town where plaintiff was injured three days before the accident, and pulled one out of the same place on the day of the accident. The court said: "That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

In Onley v. Lehigh V. R. Co., 36 F.(2d) 705 (O. C. A. 2), certiorari denied 281 U. S. 743, 50 S. Ct. 349, 74 L. Ed. 1156, a brakeman working on a switching crew was injured after having oiled an engine, while testing a fire hose. The defense was that plaintiff was not engaged in interstate commerce. It was conceded that plaintiff and the engine had been engaged during the morning in interstate switching part of the time and intrastate switching part of the time, and that but for the accident he would have been working in the afternoon doing such switching as might have been required. "The future is barren of assistance, for he was not employed in preparing for some definite movement, so that his work was a necessary incident of it, and became of like character with it; and nothing is known but that the plaintiff, and we may assume the engine, would have, in the ordinary course of events, done such switching as would have been required. We do not know what would have been required, except that it might have been wholly interstate switching, wholly intrastate, or partly both."

The cases cited in the briefs are myriad, so that an extensive analysis of them would be impossible. However, the Supreme Court of this state, in the case of Mappin v. Atchison, Topeka, etc., Railway Company, 198 Cal. 733, 247 P. 911, 914, 49 A. L. R. 1330 (not cited in any briefs), lays down the principles by which the character of commerce in which the employee was engaged is to be ascertained. The United States Supreme Court de-

nied certiorari. 273 U. S. 729, 47 S. Ct. 239, 71 L. Ed. 862. The facts of the Mappin Case differ in essential particulars from those in the instant case. In the former, a member of the switching crew was injured during the switching operation; while here no switching operation was in progress. In the Mappin Case the switching crew was in the act of making and breaking up trains in the company's yard at San Francisco. The immediate train comprised of thirteen cars, three of which not only originated as to transportation outside of California, but one of them, though empty, had actually begun its homeward movement in conformity with the rules and customs of carriers, while others were in the course of movement to designated places to receive freight for points outside the state when the injuries occurred. Speaking of one of the cars, the court said: "It had been selected by the yard master for such loading, and had been designated for that purpose. Its designation was to 'Block 6' in the freight house of the defendant, which was the place from which freight destined to Arizona points was to be loaded upon cars. * * * It was in course of movement to its thus designated place for its thus predesignated purpose when the injuries to Mappin occurred."

The court then distinguishes *Chicago Junction R. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647, 648, relied upon by appellant railroad as indicating that the employment of Mappin was not in interstate transportation. In said case deceased employee was one of the switching crew moving some fifteen empties from the shops to the storage tracks in the carrier's freight yards when he was injured in the course of such removal. Eleven of these cars after the accident were taken to the storage tracks, re-iced, and on the same day moved by another crew to loading tracks and were filled with interstate freight. The opinion of the court expressly recites (says our Supreme Court): That up to the time of the accident there had been no specific designation given as to where any particular car would ultimately go, and the court for that reason held that the cars were not, at the time of decedent's injury, engaged in interstate commerce, and the court in that case says: "It has been held that, if the object of a switching movement is the placing of an empty car in a position to receive a load to be carried out of the state, the car is engaged in moving interstate commerce from the moment the switching movement begins." (Citing cases.)

The record here shows merely that the night shift involved the same character of work as the finished day shift; namely, whatever switching work presented itself, intra or interstate, and for aught that appears, the fact that the first car that it switched that night was interstate in character, is purely a circumstance and it was not work predesignated or predetermined while the fueling operation was in progress.

There are many cases cited in the briefs which deal with injuries received while the employees were working upon property dedicated to interstate commerce such as roadbeds and bridges, which, of course, have no application here as the yard switch engine is not, in and of itself, dedicated to any kind of commerce until specific assignment occurs.

It is therefore concluded that at the time of the injuries to the decedent he was not employed in interstate transportation or work so closely connected therewith as to become a part thereof.

Appellant contends that the second cause of action is barred by the statute of limitations for the reason that the state one-year period in a death action applies. Section 340, subd. 3, Code Civ. Proc. Late decisions support this view. *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 54 S. Ct. 402, 405, 78 L. Ed. 755 (Feb. 5, 1934). In this case action was brought in two counts: (1) Under Federal Employers' Liability Act; and (2) on the theory that plaintiff was not engaged in interstate commerce under Safety Appliance Acts and a Kentucky statute. In discussing this subject, the court said:

"In relation to injuries received in that state in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. * * * Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this court. * * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. * * * But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as

to those who should be beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence, and hence that defense was still available according to the applicable state law. (Citing the *Schlemmer* [220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596] and *Popplar* [237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000] Cases.) In these respects the amended act of 1903 made no change. * * *

"The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law * * * and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * 'The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.'"

In *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57, 54 S. Ct. 573, 575, 78 L. Ed. 1123, we find the following: "Petitioner cites language in *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 S. Ct. 482, 60 L. Ed. 874. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute'"—citing *Moore v. Chesapeake & O. R. Co.*, *supra*; *Minneapolis, St. Paul, etc., Ry. Co. v. Popplar*, 237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000. "These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from the breach."

As is said in the *Gilvary* Case, *supra*, with respect to the Safety Acts: "They do not extend to the field occupied by the State Compensation Act."

While these decisions dealt with the Safety Appliance Act, it has been held in a case under the Boiler Inspection Act, where similar questions were raised, that the fact it arose under the latter act is "a distinction

involving no different question." *Rice v. Baltimore & O. R. Co.* (C. C. A.) 42 F.(2d) 387, 392.

Respondent meets this criticism by asserting that it has been repeatedly held by the United States Supreme Court that these various acts are to be read in *pari materia*, the whole to be given effect as covering a single subject, and that consequently they are to be construed together, and cites, among other cases, *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, at page 523, 45 S. C. 169, 170, 69 L. Ed. 419, where the court said: "The action was brought under the federal Employers' Liability Act of April 22, 1908, 35 Stat. 65 and the federal Boiler Inspection Act of February 17, 1911, § 2, 36 Stat. 913, amended by Act March 4, 1915, 38 Stat. 1192 [see 45 USCA § 23]." At page 528 of 266 U. S., 45 S. Ct. 172, the court said as to section 2, *supra*, which section is part of the Boiler Inspection Act: "That act was passed to promote the safety of employees and is to be read and applied with the federal Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (section 1 [45 USCA § 51]), and he will not be held guilty of contributory negligence (section 3 [45 USCA § 53]) or to have assumed the risks of his employment (section 4 [45 USCA § 54]) if a violation of section 2 of the Boiler Inspection Act contributed to cause his death."

[5] The quoted language falls short of holding what counsel contends for, namely: That in a case such as the instant where a violation of the Federal Employers' Liability Act is not shown because there was no employment in interstate commerce, that a portion, to wit, the period of limitation of death actions found in the Employers' Liability Act, may be lifted out of that act and read into the Boiler Act which contains no period of limitation and no provision for a death action. The rule that statutes which are passed at the same time, and which touch the same subject, must be construed together as forming parts of the same statute, *Jensen v. Dorr*, 159 Cal. page 742, 744, 116 P. 553, does not apply here. 23 California Jurisprudence, page 786, § 164, states: "Contemporaneous statutes. Two acts, passed near each other in point of time, must be so construed, if possible, as to give effect to both. And where two laws are passed on the same day, in relation to the same subject-matter, they should be read together as if parts of the one act." (Cases cited.) The Liability

Act was passed April 22, 1908 (amended by Act April 5, 1910) the Boiler Inspection Act February 17, 1911, and amended in March, 1915 and June 7, 1924. It would seem that if Congress had intended that they should have more or greater interrelation than is to be found in the acts it would have so declared.

[6] Upon the whole, it appears that, notwithstanding the duty of compliance with the provisions of the Boiler Inspection Act is absolute (*Louisville & N. R. Co. v. Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931, and *Baltimore & O. R. Co. v. Groeger*, *supra*), the said act does not purport to provide remedial procedure where it is to be invoked as a ground for recovery for death, independently of its application with the Liability Act in an interstate case; but, to the contrary, in an intrastate case such as this, the state law applies.

For the foregoing reasons, it is unnecessary to discuss other assignments of error. The judgment should be reversed because a case under the Employers' Liability Act is not made out, and that under the Boiler Act is barred by limitation; the motions for directed verdicts should have been granted.

Judgment reversed.

We concur: TYLER, P. J.; KNIGHT, J.



5 Cal.App.2d 726

EARLY et al. v. FORBES.

Civ. 9593.

District Court of Appeal, First District,
Division 2, California.

April 8, 1935.

1. Landlord and tenant — 49(2)

In action for breach of lessee's covenants in lease, judgment of nonsuit *held* proper, in view of evidence that lease was canceled by mutual agreement of parties and failure of evidence to show reservation of any rights under lease.

2. Contracts — 274

Suit cannot be maintained for breach of contract canceled by mutual consent of parties before suit was commenced.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Mabel Dorn Early and others against Richard J. H. Forbes. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

C. D. Dorn and Anthony S. Devoto, both of San Francisco, for appellants.

Randolph V. Whiting, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiffs sought to recover damages for alleged breaches of certain covenants of a written lease. Among the defenses set up by defendant was that of cancellation of the lease by mutual agreement of the parties prior to the expiration of the term thereof. The cause was tried by the court sitting without a jury. At the close of plaintiffs' case, defendant made a motion for nonsuit, which motion was granted. Plaintiffs appeal from the judgment of nonsuit.

[1, 2] The property was leased to defendant by plaintiffs' predecessors in 1922, and the lease was to expire by limitation of time on March 31, 1932. Plaintiffs purchased the property in 1930. Shortly before the expiration of the lease, plaintiff C. D. Dorn, who held a power of attorney from the other plaintiffs, sought to terminate the lease prior to the time fixed by the terms thereof. In doing so, plaintiffs represented that they had leased the premises to a Mrs. Barker, but it appears that the alleged tenant was in fact acting as agent for plaintiffs and that she purchased the furnishings from defendant for plaintiffs. On March 5, 1932, plaintiff C. D. Dorn wrote defendant in part as follows: "If you deliver the house to her on the 15th I will cancel your lease as of that day and pro-rate your rent." On March 10th, he again wrote defendant acknowledging check for the pro-rated rent due to March 15th, and stated: "The pro ration is with the understanding that Mrs. Barker is to purchase your furnishings and take over the premises as of that day, and therefore also as of that day your lease on the same is canceled if the plan is consummated." It is conceded that the plan was consummated and possession was delivered to Mrs. Barker on March 15th. This action was commenced by plaintiffs about one year thereafter, and was based upon alleged breaches of the covenants to keep the premises in repair.

Appellants contend that the trial court erred in granting the motion for nonsuit, but we find no error in the ruling. While we have found no authorities directly in point on the facts before us, the following cases tend to support the action of the trial court: *Silva v. Bair*, 141 Cal. 599, 75 P. 162; *Dyer Bros. G. W. I. Works v. Central I. Works*, 72 Cal. App. 202, 237 P. 386; *Holtham v. Savory*, 72 Cal. App. 497, 238 P. 136; *Head v. Solomon*, 41 Cal. App. 6, 181 P. 807. As was said in *Head v. Solomon*, supra, 41 Cal. App. 6, at page 7, 181 P. 807, "The suit was commenced in March, 1917. If by mutual consent the parties to the contract canceled the same before that time, the suit for its breach could not be maintained."

Appellants have cited several authorities dealing with mere agreements to surrender possession rather than agreements for cancellation, but these authorities are not in point. Appellants have also cited certain cases dealing with cancellation by agreement of the parties. *Bering Mfg. Co. v. W. T. Carter & Bro.* (Tex. Civ. App.) 255 S. W. 243; *Garrett v. Danner* (Tex. Civ. App.) 146 S. W. 678; *Alabama Oil & Pipe Line Co. v. Sun Co.*, 99 Tex. 606, 92 S. W. 253. In *Alabama Oil & Pipe Line Co. v. Sun Co.*, supra, 92 S. W. 253, at page 254, 99 Tex. 606, the general rule is stated as follows: "It is true that parties to a contract may agree to cancel it, and, if there be nothing to indicate a different intention, each party will be fully discharged from all liability under such contract." See, also, *Bering Mfg. Co. v. W. T. Carter & Bro.*, supra (Tex. Civ. App.) 255 S. W. 243, at page 252; 13 C. J. p. 603; *Black on Rescission and Cancellation* (2d Ed.) § 535. Here we find nothing to indicate a different intention. There is nothing in the letters agreeing to the cancellation nor in the facts and circumstances in evidence to show that the parties intended to reserve any rights under the lease after the cancellation thereof. Appellants call to our attention certain testimony regarding a telephone conversation between respondent and appellant C. D. Dorn, which conversation took place "in the forepart of March, probably not over a week before March 15th." This testimony is not helpful to appellants. Appellant C. D. Dorn did testify that there was some discussion regarding a "complete release" and that he told respondent that he wanted to examine the property before agreeing thereto. He testified: "I would not cancel the lease without doing that." On cross-examination it appeared that he had previously examined the property, although on

direct examination he stated, "We didn't examine the property until after March 15th when I went into possession." The only thing certain about this testimony is that said appellant, who wrote the letters regarding cancellation and also testified to said conversation, used the word "cancel" in its ordinary sense implying a complete discharge of the parties from all liability under the lease. Said testimony cannot assist appellants in establishing a different intention.

As the parties agreed to a cancellation of the lease in unqualified terms, and as there was nothing in the facts and circumstances in evidence to show that it was the intention of the parties to reserve any rights under said lease after the cancellation thereof, we are of the opinion that the trial court properly granted the motion for nonsuit.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



5 Cal.App.2d 732

KELLER v. JAPES et al.

Civ. 9503.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1935.

Rehearing Denied May 3, 1935.

1. Fraud ⇨66

In action for fraud in effecting sale of land, finding that one defendant "acting by and through" second defendant misrepresented value of land was sufficient finding as to agency to render second defendant liable.

2. Fraud ⇨41, 66

In action for fraud in sale of land, pleadings and findings setting out that representations were known to be false, were made with intent to deceive plaintiff, and did deceive her and induced agreement to plaintiff's damage, held to show such willfulness and intent to injure as to authorize judgment for deceit.

3. Fraud ⇨59(2)

Measure of damages for fraud in sale of land is difference between actual value of what plaintiff received and value it would have had if representations had been true.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Eva Ruff Keller against Marion L. Japes, Walter P. Hollywood, and Nellie Hollywood. Judgment for plaintiff, and from an order denying motion to amend the conclusions of law upon the findings of fact as to last-named defendant, and to enter different judgment thereon, she appeals.

Affirmed.

Walter M. Campbell, Jr., and Walter M. Campbell, both of Los Angeles, for appellant.

Ticknor & Maxwell (by Roland Maxwell), all of Pasadena, for respondent.

CRAIL, Justice.

This appeal is from the order denying defendant's motion to amend the conclusions of law upon the findings of fact as to defendant Nellie Hollywood and to enter a different judgment thereon. The evidence is not before us.

The findings of the trial court were that Marion L. Japes, acting by and through defendants Walter P. Hollywood and Nellie Hollywood, represented to plaintiff that the property which was afterwards transferred to her was of the reasonable market value of \$12,000 without taking into consideration the improvements thereon and had been appraised by a bank in that sum, and that the property had been renting for three years without interruption at a monthly rental of \$85; whereas the facts were that the property was not worth to exceed \$8,000, and that each and all of said representations were false and defendants knew that they were false and untrue, and defendants did not believe them to be true, and they were made with the intention of deceiving plaintiff and did deceive the plaintiff and induced her to enter into the transfer of the real estate described in the complaint. The court concluded that "plaintiff is entitled to recover from the defendants Marion L. Japes, Walter P. Hollywood and Nellie Hollywood the sum of four thousand (\$4,000.00) dollars," and gave judgment accordingly.

[1] It is defendant's first contention that she was not a party to the contract, nor the

agent of either party, and hence could not be guilty of fraud. The finding of the trial court that "defendant Marion L. Japes, acting by and through * * * Nellie Hollywood, represented to plaintiff," etc., is a sufficient finding as to agency.

[2] Defendant's next contention is that no allegation of willful deceit on the part of defendant was made by plaintiff or found by the court against defendant, and hence she is not liable as for deceit. We shall not enter into a discussion of the necessity for such a finding for the reason that an inspection of the record does not sustain defendant's contention in this regard. The complaint alleged and the court found "that each and all of said representations made by said defendants were and are false and said defendants knew that each and all of said representations were false and untrue and said defendants did not believe the same to be true," and "that each and all of said representations were made with the intent of deceiving plaintiff and did deceive plaintiff and did induce her to enter into said agreement and transfer said property," and "that by reason of the aforesaid fraudulent representations plaintiff has been damaged in the sum of four thousand (\$4,000.00) dollars." Defendant contends that "willfulness and intent to injure are necessary elements of a charge of deceit as such." It would be interesting to ask what findings of fact would more clearly show willfulness and intent to injure. We are satisfied that both the pleadings and the findings are sufficient to hold the defendant in an action as for deceit.

[3] Defendant's third and final contention is that the wrong measure of damages was applied. In California, in an action of this kind, a person so defrauded in the exchange of property is entitled to recover the difference between the actual value of what he received and the value which it would have had if the representations had been true. *Hines v. Brode*, 168 Cal. 507, 143 P. 729, and numerous cases cited in 12 Cal. Jur. 843 et seq. This was the measure of damages applied by the trial court. There is no merit in any of defendant's contentions.

Order affirmed.

We concur: STEPHENS, P. J.; WILLIS Justice pro tem.

5 Cal.App.2d 544

PEOPLE v. PAPPENS.

Cr. 1813.

District Court of Appeal, First District,
Division 1, California.

March 28, 1935.

Rehearing Denied April 12, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

1. Infants ⇨20

Prostitution ⇨4

In prosecution for contributing to delinquency of minor and for pandering, disallowing cross-examination of girls whereby accused sought to show that girls knew that they were violating law by engaging in prostitution and that they could be prosecuted therefor *held* not error, since such knowledge on girls' part could not exculpate accused from responsibility for her criminal acts (St. 1911, p. 9, § 1).

2. Witnesses ⇨372(2)

In prosecution for contributing to delinquency of minor and for pandering, cross-examination of girls whereby accused sought to show that girls knew that they were violating law by engaging in prostitution and that they could be prosecuted therefor *held* not permissible on ground that testimony would tend to affect their credibility as witnesses, where court and prosecuting attorney informed accused's counsel that there would be no objection to cross-examination of girls as to whether they had been promised immunity or leniency, and counsel refused to ask questions upon that subject (St. 1911, p. 9, § 1).

3. Witnesses ⇨344(1)

Witness may not be impeached by evidence of particular wrongful acts, and it is improper to cross-examine with reference to such matters except that it may be shown that witness has been convicted of a felony (St. 1911, p. 9, § 1).

4. Infants ⇨20

Prostitution ⇨4

In prosecution for contributing to delinquency of minor and for pandering, questioning whereby accused sought to show that girl during her residence in city lived part of time under assumed name at different places with man as his wife *held* properly disallowed (St. 1911, p. 9, § 1).

5. Infants ⇨20

Prostitution ⇨4

In prosecution for contributing to delinquency of minor and for pandering, testimony that younger girl lived at different places and that some of changes were made at instance of older girl, object of which testimony was

to show that immoral activities of younger girl were not due to accused's persuasion, *held* properly excluded, where accused was charged with procuring place in house of prostitution for girl and permitting her to remain there, and as to who encouraged girl to become a prostitute was immaterial (St. 1911, p. 9, § 1).

6. Prostitution ⇨1

Under statute prohibiting pandering, it is crime to procure for female a place in house of prostitution as well as to persuade female to become inmate of such house (St. 1911, p. 9, § 1).

7. Infants ⇨20

Prostitution ⇨4

In prosecution for contributing to delinquency of minor and for pandering, hospital records showing that on certain date girl was treated for sexual disease *held* properly excluded, where date of hospital treatment did not conflict with dates of specific acts accused was charged with having committed and effect of evidence, if admitted, would have operated to accused's prejudice (St. 1911, p. 9, § 1).

8. Criminal law ⇨770(2)

Instruction *held* not erroneous on ground that concluding sentence was in effect a peremptory challenge to convict, and there was no corresponding instruction ending with peremptory challenge to acquit, where entire instruction was hypothetical in its wording and was not misleading in its entirety.

9. Criminal law ⇨1037(1)

Objection to alleged prejudicial argument and conduct of assistant district attorney could not be made for first time on appeal.

10. Indictment and Information ⇨159(3)

In prosecution for contributing to delinquency of minor and for pandering, permitting district attorney at conclusion of evidence to amend information by inserting correct dates on which it was alleged acts constituting crimes were committed *held* not error, since allegation of particular days of month on which acts constituting crimes were committed was not important so long as it appeared that they were committed prior to filing of information (St. 1911, p. 9, § 1; Pen. Code, § 1008).

11. Criminal law ⇨1167(4)

In prosecution for contributing to delinquency of minor and for pandering, permitting amendment of information at conclusion of evidence by inserting correct dates on which it was alleged acts constituting crimes were committed *held* not prejudicial, where counsel made no application for continuance because of amendments and failed to point

out on appeal wherein accused was prejudiced by amendments (St. 1911, p. 9, § 1; Pen. Code, § 1008).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Marie Pappens was convicted of contributing to the delinquency of a minor and of pandering, and she appeals.

Affirmed.

Chellis M. Carpenter, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Selbert L. Sifton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Two informations were filed against the appellant, Marie Pappens, each containing four counts, two charging the crime of contributing to the delinquency of a minor, and two charging the crime of pandering. The informations involved different girls, aged seventeen and sixteen years, respectively. The causes were consolidated for trial, and a jury found appellant guilty on each of the eight counts. Execution of sentence was suspended in one case and concurrent sentences of imprisonment in the female department of San Quentin prison, at Tehachapi, were imposed in the other. From said judgments of conviction and the orders denying her motions for new trial, she has taken this appeal.

The sufficiency of the evidence to sustain the convictions is not questioned, and therefore only so much thereof will be narrated as will be necessary to make clear the legal points urged for reversal. It appears therefrom that appellant conducted two places in San Francisco known as the Dahlia Hotel and the Asia Hotel, which were used partially or wholly for the purposes of prostitution. The latter hotel was located in the so-called oriental district, and was frequented by Filipinos, Chinese, and other orientals. The girls involved in the cases arrived in San Francisco from San Pedro early in January, 1934. They were practically penniless, and soon after their arrival they came in contact with appellant, through whose instrumentality they were placed in these houses as prostitutes. The older girl had been an inmate of the Asia Hotel before, during the preceding June, but the younger girl had never before practiced prostitution; and appellant placed her in the oriental district. Later this girl attempted suicide, and was taken to the detention home, and the disclosures she made there led

to a police raid on the Asia Hotel. Among those arrested were the older girl, a maid employed by appellant, and two patrons. While the raid was in progress, the maid phoned appellant; consequently appellant was waiting at the entrance of the jail when the police arrived with those under arrest, and she furnished bail for the immediate release of the maid and the two patrons, but not for the girl. She told her not to worry, that she would obtain her release the next morning. The following day she again visited the girl at the city prison and told her that she, too, was about to be arrested, that the younger girl had revealed everything to the authorities, and the older girl was instructed to deny having any acquaintanceship whatever with the younger girl. Eventually, however, the older girl, too, unfolded the entire story of appellant's activities.

[1, 2] Appellant's first point relates to the rulings of the trial court sustaining objections to the questions asked by counsel for appellant on cross-examination of the two girls, whereby appellant sought to show that the girls knew they were violating the law by engaging in acts of prostitution and that they could be prosecuted therefor. We find no error in the rulings. Obviously such knowledge on their part could not exculpate appellant from criminal responsibility for the illegal acts she was charged with having committed. Counsel contends, however, that the testimony would have shown "a state of mind" on the part of the girls tending to affect their credibility as witnesses, in that the jury might infer therefrom that the girls would likely swear falsely against appellant in order to escape being prosecuted for the offenses they had committed. The answer to this contention is that both the trial court and the assistant district attorney repeatedly informed counsel there would be no objection to cross-examining said witnesses fully as to whether either had been promised immunity from prosecution, or that leniency would be extended if they were prosecuted; and counsel expressly refused to ask any questions upon that subject. The portion of the decision in *People v. Pantages*, 212 Cal. 237, 297 P. 890, relied on by counsel in support of his contention is not in point, for the reason that it is based on facts essentially different from those here involved.

[3, 4] Appellant complains also of the trial court's adverse rulings upon a series of questions propounded to the two girls on cross-examination, and to one of appellant's witnesses on direct examination, whereby appellant sought to show that the older girl during

her residence in San Francisco lived part of the time under an assumed name at different places with a man as his wife. And in furtherance of the contention that such rulings were improper appellant cites a number of authorities from other jurisdictions, including the federal jurisdiction. Irrespective of whatever rule prevails in those jurisdictions, it is well settled in this state that a witness may not be impeached by evidence of particular wrongful acts; and that it is improper to cross-examine with reference to such matters, except, of course, it may be shown that the witness has been convicted of a felony. See 27 Cal. Jur. 132 and cases cited. Therefore the rulings complained of were not erroneous.

[5, 6] Also on cross-examination of the girls counsel for appellant sought to elicit testimony showing that the younger girl lived at several different places and that some of the changes were made by her at the instance of the older girl. The object of such testimony was to show, so it was contended, that the immoral activities of the younger girl were due entirely to the encouragement of the older girl and not to any persuasion on the part of appellant. There was no error in the trial court's ruling excluding such testimony. Under the provision of the statute prohibiting pandering it is a crime to procure for a female person a place in a house of prostitution, as well as to persuade a female person to become an inmate of a house of that character (St. 1911, p. 9, § 1). Here appellant was not charged with having persuaded or encouraged this girl to become a prostitute or to become an inmate of a house of prostitution. The substance of the four counts was that she procured a place in a house of prostitution for the girl and allowed and permitted her to remain there. It was immaterial, therefore, so far as appellant's guilt was concerned, who actually solicited or encouraged the girl to become a prostitute.

[7] Nor did the court err in excluding the hospital records which appellant sought to introduce showing that in March the younger girl was treated for a sexual disease. The date of such hospital treatment in no way conflicted with the dates of the specific acts appellant was charged with having committed; furthermore, it would appear that the effect of such evidence, if admitted, would have operated more to appellant's prejudice than to her advantage.

[8] Appellant makes objection also to the concluding sentence of one of the several instructions which the court gave, contending

that such sentence was in effect a "peremptory challenge to convict," and that no corresponding instruction ending with a peremptory challenge to acquit was given. The record does not support the latter part of such contention. Moreover, the entire instruction was hypothetical in its wording, and therefore in its entirety was not misleading. 8 Cal. Jur. 323. And the court was justified in refusing to give appellant's instruction No. 17. It purported to be based on certain language found in the decision in *People v. Cimar*, 127 Cal. App. 9, 15 P.(2d) 166, 16 P.(2d) 139; but it is evident that the language referred to was used therein in an argumentative sense and was not intended as the declaration of a legal principle; and the proposed instruction did not correctly convey the true meaning thereof.

[9] Nor do we find anything in the conduct of the assistant district attorney during the trial of the case or in his argument to the jury which calls for a reversal of the judgment; furthermore, at no time during the course of the trial did appellant object thereto or assign the same as misconduct; consequently, under the well-established rule, objection thereto cannot be made for the first time on appeal.

[10, 11] On the first day of the trial of the case, it developed that some of the dates set forth in one of the informations on which it was alleged the acts constituting the crimes were committed were inaccurate; whereupon the assistant district attorney stated that at the close of the evidence he would ask leave to amend by inserting the correct dates. Counsel for appellant made no objection, but the next day, at the conclusion of the evidence, when the amendments were about to be made, counsel did object, and the court overruled the objections. The trial court's ruling was not erroneous. As held in *People v. Anthony*, 20 Cal. App. 586, 129 P. 968, and *People v. Marshall*, 99 Cal. App. 224, 278 P. 258, section 1008 of the Penal Code confers on a district attorney the authority to amend an information by changing the alleged date of the commission of the offense in cases where the precise date is not a material ingredient of the offense. The crimes here charged being pandering and contributing to the delinquency of a minor, the particular days of the month on which the acts constituting the crimes were committed was not important, so long as it appeared they were committed prior to the filing of the information. Moreover, counsel made no application for continuance on account of said amendments; and he has failed to point out on this appeal

wherein appellant was prejudiced by permitting such amendments.

No substantial error in the trial of the actions being shown, the judgments of conviction and orders denying the motions for new trials are affirmed.

We concur: TYLER, P. J.; CASHIN, J.



5 Cal.App.2d 580

PEOPLE v. TORRES.

Civ. 1839.

District Court of Appeal, First District,
Division 2, California.

March 28, 1935.

Poisons ☞

Evidence held to sustain conviction of rooming house proprietress for unlawful possession of marihuana (St. 1929, p. 380, as amended).

Appeal from Superior Court, City and County of San Francisco; George J. Steiger.

Leona Torres was convicted of possession of habit-forming narcotics, and she appeals.

Affirmed.

Philip M. Zwerin, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sifton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

On January 31st of this year the defendant was found guilty of the possession of habit-forming narcotics, and from the judgment of conviction she appeals, claiming insufficiency of the evidence to show possession. The reporter's transcript was filed on February 18th and the cause was submitted on the March calendar.

The defendant was found by police officers in a building of two flats which she leased and operated as a rooming house. She told

the officers that she occupied a certain room which gave the appearance of being occupied and had her clothes in it. She later denied that she lived there, saying she lived with her family at 441 Union street and that her clothes were left in the room while she was cleaning the place. In searching the building the officers found marihuana under the floor in an unoccupied room (room 7), which she said was occupied by Tomas Reyes, having earlier designated another room as belonging to Reyes, and in a room said to be occupied by Eugene Belmore (room 4); while an empty can with specks of the drug on it was found buried in the basement. Marihuana cigarettes were found in another room and on Manuel Pizarro and in the bed of one Bosch. Both men at the time of the arrest of defendant, and in her presence, stated they had obtained the cigarettes from appellant; but they denied this at the trial. Another witness testified that he had bought the drug from the defendant during the week preceding her arrest and that he came to the premises immediately after the arrest to buy more. Police officers testified as to the bad reputation of the defendant, and to previous arrests for violations of the Narcotics Act (St. 1929, p. 380, as amended). The defendant had denied the prior conviction charged in the information, and proof was duly made of this charge by the production of the records.

The evidence, though meager, shows more than a suspicion of guilt. From the circumstances of the possession of the premises, the manner in which they were conducted, and the statements of the roomers made in appellant's presence at the time of the arrest, the jury could reasonably draw the inference that the drug was in her possession. The testimony of the appellant and of the witnesses called by her merely added further support to this inference. The evidence on the whole is sufficient to support the conclusion that "the possession was immediate and exclusive and under the dominion and control of" the appellant, within the rule of *People v. Sinclair*, 129 Cal. App. 320, 322, 19 P.(2d) 23.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

5 Cal.App.2d 714

WEIR v. CONTINENTAL OIL CO. et al.
Civ. 8541.District Court of Appeal, Second District,
Division 1, California.
April 2, 1935.

Rehearing Denied April 23, 1935.

Hearing Denied by Supreme Court
May 29, 1935.**False Imprisonment** §39

Whether private detectives participated in plaintiff's unreasonable detention, application of third degree methods, and whether they acted within scope of employment so as to render detective agency and corporation employing it liable to plaintiff for unlawful imprisonment, *held for jury*.

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Robert E. Weir against Continental Oil Company and others. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Loeb, Walker & Loeb, and P. C. Black, all of Los Angeles, for appellants.

Pace, Smith & Purdue, of Los Angeles, for respondent.

YORK, Justice.

Defendants, Continental Oil Company and J. N. Pyles, appeal from a judgment rendered against them for the sum of \$5,000, which judgment was rendered in accordance with the verdict and special findings of the jury. The jury found that the plaintiff was unlawfully imprisoned for an unreasonable length of time, and that the Continental Oil Company, J. N. Pyles, R. S. Dungan, and E. W. Landenberger were all parties to such unlawful imprisonment. The jury also found that such imprisonment was not at the instance or direction of Lieutenant Murphy or other police or jail officers. The jury, in accordance with the court's instruction so to do, found against the plaintiff and in favor of all the defendants on the cause of action relating to malicious prosecution, and also brought in a general verdict by which they found for the plaintiff "and against the defendant Continental Oil Co., J. M. Pyles, on the cause of action relating to false imprisonment and assess his damages at \$5,000.00, as against said defendant." The judgment rendered on this verdict is: " * * * it is ordered, adjudg-

ed and decreed that said Robert E. Weir have and recover from said Continental Oil Co., a corp. and J. M. Pyles, the sum of \$5,000.00, together with his costs and disbursements incurred in this action, amounting to the sum of—525 and 75/100—dollars."

No point is made on this appeal, except as indicated by appellants' statement of question involved, as follows: "Where a person is arrested upon probable cause but is held in jail by the police an unreasonable time before being taken before a magistrate, can a private detective or corporation having no official connection with the police department, be held liable for the unreasonable restraint?" This is amplified somewhat by the concluding statement in appellants' brief, to wit: "Appellant Pyles cannot be held liable for the unreasonable detention of respondent since (1) he had nothing to do with the internal management of the Long Beach Police Station and had no power either to detain or release the prisoner; (2) whatever Pyles did was done at the request of Lieutenant Murphy, the officer in charge of the police department. Appellant Continental Oil Company cannot be held liable since (1) its liability, if any, would have to be predicated upon the liability of Pyles; (2) Pyles was not the agent of the Continental Oil Company; (3) assuming the liability of Pyles and that he was acting as the company's agent (all of which we deny) he acted outside the scope of his authority."

This case discloses much more than the average conflict in testimony. The plaintiff testified to third-degree methods of the most reprehensible type. His testimony is flatly contradicted by the persons charged with this misconduct. This matter was before the jury in such form as to make them the exclusive judges of the facts therein involved, and if such facts testified to by the plaintiff were true, the amount of the verdict rendered cannot be said to be excessive. Moreover, pursuant to the conditions of the order denying motion for new trial, plaintiff consented that the amount of the verdict be reduced to \$2,500.

There was sufficient evidence from which the jury could find that the private detectives employed by the corporation were guilty of all the things charged against them, including their participation in the unreasonable detention, and that being so, the "statement of the question involved" made by appellants has no force, because, regardless of how many other people were involved, such fact, if it be a fact, would not relieve the defendant private detec-

tives or the defendant corporation employing them from liability. Appellants' contention that the acts of detective Pyles were outside the scope of his employment is not supported by the evidence.

Since there was sufficient evidence to support each of the jury's answers to the special interrogatories, and as the appellants do not claim any error in any of the instructions given by the trial court, the verdict of the jury cannot be interfered with by this court.

The judgment is modified by striking therefrom the words and figures "the sum of \$5000.00," and substituting therefor "the sum of \$2500.00." As thus modified, the judgment is affirmed.

I concur: HOUSER, J.

CONREY, Presiding Justice (dissenting).

I dissent from that part of the decision which affirms the judgment against Continental Oil Company.



5 Cal.App.2d 735

EVELETH et al. v. GOODCHAP.

Civ. 9488.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Automobiles ⇨217(1)

Vehicle Act did not change pedestrian's common-law duty to use reasonable care for his own safety in crossing street (St. 1931, p. 2127, § 131½).

2. Trial ⇨194(16)

Instructions in action for death of pedestrian, struck by automobile, that duty was on deceased to use ordinary care for his own safety while on highway, held not erroneous as invading jury's province to decide what is due care.

3. Appeal and error ⇨1064(1)

Giving of instructions in death action as to deceased's duty to use ordinary care for his own safety, without reference to character of contributory negligence pleaded in affirmative defenses of answer, held not such

error as to entitle plaintiffs to reversal of judgment for defendant.

4. Trial ⇨260(1)

Refusal of instructions on matters fully covered by instructions given was not error.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Elvie G. Eveleth and others against John Goodchap. Judgment for defendant, and plaintiffs appeal.

Affirmed.

E. W. Cunningham, of Los Angeles, for appellants.

Jennings & Belcher, and R. P. Jennings, all of Los Angeles, for respondent.

CRAIL, Justice.

This appeal is from a judgment in favor of defendant (respondent) in an action brought by the heirs of F. A. Eveleth, deceased, to recover damages for the death of decedent. At the time of the accident it was dark, and rain had been falling for about an hour. The decedent started across the bridge which forms part of Huntington drive near the city limits of Arcadia and stepped in front of the automobile driven by the defendant. The headlights of defendant's automobile were lighted and plainly visible through the rain. There was evidence from which the jury might have found that the decedent when hit was in an unmarked crosswalk.

[1] Appellants first complain of a series of instructions wherein the jury were told that the duty was upon the deceased to use ordinary care for his own safety while upon the highway. The rule was applied in various ways to the circumstances of the case, but this was the essence of all of them. Thus the jury were told that "The same duty of care rested upon the deceased as upon the defendant, that is, each was bound to use ordinary care. The deceased was bound to use ordinary care for his own safety in crossing the street and the driver of the automobile was bound to use ordinary care in the operation and driving thereof," and "It was the duty of the deceased * * * at the time in question, to make reasonable use of all of his faculties to make a safe crossing and to avoid being injured," and "to exercise ordinary care in maintaining a reasonable lookout for vehicles approaching," and "to exercise ordinary care in the use of all of his faculties for

the purpose of ascertaining the approach of vehicles and of avoiding accident and injury to himself," and "a pedestrian has no right to assume that a street is clear, but under all circumstances and at all times he must use ordinary care and must anticipate that vehicles may be traveling in the street." It is appellants' contention, since under their theory of the case the decedent was in an unmarked crosswalk, that the court erred in giving any instruction placing upon the decedent the duty of using ordinary care while crossing the street. They say, "The effect of section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127) is to change the common-law duty resting upon both the pedestrian and the driver of an automobile to use due care." This is not the law. The duty remains upon a pedestrian in a street at all times to use reasonable care for his own safety.

plaintiffs," but we find no merit in this contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

[2] Appellants' next contention is that these instructions were erroneous because "they invade the province of the jury, it being the jury's prerogative to decide what is due care. * * *" There is no merit in this contention. The appellants rely upon the cases of *Long v. Barbieri*, 120 Cal. App. 207, 7 P.(2d) 1082, and *Pinello v. Taylor*, 128 Cal. App. 508, 17 P.(2d) 1039. In the former case the jury was told it was the decedent's duty to look in the direction from which danger was to be anticipated and that this was a continuing duty. In the latter case the court instructed the jury that it was the duty of the decedent to look in both directions to see if vehicles were approaching and that this duty was imperative during all the time he was crossing. Such instructions obviously were invasions of the province of the jury and, as such, were condemned. But the instructions before us do not have this defect.

[3] Appellants also complain that "these instructions were given without reference to the character of the contributory negligence pleaded in the two affirmative defenses of the answer." There is some truth to this contention, but no error such as would entitle appellants to a reversal.

[4] Appellants also complain of "instructions requested by plaintiffs which were erroneously refused." The matter contained in these instructions, where not erroneous, was fully covered by the instructions which were given.

Appellants' final contention is that "the court improperly excluded evidence offered by

5. Evidence ⇨53

Bare legal presumptions are indulged only where there is a total lack of evidence bearing on questions at issue.

6. Wills ⇨3

Will of husband which expressly excluded his children from participating in estate held ineffective to bar statutory interest of children in community property on death of widow prior to effective date of Probate Code (Probate Code § 1080; Civ. Code § 1386, subd. 8).

7. Estoppel ⇨68(2)

That one of husband's children by former marriage had filed petition to set aside appointment of administrator gave next of kin of deceased widow no right to complain, in proceedings by children for determination of heirship in widow's estate and for distribution of community property, where other children would in any event succeed to community interest (Probate Code §§ 450, 1080; Civ. Code § 1386, subd. 8).

3 Cal.2d 58

In re BRYANT'S ESTATE.

BUSH et al. v. GREENLEAF et al.

L. A. 14227.

Supreme Court of California.

April 1, 1935.

1. Gifts ⇨49(1), 82(1)

Evidence in proceeding for determination of heirship in widow's estate sustained finding that bill of sale, given widow by her deceased husband, did not constitute gift inter vivos or causa mortis, but was attempted testamentary disposition (Probate Code, § 1080).

2. Husband and wife ⇨262(1)

Property of household or marital character found at end of long marriage in possession of last surviving spouse whose death followed shortly after death of predeceased spouse is presumably community property, in absence of rebutting proof.

3. Husband and wife ⇨264

Evidence in proceedings for determination of heirship in widow's estate sustained finding that interest in tramway, to which widow succeeded on husband's death, was community property (Probate Code § 1080; Civ. Code § 164, and § 1386, subd. 8).

4. Husband and wife ⇨264

Evidence in proceedings for determination of heirship in widow's estate held insufficient to sustain finding that household furniture, bric-a-brac, silverware, etc., in widow's possession at death was her separate property, as distinguished from community property (Probate Code § 1080; Civ. Code § 164, and § 1386, subd. 8).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank B. Belcher, Judge.

In the matter of the estate of Anna K. Bryant, deceased, in which John I. Bujan was appointed administrator. Proceeding on the petition of Mrs. J. S. Bush and others for determination of heirship and right to distribution in which proceeding Margaret Greenleaf and others appeared as contestants. From a judgment awarding a portion of the estate to petitioners and the remainder to contestants, both petitioners and contestants appeal.

Affirmed in part, and cause remanded in part, with directions.

Prior opinion, 28 P.(2d) 701.

Murphy & Doherty, of Los Angeles, and Harrison Weil, of Pasadena, for petitioners.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

Milton Bryan, of Los Angeles, for administrator John I. Bujan.

George C. Wheeler and Allard, Stead & Whyte, all of Pomona, and Warren H. Ather-ton, of Stockton (Barton Corneau, of Boston, Mass., of counsel), amici curiæ.

S. Joseph Theisen, of San Francisco, amici curiæ for Eyrle R. Levy.

SEAWELL, Justice.

Both parties to this proceeding have appealed from those portions of the judgment

therein entered by the probate court determining heirship in the above-entitled matter which were adverse to said respective parties.

Thomas Bryant, deceased, was the father of Mrs. J. C. Bush, Thomas Bryant, Jr., and J. Ross Bryant by a former marriage. Anna K. Bryant, deceased, whose estate is the subject of distribution herein, was his wife by a second marriage and was his widow upon his demise. She had once before been married, but she bore no children as the issue of either marriage. She died intestate June 5, 1931, in the county of Los Angeles, leaving neither father nor mother. Her next of kin surviving her are Margaret Greenleaf, a sister, and two nephews and three nieces, the issue of deceased brothers.

Thomas Bryant and his former, or first wife, mother of petitioners herein, were married in the state of Colorado on January 22, 1885, and soon thereafter they removed to Butte, Mont., where he was at first employed as a common miner. He advanced progressively from one position to another. In 1905 or 1906 he was made superintendent of the mining properties of the late Senator W. A. Clark. His salary from all sources, for some three or four years immediately prior to the decree of divorce which was granted to the first wife in the action brought by her against him, was \$1,000 per month. During this coverture he made mining investments which returned him approximately \$60,000. One week after said decree of divorce was granted he married said second wife, Anna K. Healy. The mother of said children was given their custody. She reared them without receiving any financial assistance from their father by way of settlement, alimony allowance for herself, or support for said children, except the Salt Lake City residence, valued at \$10,000, which was conveyed to her by her former husband, Thomas Bryant. Thomas Bryant and his wife by said second marriage, Anna K. Bryant, removed to Los Angeles county in 1914, where he engaged in several business enterprises until a short time before his death, which occurred in said county of Los Angeles on November 4, 1927. Anna K. Bryant, his wife, died in the county of Los Angeles on June 5, 1931, leaving the estate which is the subject of contest between the children of Thomas Bryant and his former wife on the one side and a sister and children of three deceased brothers of said Anna K. Bryant, on the other side. For the purpose of convenience, the first group, children of Thomas Bryant, will hereafter be referred to as petitioners, and the second

group, the next of kin and heirs at law of Anna K. Bryant, as contestants. Said parties have been so designated by the parties to the proceeding. On March 15, 1932, the first group commenced this proceeding under the authority of section 1080 of the Probate Code for the determination of heirship and the right to distribution of the estate. The rights of the parties to succeed to the properties of the estate are controlled by subdivision 8, § 1386, Civil Code; the decedent having died prior to the effective date of the Probate Code. As to all matters of procedure the Probate Code rules. During the first marriage Thomas Bryant made a considerable fortune. How much of this he possessed at the time of his second marriage was not definitely determined at the trial.

During his second marriage, through business transactions and land speculation, he made and lost considerable sums of money. His best investment in California was the purchase in 1923 of a one-third interest in an electric tramway operated between Venice and Ocean Park, from his close friend T. M. Gibbons. The original investment was listed at \$60,000 and Mr. Bryant's one-third interest was evidenced by his promissory note given to Mr. Gibbons, the owner of the remainder. This note was paid out of the earnings of the tramway and in addition thereto Mr. Bryant was paid in dividends something over \$38,000 and a salary somewhat exceeding \$11,000. Four years after the purchase of an interest in said tramway Thomas Bryant died. He left a will executed August 26, 1924, devising and bequeathing all of his estate to Anna K. Bryant, expressly excluding his three children, petitioners herein, from sharing in any part of his estate. Said will was never offered for probate upon the claim that he left no estate to probate.

The probate court found that the properties held by Thomas Bryant and Anna K. Bryant during their married life were of two kinds, to wit, separate properties of Thomas Bryant, owned and held by him prior to his marriage to decedent; community property acquired subsequent to the marriage of Thomas Bryant and decedent; separate estate of Anna K. Bryant, in the sum of \$2,400, acquired as a legacy by decedent from her mother. This \$2,400 was not specifically traced and there was no evidence to show that it reached the estate of Anna K. Bryant.

Said court also found that during the marriage relationship of Thomas Bryant and decedent, and shortly prior to his death, he converted certain properties into the separate

estate of Anna K. Bryant by gift inter vivos, which properties were held by her as her separate property to and including the date of her death. Said properties (not including the tramway) consist of certain real property and a long list of personal property.

[1] One of the principal grounds of dispute between the two groups of opposing heirs is whether a certain bill of sale made and executed on April 15, 1927, by Thomas Bryant to Anna K. Bryant conveyed the title of said tramway to his said wife. The court found that said tramway was acquired by the earnings of Thomas Bryant during coverture with said Anna K. Bryant and was property of the community. It expressly found that said bill of sale did not amount to a transfer by gift inter vivos or causa mortis, but that the intent of the maker of said instrument was testamentary in character and did not evince an intent to convey said tramway as either a gift inter vivos or causa mortis to Anna K. Bryant. Contestants vigorously assailed the finding which holds that said instrument, which in form is a bill of sale, should be construed to be an ineffectual attempt to pass title to property by a testamentary act. We have examined the evidence directed to this issue and while it may be said that there is evidence in the record which possibly might support a finding holding either way, it cannot be said that there is no substantial evidence supporting the conclusion arrived at by the trial court. The reason for its conclusion is as well or better fortified as any which could be urged in support of a contrary conclusion.

Thomas Bryant's unprobated will by which he made Anna Bryant his sole legatee and devisee was executed August 26, 1924. Said instrument denominated a bill of sale but which was held by the probate court to have been an attempt on the part of Mr. Bryant to avoid probate, and therefore testamentary in character, was executed April 15, 1927. On the same day said will was executed Thomas Bryant wrote a letter to his partner, Mr. Gibbons, that it was his wish that his wife should succeed to all of his interest in the tramway company and that it might be taken over by her "without the delay or expense incident to probate proceedings." He thanked Mr. Gibbons for his suggestion as to the method of transferring title of said interest in the event of death, upon a plan initiated and formulated by Mr. Gibbons. Mr. Gibbons realized that Mr. Bryant was a sick man and could not live a great while, and he wished to avoid any interruption to the busi-

ness in case either should die. He therefore suggested to Mr. Bryant that each execute to his respective wife a bill of sale to the end that the business would continue without the intervention of probate proceedings in case of the death of either one. Mr. Bryant readily assented to the plan and left the entire matter in the hands of Mr. Gibbons. He consulted an attorney and had three instruments drawn, one to be signed by his brother, who owned a small interest in the tramway, one by himself, and one by Mr. Bryant. They looked them over and signed them in the presence of one another. Mr. Gibbons originated and dominated the whole program. Mr. Bryant never suggested to his partner, Mr. Gibbons, that he was in a serious physical condition or was acting in fear of impending death.

Upon a full and fair hearing on this question, the trial court found that the bill of sale was not made in view of impending death; that it was executed at the request of his partner with the understanding that both partners would execute similar documents which would not be delivered nor take effect until the death of either partner; that Mr. Bryant exercised and maintained the same exclusive control and dominion over the property that he had exercised from the beginning of his ownership; that the books showed Thomas Bryant to be the owner of said one-third interest until after his death, and that they were then voluntarily changed by Mr. Gibbons so that it would appear that Mrs. Bryant had succeeded to her husband's interest; that all dividends or earnings from the tramway business were paid to Thomas Bryant up to the date of his death; that the bill of sale was at no time presented by Mrs. Bryant to the partnership until after Mr. Bryant's death.

In addition to the findings made on this issue, the trial court made a summation of the evidence and the law applicable to this question, which we incorporate as a part of our decision to-wit:

"* * * The essential intent on the part of Bryant to completely divest himself of dominion over the property is lacking. In re Estate of Hall, 154 Cal. 527, 98 P. 269.

"It is strenuously urged, however, that there was a gift causa mortis of the Tramway property by Bryant to his wife. It is urged that the intent to make such a gift is evidenced by the will of August 26, 1924, the letter bearing the same date addressed to Gibbons (though never delivered to him) and the bill of sale from Bryant to his wife ex-

ecuted under date of April 15, 1927. From the evidence, including these documents, there can be no doubt but that it was Thomas Bryant's intent that his wife should succeed to the Tramway property upon his death. The will, the undelivered letter addressed to Gibbons, the circumstances surrounding the execution of the bill of sale of April 15, 1927, considered in the light of the facts that Bryant did not part with dominion over his interest in this Tramway property but instead continued to collect dividends therefrom and to exercise such control over it up to the time of his death, as his health permitted, make it clear, however, that his intent was 'testamentary' in character rather than to make a gift to his wife either *inter vivos* or *causa mortis*. The evidence is conclusive that Thomas Bryant continued to collect dividends from the Tramway property up until the time of his death. It was only after his death that any change was made on the books of the partnership. No diminution in Bryant's dominion or control over the partnership property or his interest therein appears, except that his health did not permit him to give as much attention to its management during the closing months of his life as formerly. Neither does it appear that Mrs. Bryant made any attempt to collect dividends from the Tramway property during the lifetime of her husband nor did she attempt to assert any dominion or control over his interest therein until after his death.

"The circumstances surrounding the making of the bill of sale of April 15, 1927, do not indicate that this bill of sale was executed with an expectation of speedy death.

"Because of these, and other facts, appearing from the evidence, the court concludes that there was neither a gift *inter vivos* nor a gift *causa mortis* of the Tramway property"—citing *Beebe v. Coffin*, 153 Cal. 174, 94 P. 766; *In re Estate of Hall*, *supra*, and other authorities.

[2, 3] During the four years following the death of her husband Mrs. Bryant received approximately \$23,000 in dividends earned by the operation of the tramway under Mr. Gibbons' management. In addition to said earnings, Mr. Gibbons gave her a part-time office employment at a salary of \$50 per month. The total paid her as salary at the time of her death amounted to \$2,400. She received no alimony or property from her former husband, whom she divorced in 1905, and during the period thenceforward to her marriage with Thomas Bryant she seems to have earned some money by giving music lessons,

but her principal source of support was funds provided by a regular allowance contributed by Mr. Bryant. At the time of her marriage she had no separate property. There is evidence in the record of a hearsay character to the effect that either she, or she jointly with her husband, received a legacy in the sum of \$2,400 from her mother some time between 1923 and 1925. This amount, however, is not traced into her estate or into the business of the tramway or any other property. Its actual existence and the form which it may have taken is left in a very nebulous state. The greater part, if not the whole of her estate, except the doubtful legacy above adverted to and the \$50 per month salary came to her either as gifts from Thomas Bryant or as community property. Petitioners concede that the orange grove situated in West Highland, San Bernardino county, consisting of 8.64 acres, together with nine shares of West Highland water stock, which Mr. Bryant by *mesne* conveyances caused to be deeded to Mrs. Bryant, the jewelry, including diamonds, and the Etz mortgage, amounting to \$3,500, are all separate property of the decedent which came to her as gifts from Mr. Bryant. Petitioners contest the finding of separate ownership of a 1927 Buick coupé, and certain loans secured by mortgage upon real property purchased after Mr. Bryant's death, and which are listed as bills receivable, and a long list of furniture, silverware, glassware, chinaware, musical instruments, pictures, wearing apparel, bed furnishings, rugs, and household effects generally, as set forth in Schedule B, on the theory that there was no evidence to indicate their source, character, or disposition. Disregarding, for the purposes of the case, the presumption that all property acquired after marriage by either husband or wife is community property (section 164, Civ. Code) and the many decisions of this court indulging that presumption in cases where no evidence exists as to the origin of property found in the possession of the last survivor, we are of the view that the property of a household or marital character found at the end of a long marital existence in the possession of the last surviving spouse upon his or her death which occurred at a relatively short time following the death of the predeceased spouse will, in the circumstances of this case, in the absence of rebutting proof be inferred to be community property. The fact that decedent was a woman well advanced in years and was less than four years in widowhood, in the absence of contrary evidence, stands in rebuttal of any reasonable theory that she

would in her circumstances and at her period in life indulge in purchasing a long list of expensive household furnishings, much of which was neither appropriate or necessary to the needs or comfort of a woman advanced in years. Besides, some of the listed articles show that they are exclusively for the use of men, or are adapted to the use of either husband or wife. All of this property is claimed to have been community property, and if any was purchased after Bryant's death it was purchased with money earned in the operation of the tramway as dividends; said tramway being found to be community property. This finding, although made upon a consideration of conflicting evidence, we hold to be amply supported by evidence of a satisfactory character. The tramway was unquestionably the only revenue-producing property of any considerable consequence appearing in the list of properties owned by either spouse at the time of Bryant's death, or that came into Mrs. Bryant's possession from any source. She survived him but four years, and she must have been approaching seventy years of age at the time of his death. She had had no business experience. On the other hand, Mr. Bryant was, before and during their married life, an active, capable business man, and had managed the tramway business until sickness incapacitated him a few months before his death. Mr. Gibbons then assumed full charge and conducted the business to the day Mrs. Bryant died, without her assistance or advice. Mr. Bryant undoubtedly possessed considerable property at the time of marriage. A reading of his business activity and capability impels this conclusion. There is no evidence that the orange grove produced any revenue. In fact, her deed to the property is dated June 1, 1927, and she died June 5, 1931, a few days short of four years after she became the owner by gift. The net income should be easy of approximate computation. The net income from the \$3,500 mortgage is most likely a simple matter of computation of interest. The income from the tramway is, as was testified to by Mr. Gibbons, easily determinable from an examination of the account books of the tramway company. Other loans were made on real property after Mrs. Bryant's death and during the time when she was receiving the income from the tramway business. It would not be very laborious or difficult to at least apportion the moneys she received from the community property and her separate property either before or after Mr. Bryant's death.

[4, 5] We do not agree with the learned trial court that all of the property enumerated in Schedule B should, upon a presumption, be classified as the separate estate of deceased, it appearing that the greater part of it was acquired during coverture or from the earnings and proceeds thereof, and it not being shown that Mrs. Bryant acquired it or came into possession of it as her separate property in any of the ways provided by the provisions of the Civil Code, the presumption is that it is community property. Of course, this is but a presumption which may be overturned even by an inference tending to prove the contrary contention. We do not deem it necessary to rest the decision of this question upon mere presumptions of law, as a more satisfactory solution is deducible from evidence which, from the nature of the estate, may be readily produced tending to prove the character of the property in controversy. The application of bare legal presumptions is only indulged in cases where there is a total lack of evidence bearing on the question at issue. Here it appears that the sources of the funds is reasonably capable of ascertainment by inferences which reason makes from proved facts and there is no occasion to resort to a less uncertain method of determining which portion of said estate was separate property and which was community property. It is sufficient if this may proximately be done. The income-bearing properties are not so inextricably mixed or confused that their identity may not satisfactorily be segregated. In fact, the household effects and much of the long list of property listed in Schedule B has already been shown to be community property. The source of the small amounts of money loaned by the decedent after the death of her husband, and included in said schedule, may be reasonably determined by evidence showing the net income derived from the several pieces of income property.

If it should appear, however, upon a re-examination of this cause by the trial court, that the decedent was the owner of separate property or funds sufficient to have made the loans set forth in Schedule B or purchases of unidentified property, if any, after her husband's death, it would be but a fair presumption that the unidentified property not traceable by direct or indirect evidence to any original source belonged to her separate estate. We think, as was suggested under similar circumstances in *Stafford v. Martinoni*, 192 Cal. 724, 221 P. 919, this issue should be subjected to further consideration and review upon a retrial thereof.

[6] Contestants urge that petitioners are not entitled to participate in any portion of the estate of decedent because the predeceased husband had by his will expressly excluded petitioners, his children, from participating in his estate. His wife was made his sole legatee and devisee. This contention is untenable. Petitioners took as statutory heirs under the provisions of section 1386, subd. 8, Civil Code, and it was not in the power of the predeceased husband by any act of his to defeat the purpose of said Code section. The will did no more than to vest the community interest of the testator in the wife. That act marked the limit of his dominion over said community property. The law made final disposition of whatever remained over subsequent to his death.

[7] It is further contended that petitioners are estopped from asserting any rights to the estate herein because one of them, Mrs. J. C. Bush, had filed a petition to set aside the appointment of the administrator, as provided by section 450, Probate Code, and asked for the issuance of letters to herself. Upon her petition and proceedings had thereon the probate court seemed to have treated the matter as a proceeding to determine heirship and proceeded to make elaborate findings, whereby it held that no part of the estate of said Mrs. Bryant came to her by descent, devise, or bequest from her husband, Thomas Bryant, and no part of said estate was the common property of Mrs. Bryant and her husband; that all of the property of the estate of Mrs. Bryant was at the time of her decease the sole and separate property of said deceased; that none of the children of Thomas Bryant was an heir at law of Mrs. Bryant, and none was entitled to share in her estate. Mrs. Bush's petition for letters was accordingly denied. It was further found that the will of Thomas Bryant devised all of his estate to his wife to the exclusion of said children, and that the will was never offered for probate for the reason that the testator left no estate save a few personal effects of slight value. It was found that said tramway interest was, for value, sold and conveyed to Mrs. Bryant in his lifetime. Thomas Bryant, Jr., and J. Ross Bryant were in no sense parties to the proceedings instituted by Mrs. Bush praying for the revocation of the letters issued to the administrator and for the appointment of herself. For all that appears from the record before us, Thomas Bryant, Jr., and J. Ross Bryant may have been well satisfied with the appointment of the administrator whom Mrs. Bush desired to remove. Several reasons might be offered in

support of the proposition that the proceedings had on the petition to remove the administrator were not *res judicata* as to Mrs. Bush in the proceeding to establish heirship or for distribution, and certainly not as to the other petitioners, if deemed helpful or necessary to illustrate this proposition by argument. A complete answer to contestants' complaint in this respect is that whether Mrs. Bush does or does not participate in the proceeds of the estate is no concern of theirs. Her failure to do so would in no sense enhance or add to their share of the estate. Therefore they will not be heard to complain as to whether two or three of the children of Thomas Bryant succeed to said community interest.

This disposes of all the controversial questions raised by the appeals.

It is but proper to say that in the solution of the questions here presented we have been aided by the investigations made by Presiding Justice Nourse, District Court of Appeal, First Appellate District, Division 2, when this cause was before said court.

The portion of the judgment awarding the tramway interest to petitioners and directing distribution thereof to them is affirmed.

The judgment awarding to contestants the San Bernardino county orange grove, the Etz note and mortgage of the value of approximately \$3,500, the diamonds of which Mr. Bryant became the owner when a resident of the state of Montana, all of which property is conceded by petitioners to have been the separate property of Mrs. Bryant, is affirmed.

As to the household furniture, bric-a-brac, silverware, etc., there is a strong presumption that it is property of the community. However, if any evidence is obtainable which tends to dispel the presumption of the household furnishings and other property of a distinctively marital character, the contestants will be permitted to produce it.

As to the notes and mortgages and some other property of doubtful value which came into the possession of Mrs. Bryant during Mr. Bryant's last illness and after his death, the source may be reasonably traced by showing the amount of her income from her separate property.

The cause is remanded, with directions to proceed upon a retrial of the issues herein set at large. In all other respects, the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; THOMPSON, J.; LANGDON, J.

2 Cal.2d 625

OSTER v. STATE BAR OF CALIFORNIA.
L. A. 14921.

Supreme Court of California.

April 18, 1935.

Appeal and error ⇨832(6)

Petition for rehearing could not be granted merely because court inadvertently stated that certain facts were admitted by petitioner when the evidence established to court's satisfaction such facts.

In Bank.

Proceeding to review the recommendation of the Board of Bar Governors of the State Bar that petitioner be suspended from the practice of law for a period of six months.

Affirmed.

On petition for rehearing.

Prior opinion modified and rehearing denied.

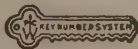
Prior opinion, 42 P.(2d) 627.

Alexander L. Oster, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

The petition for rehearing herein is denied. In the above-entitled action the opinion of this court filed March 21, 1935, is hereby modified by striking out the following words appearing at the beginning of the fifth sentence of said opinion: "It is also admitted by petitioner" and inserting in their place the words: "We are satisfied from the evidence."



3 Cal.2d 51

MAYO v. MAYO et al.

L. A. 14019.

Supreme Court of California.

April 1, 1935.

Rehearing Denied April 29, 1935.

1. Divorce ⇨27(8)

Evidence of wife's false accusations against husband and husband's child by former marriage held to justify grant of divorce to husband on ground of extreme cruelty.

2. Divorce ⇨29, 53

Indignities allegedly imposed on wife by husband after final separation of parties were not proper grounds for divorce and were insufficient to establish defense of recrimination to husband's action for divorce.

3. Divorce ⇨51

Husband's dismissal of divorce action held insufficient to support defense of condonation in husband's subsequent divorce action, where wife was guilty of conjugal unkindness and cruelty after dismissal (Civ. Code, §§ 117, 121).

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Luther T. Mayo against Marguerite Maloney Mayo and others, wherein named defendant filed a cross-complaint against plaintiff and codefendants. From an interlocutory judgment, named defendant appeals, and plaintiff files a cross-appeal.

Affirmed.

George Acret, Hill, Morgan & Bledsoe, and Hiram E. Casey, all of Los Angeles (Lawrence L. Larrabee, of Los Angeles, of counsel), for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

Hunsaker & Cosgrove, of Los Angeles, for respondent Citizens' Nat. Trust & Savings Bank of Los Angeles.

PRESTON, Justice.

We have before us cross-appeals in a divorce action involving also the custody of three minor children as well as separate and community property rights. Plaintiff husband was awarded an interlocutory decree of divorce upon grounds of extreme cruelty. The defendant wife was awarded custody of the three minor children, with an allowance for their support and nursing of \$500 per month to continue until the further order of the court. A large number of parcels of property were adjudged separate property of the husband, a smaller number were adjudged community property. The community debts were marshaled and held to be a charge upon the whole community estate. Subject to this charge the community property was equally divided between the spouses. A homestead declared by the wife upon property found to be separate property of the husband was dissolved and the wife was directed to vacate the former family residence in thirty

days. The appeal of the wife is from the interlocutory judgment as a whole; that of the husband from the portion thereof dealing with the community property and awarding custody of the children to the wife, with said allowance for their support and care. The terms "wife's appeal" and "husband's appeal" will be used in the discussion that follows:

This whole case is permeated with strife and bitterness and is enveloped in a sordid atmosphere created by the charges relating to sex tendencies and practices. Not a single proposition of law of importance is involved. Every question raised is in reality an issue of fact on which the evidence is in sharp and hopeless conflict. We have not found the slightest reason for a court of equity to extend its arm to give further relief to either party. The trial of the case was begun on September 29, 1931, and it covered a period of 90 days, during which the court actually sat and heard testimony on 56 days. The reporter's transcript comprises 26 volumes. The clerk's transcript is 396 pages. The wife has tendered a printed supplement of 4 volumes, comprising 1,580 pages, together with an original brief of 400 pages and a reply brief of 115 pages. To this the husband has contributed a brief of 272 pages. The appeals reveal the expenditure of an enormous amount of effort, particularly on the part of counsel prosecuting the wife's appeal. The matter is segregated, arranged, and indexed in such manner as to save the court much labor. But as each point urged is examined, the conviction that it is without substantial merit immediately arises.

That the trial court gave the cause a thorough and fair hearing and consideration is everywhere manifest. The findings show a conscientious endeavor on his part to justly resolve a hopeless and unfortunate marital tangle. He clearly had in mind, throughout the trial, saving as far as possible the reputation of the parties to the marriage contract as well as protecting from stigma and shame two sets of innocent children, to wit, the three children of the marriage and the husband's three children by a former marriage, who resided in the home. That the court handled the cause wisely and without prejudicial error, there is no doubt.

Just how many of the repulsive facts of this case we should make of record is a problem. It is now approaching four years since the trial ended. Doubtless ere this life has taken on a new meaning for both spouses. Each should, and probably would, shrink from an extended portrayal of the facts;

however, the requirements of law will be met.

The action was commenced by the husband on January 11, 1930. His complaint charged some 24 specific acts of mental cruelty. The pleadings grew and multiplied as time passed. The pleadings upon which the case was actually tried consisted of an amended and supplemental complaint of the husband, answer of the wife and two or three amendments and supplements to her amended cross-complaint for divorce and the husband's answers thereto. The final amendment of the wife's pleadings was one to discount the date of marriage in Alameda county, Cal., on August 24, 1923, and to show a prior marriage in Tia Juana, Mexico, on August 19, 1922. The purpose of this amendment was to secure the benefit of a finding showing a larger amount of community property. The court properly found the marriage date to be August 24, 1923, and the date of separation October 31, 1928.

The wife's cross-complaint charged cruelty on the part of the husband growing out of his conduct toward her subsequent to October 31, 1928, as well as arising out of allegations against her made by him in his several complaints, which allegations the wife alleged were false and maliciously urged and from which she suffered a loss of health and other injuries amounting to extreme cruelty. The wife also pleaded the defenses of condonation and recrimination. The defense of condonation was grounded on the fact that in June, 1927, the husband filed a former action for divorce upon charges of cruelty, which action later, and in July, 1927, he caused to be dismissed.

[1] The principal findings upon which the court rested its judgment for the husband were that the charge made by the wife of sex degeneracy was false as well as her later charge that Robert Mayo, the 13 year old son of the husband by a former marriage, had been guilty of sexual attacks upon the young half-sisters, then infant children, of the present marriage, resulting in a juvenile court proceeding. In summing up the situation, the court found: "Each and all of said false charges of sexual degeneracy so made by defendant against plaintiff and the false charges filed against Robert Mayo without the knowledge of plaintiff have caused and each of them continues to cause plaintiff great humiliation, grief and mental anguish and physical suffering with the result that the ends and purposes of matrimony between plaintiff and defendant have been irreparably destroyed."

We need only say here, without reciting in detail the further facts found, that they were amply sufficient to produce such grievous mental suffering as would justify the trial court in holding them to be proper grounds for granting plaintiff a divorce, under the rule found in the following, among other cases: *MacDonald v. MacDonald*, 155 Cal. 605, 102 P. 927, 25 L. R. A. (N. S.) 45; *Clopton v. Clopton*, 162 Cal. 27, 121 P. 720; *Daroux v. Daroux*, 53 Cal. App. 223, 199 P. 1112; and *Weisburg v. Weisburg*, 214 Cal. 499, 6 P.(2d) 504.

At this point it should be noted that the court found to be untrue several specifications alleging unchaste acts upon the part of the wife, which the wife in turn specified as extreme cruelty entitling her to a decree of divorce. But under the facts as found by the court, its discretion in this behalf may not be overthrown. The court found: "It is not true that said allegations were made recklessly or without knowledge or proof of the truth thereof or with knowledge on the part of plaintiff that the same were false or for the purpose of intimidating the defendant or for the purpose of injuring her reputation, or for the purpose of causing her any publicity nor were said allegations nor any of them made maliciously or fraudulently or for the purpose of injuring the defendant but on the contrary it is true that the same were made in good faith and upon information which plaintiff deemed to be reliable and in the belief on the part of plaintiff that they were true and it is true that plaintiff had at the time reasonable grounds for such belief." See cases above cited.

[2, 3] As to all other indignities imposed upon the wife by the husband, the court found that said indignities occurred subsequent to final separation of the parties, to wit, subsequent to October 31, 1928; hence such conduct was not proper grounds for divorce. In this connection it should also be observed that if the said matters were insufficient as a ground for divorce to the wife, they were likewise insufficient to establish the defense of recrimination. Likewise, the defense of condonation was not made out. The divorce action in June, 1927, followed the charge by the wife to others that the husband was a sex pervert. The court found that upon her plea to him, the action was dismissed. The necessary inference from this finding is that the wife withdrew her said charge and in turn promised conjugal kindness. The husband testified that he did not know the extent to which she had circulated the accusation at the time he dismissed the action. But,

be that as it may, the court further found that subsequent to said dismissal and prior to the date of separation the wife was guilty of other conjugal unkindness and cruelty, particularly the false charges against the son, Robert Mayo. The necessary effect of this finding was that the condonation, if any, theretofore existing, being conditional, had been properly revoked. Sections 117 and 121, Civil Code.

We have examined the rather nebulous contentions of the wife as to the insufficiency of the evidence to justify the findings as to items of separate and common property. There is no substance in them. The husband accounted, in a very plausible, if not substantial manner, for every item of property and traced its origin. His books subsequent to January 1, 1925, were submitted to auditors employed by the wife. The income and assets and expenses subsequent to the marriage in August, 1923, and prior to January 1, 1925, were attested by a bookkeeper who claimed to have taken her data from the books of the husband then in existence and since lost or destroyed. The income tax report for the year 1924 was available. The income from all sources, during all the years from marriage to trial date, was rather accurately estimated. The community expenses were also tabulated. The rulings of the court in admitting secondary evidence of the books for the years 1923 and 1924 were clearly within its discretion. The wife has tossed into our laps almost 100 pages of undigested testimony received on this question of property and in the following desultory language leaves the question to its fate: "Since the evidence shows that all other property involved in the case was acquired subsequent to January, 1925, and since the plaintiff contends that all of said property is separate property only because it was supposedly acquired with funds coming from said special savings account, all property is therefore community property, and said findings are not supported by the evidence in all respects in which said findings are adverse to the defendant. Also, whether said findings are supported by the evidence, or not, said findings should be reversed and modified upon this appeal, to make the same find all of the property involved herein as community property, because the plaintiff did not show any reason why there should be any finding otherwise, and because the preponderance of the evidence, and all of the evidence, shows all of said property to be community property."

The cross-appeal of the husband is likewise clearly without merit. Fitness of both

husband and wife to care for and have custody of the minor children was found to exist by the court. The allowance for their support, including nurse hire, was a fair and a proper exercise of discretion, clearly warranted by the evidence. Furthermore, the husband is not aggrieved by the property award made by the court. In fact, his entire appeal has all the earmarks of a mere counter-attack to maintain the status quo fixed by the trial court as to the wife's rights.

Further complaints as to rulings of the court in accepting or rejecting evidence are so clearly without merit that we shall not prolong this discussion.

The judgment in its entirety is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.



3 Cal.2d 141

LYNCH v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15020.

Supreme Court of California.

April 4, 1935.

1. Constitutional law ☞67

Generally, whether activity is for common good or public welfare is not primarily judicial question, and courts should avoid interference with reasonable determination thereof by properly authorized bodies and officers.

2. Municipal corporations ☞717

Use for boxing and wrestling matches of exposition auditorium, which reverted to city under agreement providing for maintenance for assemblages for purposes connected with general welfare, *held* not enjoinable, since staging of boxing and wrestling matches and other sports, which were authorized by statutes, were not contrary to public welfare.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Edward J. Lynch against the City and County of San Francisco and others.

From a judgment denying relief to plaintiff, he appeals.

Affirmed.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco (Conrad Louis Gardner, of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Leo C. Lennon and Henry Heidelberg, Deputy City Attys., all of San Francisco, for respondents.

LANGDON, Justice.

This is an action by a taxpayer to enjoin the defendant city and county and certain officers thereof from permitting the exposition auditorium in the said city to be rented and used for allegedly improper purposes, particularly boxing and wrestling matches. The lower court denied any relief to plaintiff.

The auditorium was built by the Panama-Pacific International Exposition Company to be used in connection with the exposition held in San Francisco in 1915. The land was owned by the city, and the funds for building the exposition and the auditorium were raised by a bond issue of the city. It was contemplated that, upon the termination of the exposition, the auditorium should remain the property of the city, to commemorate the enterprise. An agreement was entered into by the city and the company, which provided that the building should be maintained by the city "for assemblages for purposes connected with the general welfare," including "special private assemblages, congresses, or conventions of such societies, associations, organizations or groups of individuals brought together for their common good, or for any purpose connected with the public welfare."

[1, 2] The parties have discussed at some length the legality and binding force of this agreement; the contention of respondents being that it was void for lack of compliance with the method prescribed by the charter. But it is unnecessary to pass upon this issue, for the cause may be decided upon elementary and settled principles. The question whether an activity is for the common good or public welfare is, generally speaking, not primarily a judicial one, and the courts should avoid interference with a reasonable determination thereof by properly authorized bodies and officers. The staging of boxing and wrestling matches, basketball games, and other sports, all of which are carried on under the authority of, and in accordance with, our statutes, cannot be held by this court contrary to the

public welfare as a matter of law. See County of Los Angeles v. Dodge, 51 Cal. App. 492, 197 P. 403.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



2 Cal.2d 693

**STRATTON et al. v. SUPERIOR COURT
OF LOS ANGELES COUNTY et al.**

L. A. 15018.

Supreme Court of California.

March 25, 1935.

1. Courts ⇐480(1), 486

Where defendant, sued in municipal court, has counterclaim not within jurisdiction of such court, he may plead counterclaim and have municipal court transfer cause to proper court, or he may bring suit on claim in superior court, and have further prosecution of suit in municipal court enjoined (Code Civ. Proc. § 396, as re-enacted by St. 1933, p. 1841, § 7).

2. Courts ⇐487(5)

Under statute providing that cause shall be transferred to court having jurisdiction, where it appears from verified pleadings, or at the trial, that determination of action, or of a counterclaim arising out of transaction sued on, or of a cross-complaint, will involve questions not within jurisdiction of court in which action is pending, lack of jurisdiction must appear on face of pleading or from evidence introduced in support thereof (Code Civ. Proc. § 396, as re-enacted by St. 1933, p. 1841, § 7).

3. Courts ⇐487(5)

Municipal court was without power to transfer cause to superior court, where defendant filed no pleadings in municipal court raising issues beyond such court's jurisdiction, but merely showed that defendant had instituted in superior court an action for damages, in excess of municipal court's jurisdiction, for fraudulent inducement of contract sued on in municipal court (Code Civ. Proc. § 396 as re-enacted by St. 1933, p. 1841, § 7).

In Bank.

Proceeding for a writ of review by Cora L. Stratton and another to review an order of the superior court of the County of Los Angeles retransferring to the municipal court of the City of Los Angeles a cause transferred to the superior court on the motion of petitioners as defendants therein.

Order of superior court affirmed.

For prior opinion, see 35 P.(2d) 393.

J. M. Clements and James V. Brewer, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, W. B. McKesson, Deputy Co. Counsel, and Stanley E. Fox, all of Los Angeles, for respondents.

LANGDON, Justice.

This is a proceeding by Cora L. and G. W. Stratton, petitioners, to review an order of the superior court annulling an order of the municipal court.

In December, 1933, Arthur Pinover brought an action in the municipal court against Cora L. and G. W. Stratton, for the sum of \$1,288.87 alleged to be due under a contract executed August 30, 1932. The defendants filed an answer and counterclaim for \$1,455. Subsequently, on January 25, 1934, the Strattons commenced an action against Pinover in the superior court, seeking recovery of \$15,304 as damages for fraud in the inducement of the said contract, and also praying for the \$1,455 sought in the counterclaim filed in the first action. Petitioners allege that all of the claims of the parties in each action arose out of the same transaction, that involving the contract of August 30, 1932.

On February 17, 1934, the Strattons made a motion in the superior court to restrain the action in the municipal court. This was denied.

When the first action came to trial in the municipal court, the Strattons, defendants therein, offered in evidence the file of the superior court action, and moved to transfer the case to the superior court on the ground that the superior court action constituted a counterclaim in the municipal court action, and was beyond the jurisdiction of the municipal court. The municipal court, on February 26, 1934, granted the motion and certified the case to the superior court.

On March 23, 1934, in the superior court, Pinover moved to retransfer the cause to

the municipal court, and the motion was denied in the law and motion department, without prejudice.

On April 20, 1934, Pinover made another motion to retransfer the cause, this time in the calendar department. The motion was granted, and the order of the superior court was thereupon made transferring the matter back to the municipal court. It is this order which petitioners seek to have annulled.

[1] The main contention of petitioners is based upon the provisions of section 396 of the Code of Civil Procedure, a new section enacted in 1933 (St. 1933, p. 1841, § 7), which reads in part as follows: "If an action or proceeding is commenced in a court which has jurisdiction of the subject matter thereof as determined by the complaint, and *it thereafter appears from the verified pleadings, or at the trial*, that the determination of the action, or of a counterclaim arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings in the action or proceeding, and certify the pleadings * * * to a court, having jurisdiction thereof." In the instant case, if the Strattons had originally counterclaimed in the municipal court action for the sum of \$15,304 as damages for fraud, it would then have been the duty of the court, under the statute, to transfer the case to the superior court, for there would be a counterclaim beyond the jurisdiction of the court in which the action was filed. On this point the statute is quite clear, and it does not appear why petitioners did not follow this obvious procedure. It seems settled, also, in this state, that petitioners, having a counterclaim arising out of the transaction and beyond the jurisdictional limit of the municipal court, could sue in the superior court, and compel the plaintiff in the municipal court action to litigate the entire controversy in the superior court, by enjoining the further prosecution of the municipal court action. *Todhunter v. Smith*, 219 Cal. 690, 694, 28 P.(2d) 916. Here the Strattons did sue in the superior court and did move to restrain the other action. It does not appear why their motion was denied, but since this is not an appeal from or review of the order denying that motion, the matter need not be further considered. We make these observations, however, in order that it may be clear that

if petitioners had a bona fide counterclaim arising out of the transaction involved in the first action, which counterclaim was in excess of the jurisdiction of the municipal court, they had a right to have the case tried in the superior court; and they could have achieved, and, indeed, may still achieve, this result by either of the two methods suggested above.

[2] But the question presented to us in this review is whether the municipal court had jurisdiction to transfer the case to the superior court when the *pleadings* did not raise any issues beyond the jurisdiction of the municipal court. Petitioners did not set up their cause of action for damages as a counterclaim in the municipal court action; they merely offered in evidence the file of the superior court action. It is their contention that the words "or at the trial" in section 396 permitted them to do so; and that under this language, the municipal court was bound to transfer the case, because although the pleadings did not show issues beyond its jurisdiction, such issues were set up at the trial by the introduction of the file of the action in the superior court.

The statute relied upon is new in this state, and although it is similar to former section 838 of the Code of Civil Procedure, dealing with justices' courts, no cases have been cited to us which would be decisive of the point raised herein. It has been observed, however, in connection with the old section, that "the jurisdiction of the superior court must appear on the face of the pleadings certified to it. * * *" *Baker v. Southern California Ry. Co.*, 114 Cal. 501, 506, 46 P. 604, 605; *Inferior Courts*, 1934 Supplement to Cal. Jur., pp. 70, 71.

This seems to be a desirable rule, and it is the most reasonable interpretation of section 396. It is true that taken alone the words "or at the trial" would suggest that matters requiring a transfer might be raised in open court, though in fact outside the pleadings, with the result that pleadings would be certified to the superior court for trial therein for reasons, and upon issues, which did not appear in those pleadings. But a fair reading of the entire section shows that no such result was intended. It provides for transfer when it appears that the determination of the "action," a "counterclaim," or "a cross-complaint" will involve issues beyond the jurisdiction of the court. It should be obvious that a "counterclaim" means there not merely the cause of action itself, but that cause of action *pleaded* by the defendant in

his answer as a counterclaim. If it is not pleaded as such, it seems wholly unreasonable to regard it as coming within the statutory provision. For the same reason, the pleading of that cause of action in a complaint in the superior court is not within the meaning of the section. We are unable to construe the statute to provide that a complaint in the superior court should be deemed a counterclaim in an action in the municipal court, and we have been referred to no authority which supports such a construction. The statement "or at the trial" must be taken to mean that where a cause of action is set up in the municipal court action by counterclaim or cross-complaint, even though lack of jurisdiction of said cause may not appear from the pleading itself, evidence may be offered at the trial which discloses the lack of jurisdiction over the cause of action so pleaded, and thereupon the court must transfer the case.

[3] The foregoing discussion disposes of this proceeding, for the municipal court lacked statutory power to transfer the cause. Its order was, in consequence, void (see *Arroyo Ditch & Water Co. v. Superior Court*, 92 Cal. 47, 28 P. 54, 27 Am. St. Rep. 91), and the order of the superior court retransferring the cause was, under the circumstances, proper.

The said order of the superior court is hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



3 Cal.2d 32

Ex parte JOHNSTON et al.
Cr. 3838.

Supreme Court of California.

March 29, 1935.

1. Habeas corpus ☞44

District Court of Appeal and Supreme Court had jurisdiction of petition for habeas corpus in view of statute providing for appeal to Court of Appeal, or in capital cases, to Supreme Court from order discharging a defendant in case prosecuted by indictment or information, and that hearing may be granted

by Supreme Court after determination by Court of Appeal (Pen. Code, § 1506).

2. Criminal law ☞186

Statutory proviso that two or more different offenses may be charged in one indictment, and that acquittal on one or more counts will not be acquittal on others manifests intent that apparently inconsistent verdict shall afford no basis for reversal where conviction is supported by evidence, but does not validate an indictment charging conspiracy without an allegation of an overt act nor authorize a conviction when defendant has been acquitted of overt act alleged (Pen. Code, § 954).

3. Criminal law ☞186

Where defendants were acquitted on counts of indictment charging overt acts constituting violation of Corporate Securities Act, conviction on count charging conspiracy could not be supported notwithstanding statutory provision that acquittal on one count shall not be deemed acquittal on any other count (Pen. Code, § 954; St. 1917, p. 673, as amended).

In Bank.

Application by Charles H. Johnston and E. Pratt for writ of habeas corpus.

Petitioners discharged from custody.

Prior opinion, 36 P.(2d) 225.

McGee & Robnett, Paul Friedman, and Erwin P. Werner, all of Los Angeles (Robert L. Collins, of Los Angeles, of counsel), for petitioners.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker and A. H. Van Cott, Deputy Dist. Attys., all of Los Angeles, for respondent.

THOMPSON, Justice.

A petition for hearing by this court was granted after decision by the District Court of Appeal, pursuant to which the petitioners were discharged in a habeas corpus proceeding after conviction in the superior court and while an appeal was pending in the District Court of Appeal.

The following statement of facts is taken from the opinion of the District Court of Appeal [36 P.(2d) 225, 226]: "By an amended indictment filed in the superior court of Los Angeles county, petitioners were charged in several counts with having committed certain specified acts, to wit, selling certain corporate stock in nonconformity with the Corpo-

rate Securities Act (St. 1917, p. 673, as amended), of this state. By another count it was alleged that they combined, confederated, and conspired to violate the same provisions of said act, and that in furtherance of such conspiracy certain overt acts therein enumerated were committed, which overt acts were identical with and mere repetition of, the crimes charged in the preceding counts. On a trial before a jury verdict[s] were returned finding petitioners guilty of the charge last mentioned and not guilty of the offenses alleged in all other counts. From the judgments entered upon the verdict of conviction they appealed. A petition for a writ of habeas corpus was thereafter filed and is now before this court, praying that petitioners be discharged from custody, for the reason, among others, that said acquittals constitute a finding that none of the overt acts alleged in the count of the information charging conspiracy were committed, and hence in legal effect result in an acquittal of the crime charged in that count."

[1] It is asserted by the respondent that because petitioners had appealed from the judgment of conviction the District Court of Appeal was without jurisdiction to consider the petition for the writ of habeas corpus and the case of *France v. Superior Court*, 201 Cal. 122, 255 P. 815, 52 A. L. R. 869, is cited in support thereof. It is to be noted that the effect of the cited case is that after an appeal from a judgment of conviction, the superior court is without authority during the pendency of the appeal to discharge the appellant in a habeas corpus proceeding for any defect or infirmity existing in the proceedings which could be reviewed by the appellate court on appeal. It is to be further noted that section 1506 of the Penal Code was adopted subsequent to the decision of the case mentioned and provides for an appeal to the District Court of Appeal, or in capital cases to the Supreme Court, from an order discharging a defendant after his conviction in a case prosecuted by indictment or information, and the section also provides that a hearing may be granted in this court after a determination by the District Court of Appeal. From which it is manifest that the District Court of Appeal had jurisdiction to entertain the petition for the writ of habeas corpus and that we have jurisdiction by reason of granting a petition for hearing in this court.

[2, 3] We may therefore pass to the principal question involved. It may be phrased in these words: Do the acquittals on the

thirteen counts charging the defendants with the specific crimes of violating the Corporate Securities Act (St. 1917, p. 673, as amended) amount to special findings that the defendants did not commit the overt acts alleged in the count charging conspiracy? If this question be answered in the affirmative, it must follow by reason of the specific controlling the general, that the court was without jurisdiction to pronounce a judgment of conviction on that count. Practically the identical situation was before the District Court of Appeal in *Oliver v. Superior Court*, 92 Cal. App. 94, 267 P. 764, 765, and it was there said: "It is important to note the fact conceded by respondent, that the only overt acts alleged in count 34 are the specific crimes charged in the other counts; the sole overt acts averred were 'larceny and embezzlement.' The situation is clearly different from that which would have been presented had the conspiracy charge contained allegations of a number of overt acts which, taken together, would constitute grand larceny or embezzlement. Had the indictment been so drafted, it could not be said that an acquittal of grand larceny or embezzlement would necessarily have been a determination that no criminal conspiracy pertaining to the same transactions had occurred. But here the conclusion cannot be escaped that since each crime, considered and described collectively as a single entity, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy. Moreover, considering the record here presented, by finding that none of the overt acts charged as parts of the conspiracy were committed, the jury, in effect, acquitted the petitioners of the offense of conspiracy. This must be so, since one of the overt acts charged must be proved to permit of conviction of conspiracy under section 1104 of the Penal Code."

We are in accord with the reasoning of the *Oliver Case* and, to show how closely the cases follow each other, we direct attention to the fact that the petitioners here were charged in count 1 with the commission of "an overt act done in furtherance of the conspiracy and to carry out the same" in that they "did willfully, unlawfully, feloniously and knowingly, on or about the ninth day of August 1930, issue and sell and cause to be issued and sold shares of capital stock." This language follows the exact language of the remaining counts charging the specific crime of violation of the Corporate Securities

GRAHAM et ux. v. LOS ANGELES FIRST
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L. A. 14011.

Supreme Court of California.
March 30, 1935.

Act. Hence it cannot be said that an element is contained in the overt act which is not also contained in the specific charge, nor vice versa. They are to all intents and purposes identical.

But the respondent calls to our attention the last provision of section 954 of the Penal Code, enacted in 1927 and prior to the decision of *Oliver v. Superior Court*, supra. After providing that an indictment or complaint may charge two or more different offenses connected together in their commission or different statements of the offenses or two or more offenses of the same class, the section concludes: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." The section was manifestly adopted for the purpose of enabling the prosecutor to designate or name the offenses by two or more names or designations and of making it impossible for the defendant to escape by reason of an error in designation of the crime. The proviso was written into the section for the purpose of declaring the law that a verdict apparently inconsistent shall afford no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted. But we cannot construe it to mean that an indictment or information charging conspiracy is sufficient without the allegation of an overt act, nor that such an indictment or information furnishes the basis for a judgment of conviction when the defendant has in fact been acquitted of every overt act alleged. This conclusion is corroborated to a degree by the case of *People v. Koehn*, 207 Cal. 605, 279 P. 646, 649, wherein it was held, where two counts were inconsistent, not as a matter of pleading but as a matter of evidence, that the defendant, though found guilty of both, must be held to be acquitted on one of the two counts. The pertinent part of that opinion reads as follows: "Returning to the question whether a conviction on both counts of the information may be sustained, we are of the view that the two conclusions are inconsistent with each other and cannot be reconciled by the application of any rule by which the purposes of a rational mind may be determined."

It follows that the petitioners should be and they are discharged from custody.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

1. Fraud ☞12

Promise made without any intention of performance constitutes actual fraud and deceit.

2. Vendor and purchaser ☞107

Vendors' alleged misrepresentations to purchaser that all improvements, water, gas, and electricity would be installed within a reasonable time without expense to purchasers, whether considered as vendors' promise to do such things or procure them to be done, or merely a statement as fact of course of action which would be followed by others not warranted by information at vendors' command, were actionable, and justified rescission of land contract.

3. Vendor and purchaser ☞341(1½)

Vendors' misrepresentations would justify recovery of money paid by purchasers on land contract against bank which held legal title to realty in trust for vendors, executed contract, and received payments thereon, since vendors were agents for bank.

4. Vendor and purchaser ☞341(2)

Complaint alleging that bank held legal title to realty in trust for beneficiaries who misrepresented realty to purchasers, that purchasers entered into agreement with bank as holder of legal title, that they made payments on price to bank, and that they made demand on bank for return of price, which had not been complied with, held sufficient to render bank liable as trustee for repayment of price received, notwithstanding failure to state that bank as trustee held funds for or was indebted to beneficiaries.

5. Limitation of actions ☞180(5)

General demurrer, to raise defense of limitation, must specify such ground.

6. Vendor and purchaser ☞123

Complaint seeking rescission of land contract for fraud, which failed to set forth facts and circumstances surrounding discovery of fraud, but merely set out date of discovery, held not subject to general demurrer which did not specify ground of limitation.

7. Vendor and purchaser ☞119

Purchasers' delay in giving formal notice of rescission of land contract after discovery of falsity of representations, which was alleged to have been caused by negotiations with vendors attempting settlement,

would not preclude rescission (Civ. Code, § 1691).

8. Vendor and purchaser ☞117

Purchasers' notice of rescission containing offer to reassign land contract was sufficient offer to restore to vendors everything of value received to justify rescission, in absence of allegation that purchasers ever went into possession.

9. Vendor and purchaser ☞117

Provision, in land contract pleaded in *hæc verba* in purchasers' complaint seeking rescission, that possession was delivered to purchasers, could not be treated as equivalent to averment that possession was transferred, so as to render offer to reassign contract insufficient tender of everything received under contract to warrant rescission.

10. Vendor and purchaser ☞118

Purchasers' default at time of notice of rescission did not bar right to rescission of land contract on ground of fraudulent representations.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Orrel L. Graham and wife against the Los Angeles First National Trust & Savings Bank and others. From a judgment dismissing the action after an order sustaining a general demurrer of the named defendant to the third amended complaint without leave to amend, plaintiffs appeal.

Reversed.

Willedd Andrews, of Los Angeles, for appellants.

John L. Mace and John C. Campbell, both of Los Angeles (Arch R. Tuthill, of Los Angeles, of counsel), for respondent.

CURTIS, Justice.

This appeal is from a judgment dismissing the action after an order sustaining a general demurrer of the defendant bank to the third amended complaint without leave to amend.

The third amended complaint, which we will refer to hereinafter as the complaint, sets up that on the 1st day of June, 1928, plaintiffs entered into a contract with the Los Angeles First National Trust & Savings Bank for the purchase of a certain lot or parcel of land situated in the city of Burbank, county of Los Angeles; that the personal defendants, one of whom operated under the name of Hollywood Organization, were jointly re-

sponsible for the execution of the contract by the appellants; and that the corporate defendant, Los Angeles First National Trust & Savings Bank, was acting as trustee for the other defendants. The complaint alleges, after setting out a verbatim copy of the contract, that appellants were induced to execute the contract by the defendant James J. Toy, one of the partners, who represented and stated to them as follows:

"That all improvements, including a paved street, curbs and sidewalks, would be installed upon the tract of land and in front of Lot 97 of the tract of land known as Tract 10363, and that said improvements would be made within a reasonable time and without expense to any purchaser of any property therein referred to and in particular of Lot 97 of said Tract 10363.

"That water and gas mains would be piped to said Lot 97 in Tract 10363 within a reasonable time and without expense to any purchaser of said property known as Lot 97 in Tract 10363.

"That electric lines would be installed on said Tract 10363 and adjacent to said Lot 97, within a reasonable time and without expense to any purchaser of said property known as Lot 97 in Tract 10363."

There then follows appropriate allegations to the effect that the defendants at no time had any intention of performing or carrying out or completing the improvements; that plaintiffs relied upon and believed the statements so made; that plaintiffs had paid certain amounts upon the purchase price; that on or about the 14th day of October, 1930, plaintiffs discovered said representations were untrue and that no curbs and sidewalks had been installed, no water mains or gas mains had been piped, and that no electric lines had been installed; and that thereafter on April 24, 1931, they served upon the defendants and each of them notice of cancellation of said agreement and a demand for the return of the money paid as principal and interest to the defendants, together with the money paid out as taxes, and containing a tender and offer to assign or reassign said agreement of sale. Further allegations followed that the defendants have refused said offer, and that the delay in filing plaintiffs' action to cancel, annul, and set aside the agreement of purchase was due to the fact that plaintiffs, after the discovery of the falsity of the representations, had entered into negotiations with the defendants to adjust said matters and that during the nego-

tations they were requested by one of the defendants to defer the commencement of legal proceedings until the return of another defendant to the state when the matter could be adjusted and cleared up to the satisfaction of the plaintiffs.

Respondent bank filed a forty-page brief specifying five particulars in which it contends that said third amended complaint fails to state a cause of action against said defendant bank. The five particulars in which respondent claims that appellants failed to state a cause of action are as follows:

1. There are no allegations in the complaint as to who was to make the improvements. Representations by a seller to the effect that improvements will be made by third persons constitute mere expressions of opinion and rescission cannot be based thereon unless it appear that some control is exercised by the seller over such third person.

2. In the absence of any allegations in the complaint that the respondent bank held in its possession any money of, or was indebted to, the personal defendants, said complaint fails to state a cause of action against the bank to recover money paid on the contract.

3. The plaintiffs, in order to state a cause of action, must allege the facts and circumstances surrounding the discovery of the alleged fraud.

4. The plaintiffs' notice of rescission was not given promptly as required by section 1691 of the Civil Code.

5. Plaintiffs' offer to reassign the contract is not a sufficient offer to restore to the other parties everything of value which they had received under the contract, since it was not an offer to deliver up possession of the property.

Appellants made no answer to this brief and the cause was submitted for decision without oral or any further argument. Appellants' opening brief, in addition to its statement of facts, sets forth two general principles of law: First, that in the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties; and, second, that in a complaint seeking cancellation of an instrument based upon fraud, the facts constituting the fraud only must be specifically stated. These statements with supporting authorities occupy less than two pages. It is apparent that in the solution of the questions

presented by the appeal, the court has had absolutely no real help from the attorney for the appellants. It would seem from the fact that an attorney devotes none of his time or efforts to furnishing the court with argument and authorities in support of his appeal that he must necessarily deem it utterly lacking in merit, and that the court, taking the appeal at the attorney's own valuation, would be warranted from this fact alone in concluding that such appeal was a frivolous one, and summarily dismissing it with a penalty. At the very least, such a failure shows an utter lack of conception of the duties of an attorney upon taking an appeal.

We have, however, taken the time to make an independent research and, inasmuch as such research has convinced us that the demurrer was improperly sustained, we have decided to refrain from penalizing the clients by dismissing the appeal. We will take up in order the various grounds upon which respondent bank claims the general demurrer was properly sustained.

[1, 2] 1. We are not impressed with the argument that the representations made to the purchasers by the sellers were merely erroneous predictions as to the future conduct of third persons and therefore were not actionable. Whether the representations to the purchasers that all improvements, including paved streets, curbing, and sidewalks, would be installed upon the tract of land, that water and gas mains would be piped to said lot, and that electric lines would be installed on said tract adjacent to said lot within a reasonable time without expense to purchasers, be considered as a promise of the sellers to do these things or to procure them to be done, or merely as a statement as a fact of the course of action which would be followed by other persons, not warranted by the information at the command of the person making such representations, they are equally actionable. If considered in the category of a promise of the sellers, it is actionable. A promise made without any intention of performing it constitutes actual fraud and deceit. *Boulevard Land Co. v. King*, 125 Cal. App. 224, 13 P.(2d) 864; *Greenberg v. Du Bain Realty Corporation* (Cal. Sup.) 42 P.(2d) 628. If it is merely a statement as a fact, which should have been stated as a belief, that certain improvements would be made by third persons, it is equally actionable. *Curtis v. Title Guarantee & Trust Co.* (Cal. App.) 40 P.(2d) 562. The allegations of the complaint herein, relative to the misrepresentations of the beneficiary-sellers, if

proven, are sufficient to justify a rescission of the contract of purchase.

[3] 2. Equally untenable is the contention of the respondent bank that inasmuch as the representations were not made by it, but by the individual respondents, the beneficiaries who were also the sellers, and the complaint contains no allegation that the respondent bank has the money of or is indebted to said beneficiaries, the complaint fails to state a cause of action against respondent bank to recover the money paid on the contract. Since the bank held legal title to the real property which the plaintiffs agreed to purchase, it follows that in the negotiations of purchase and sale relating to the real property, the bank stood in the position of principal and the beneficiary-sellers stood in the position of agents. It is now settled by the recent cases of *Speck v. Wylie*, 1 Cal.(2d) 625, 36 P.(2d) 618, 95 A. L. R. 760; *Curtis v. Title Guarantee & Trust Co.*, supra, and *Greenberg v. Du Bain Realty Corporation*, supra, that a purchaser who has been induced to enter into a contract by the fraudulent misrepresentations of an agent, by rescinding the contract may recover the consideration paid from the principal, although the principal was in fact ignorant of the representations made, and although such principal had attempted to limit its liability by a clause in the contract to the effect that it would only be bound by the representations contained in the written contract. This is upon the theory that an innocent principal so contracting may not be permitted to enrich itself by reason of its agent's fraud, and that any property received by such principal is held by it as a constructive trustee for the person defrauded. The case of *Wantz v. Union Bank & Trust Co.*, 137 Cal. App. 98, 29 P.(2d) 882, 31 P.(2d) 826, relied upon by respondent bank as exempting it from such liability, was decided prior to the three last-named cases, and was based upon the theory of *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, which theory has been modified by these three decisions.

[4] Although the complaint does not state that the bank as trustee holds funds for or is indebted to the beneficiaries, yet it does set forth the fact that the bank holds legal title to the real property in trust for the beneficiaries, that the purchasers entered into the agreement with the bank as holder of the legal title, that they paid over to the bank on the purchase price of said lot the various sums set out in said complaint, that they had made a demand upon the bank for a return of said purchase price, and that said

demand had not been complied with. These allegations are sufficient to render the bank liable, at least in its relation as trustee, for the repayment of the purchase price received by it.

[5, 6] 3. In support of its contention that the complaint herein failed to state a cause of action because it failed to set forth the facts and circumstances surrounding the discovery of the fraud, but merely set out the date of the discovery, respondent relies upon the rule set out in *Consolidated, etc., Co. v. Scarborough*, 216 Cal. 698, 16 P.(2d) 268, and *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 486, 45 P. 809. In both these cases demurrers specifically setting up the statute of limitations had been interposed. It may be conceded that these cases are definite authority for the rule that if the defense of the statute of limitations is properly presented, the complaint is vulnerable unless it shows facts and circumstances surrounding the discovery of the fraud from which the court may decide that the facts and circumstances furnish justification for a suspension of the statute until the discovery of the facts constituting fraud. In the instant case, however, the defense of the statute of limitations was not interposed. The demurrer was a general demurrer which did not specify the statute of limitations. Although the defense may be raised by a general demurrer, such demurrer must specify that the ground relied on is the bar of the statute of limitations. *California Safe, etc., Co. v. Sierra, etc., Co.*, 158 Cal. 690, 112 P. 274, Ann. Cas. 1912A, 729; *McFarland v. Holcomb*, 123 Cal. 84, 87, 55 P. 761. The two cited cases relied upon by appellants are therefore not applicable to the facts in this action.

Respondent seeks to apply the rule set out in the cases of *Consolidated, etc., Co. v. Scarborough*, 216 Cal. 698, 16 P.(2d) 268, supra, and *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 45 P. 809, supra, that a complaint must contain allegations of facts and circumstances surrounding the discovery of the fraud, in order to successfully meet the bar of the statute of limitations, to the instant case involving rescission on the ground of fraud. No cases directly in point are cited, however. *Bancroft v. Woodward*, 183 Cal. 99, 190 P. 445, cited by respondent as its principal authority in support of this contention, does not support it. In that case the evidence failed to show any excuse on the part of the cross-complainant for delaying two and a half years after discovering the fraud before attempting to rescind. No de-

BOSQUI et al. v. CITY OF SAN BERNARDINO et al. (two cases).
L. A. 14946.

Supreme Court of California.

March 26, 1935.

Rehearing Denied April 25, 1935.

murrer was interposed to the cross-complaint and the case was decided upon the evidence and not upon the pleadings. We think, therefore, that that case is not applicable to the situation before us in this case.

[7] 4. The contention that appellants delayed so unduly in giving formal notice of rescission after discovery of the falsity of the representations that they lost their right of action is adequately answered by the allegations of the complaint which alleged that the delay in rescinding was caused by the negotiations with the defendants looking toward an amicable settlement of the matter. A delay in rescinding a contract on the ground of alleged false representations which is the result of indulgence shown to the party perpetrating the fraud is not available as a defense in an action for rescission. *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, 704, 262 P. 730; *Gist v. Security Trust & Savings Bank*, 218 Cal. 581, 24 P.(2d) 153.

[8, 9] 5. We are of the opinion that appellants' notice of rescission containing the offer to reassign the contract was a sufficient offer to restore to the opposite parties everything of value received. The complaint contains no allegations which indicate that the appellants ever went into actual possession of the property. It is true that there is a provision in the contract, which was pleaded in *hæc verba*, to the effect that possession was delivered to the buyer; but the statement contained in such contract cannot be treated as equivalent to an averment that possession was in fact transferred. *Hayt v. Bentel*, 164 Cal. 680, 130 P. 432.

[10] The fact that appellants were in default at the time of the giving of the notice of rescission, which may be deduced from the complaint if the total amount paid by appellants be divided by the amount of each installment to be paid, is also immaterial, as the rule that a person in default cannot rescind has no application to an action based upon the ground that the contract was induced by fraudulent representations. 12 Cal. Jur. 791.

The complaint herein is not a model of pleading. Nevertheless, we are constrained to hold that it does state a cause of action as against respondent and that, therefore, the general demurrer thereto was improperly sustained.

Judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

1. Railroads ⇨95(6)

Railroad Commission's order requiring railroad to "maintain" certain portion of viaduct over tracks *held* to require keeping such portion in proper repair, but did not include duty of keeping roadway clean and free of foreign substances; such duty resting on city.

[Ed. Note.—For other definitions of "Maintain," see Words & Phrases.]

2. Municipal corporations ⇨762(2)

Railroad Commission's order placing on railroad responsibility of maintaining certain portion of viaduct crossing railroad tracks *held* not to affect city's liability for injuries caused by dangerous or defective condition thereof (St. 1923, p. 675, § 2).

The Railroad Commission's order did not affect city's liability because city has control over its streets and has both power and duty of keeping them in repair, and order did not purport to release city from its duty and liability, even if it might have done so, but left railroad liable with city for any damages resulting from their separate obligations arising on the part of the railroad under the order, and on the part of the city under Public Liability Act (St. 1923, p. 675).

3. Appeal and error ⇨927(3)

On review of judgment of nonsuit, every favorable inference and presumption fairly arising from evidence must be considered as facts proved in plaintiff's favor.

4. Appeal and error ⇨927(3)

On review of nonsuit, view most favorable to plaintiff must be taken, where evidence is fairly susceptible of two constructions.

5. Appeal and error ⇨927(3)

On review of nonsuit, relevant evidence must be given its full probative strength, and any question arising from variation between testimony of witnesses cannot be considered.

6. Trial ⇨139(1)

Motion for nonsuit must be denied where plaintiff establishes *prima facie* case.

7. Automobiles ⇨308(10)

Whether viaduct crossing tracks was dangerous, due to splintered and defective

wooden barrier at curve, and whether such condition, for which both railroad and city would be liable, was proximate cause of automobile crossing curb, crashing through guard rails, and falling to street below, resulting in death of occupants, *held* for jury (St. 1923, p. 675, § 2).

8. Automobiles ⇨276

Evidence of many previous automobile accidents at curve in viaduct crossing railroad tracks, and knowledge thereof by responsible city officials, *held* sufficient notice to city officers of defective condition of viaduct (St. 1923, p. 675, § 2).

9. Automobiles ⇨308(11)

Ordinarily, question of contributory negligence in automobile cases is for trier of facts.

10. Negligence ⇨136(9)

Contributory negligence is question of law only when court is impelled to say that from facts reasonable men can draw but one inference which points unerringly to plaintiff's negligence contributing to injury.

11. Automobiles ⇨308(11)

Contributory negligence of driver of automobile which crossed curb barrier of viaduct over railroad tracks, crashed through guard rails, and fell to street below, resulting in death of occupants, *held* for jury (St. 1923, p. 675, § 2).

12. Statutes ⇨71

Statute giving right of action against cities, counties, and other public agencies, and not against state, for damages resulting from defective condition of public streets, *held* not unconstitutional as not having uniform operation (St. 1923, p. 675, § 2; Const. art. 1, § 11).

13. Municipal corporations ⇨800(2)

Where city's neglect to remedy dangerous or defective street after knowledge thereof proximately causes an injury, city is liable under statute giving right of action against cities and other public agencies for damages resulting from defective streets, despite the existence of another and concurring cause (St. 1923, p. 675, § 2).

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Actions by Daniel Van Allen Bosqui, Jr., and another against the City of San Bernardino and another, which actions were consolidated for trial. From an adverse judgment, plaintiffs appeal.

Reversed.

For prior opinion, see 34 P.(2d) 204.

Swing & Swing, of San Bernardino, for appellants.

William Guthrie and Wardwell D. Evans, both of San Bernardino, for respondent City of San Bernardino.

Robert Brennan, M. W. Reed, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District. Upon further consideration we adopt the opinion of Mr. Justice Marks as part of the opinion of this court. It reads as follows:

The plaintiffs are the adult children of Daniel Van Allen Bosqui and Mary Bosqui, his wife, who were killed in an automobile accident at about noon on the 17th day of April, 1932. For the sake of brevity we will refer to the city of San Bernardino as the city, and to the Atchison, Topeka & Santa Fé Railway Company as the company.

The plaintiffs filed separate actions for damages resulting from the death of each parent. They were consolidated for trial and come here on one record. At the close of plaintiffs' case, the trial court granted a nonsuit, and the judgment thereafter entered is now before us for review.

The fatal accident occurred on an overhead crossing which is popularly known as a viaduct built over the tracks of the company. The history of the construction of the original viaduct and its extension (describing only a portion thereof) and proceedings before the Railroad Commission are described by the Supreme Court in the case of *City of San Bernardino v. Railroad Commission*, 190 Cal. 562, 213 P. 980, as follows:

"In 1907, and for a long time prior thereto, Mt. Vernon avenue was a public highway in the city of San Bernardino, which was crossed, at grade, between Third street and Fourth street, in said city, by three or more tracks of the railway company. The latter, being desirous of laying additional tracks to extend its switching yards, entered into negotiations with the city authorities which resulted in an agreement or understanding to the effect that the city should vacate that portion of Mt. Vernon avenue between Third and Fourth streets, in consideration whereof the railway company should erect over the portion thus vacated a viaduct for highway purposes, on condition that the city should there-

after maintain the same 'so long as the same shall be used by the public for travel thereon.' This agreement was carried out. The city by ordinance abandoned and vacated that portion of the highway, on the expressed condition that the railway company should construct the viaduct in accordance with plans and specifications therein referred to, and when completed should convey the same to the city; 'said deed or conveyance to be upon condition that the expense of maintaining said viaduct will thereafter be borne solely by said city.' The viaduct was constructed and conveyed to the city by deed of conveyance containing the above-quoted condition and the city by resolution accepted the same. Upon the completion of the viaduct there were 15 tracks laid across the land which previous to the closing had been Mt. Vernon avenue. In 1916 the railway company desiring to further extend its yards, negotiations resulted in a further agreement, or understanding, similar to the first, as a result of which an additional portion of Mt. Vernon avenue was vacated by ordinance. The railway company constructed an addition to the viaduct, extending the same approximately 300 feet further south, and conveyed the extension thereof to the city by deed. With respect to this extension, however, so far as the evidence discloses, nothing was said, either orally or in writing, upon the subject of the cost of future maintenance thereof. After completion of the extension to the viaduct there were approximately 38 tracks crossing thereunder. The viaduct consisted of a steel structure with a wood floor, constituting an elevated highway about 20 feet in width, in addition to the sidewalk thereon, and at a height sufficient to permit the operation of trains underneath. In 1920 the plank roadway of the old portion of the viaduct was and for three years had been, very badly out of repair, so much so that it constituted a danger to traffic passing over it.

"In this situation the railway company filed an application before the Railroad Commission setting forth the facts above outlined and praying that the Commission after a hearing 'make such orders and directions with respect to the maintenance and care of said viaduct as may be just.' The city filed an answer and an amendment thereto, substantially admitting the facts alleged in the petition, but denying the jurisdiction of the Railroad Commission in said matter, and alleging that the city had no power or authority to enter into the agreement therein referred to for the maintenance of the viaduct by it. After hearings therein the Commission made the order which is now up for review, wherein it found

as a fact that public safety, convenience, and necessity require the maintenance and repair of the viaduct, and require the making of an order apportioning the cost of such maintenance and repair between the railway company and the city, and ordered that the railway company shall maintain 'at its sole cost and expense' the new portion of the viaduct, and that the city shall maintain 'at its sole cost and expense' the old portion thereof."

To the foregoing description of the viaduct as constructed in 1916 we must add a description of that portion over what is now Third street in the city. The original viaduct was extended south beyond the boundaries of Third street to, or near, the line of Broadway, and is described in the above-quoted paragraphs of the Supreme Court opinion in the case of *San Bernardino v. Railroad Commission*, supra. Third street was relocated and bore southerly and probably into what had been Broadway. At its southerly extremity the new portion of the viaduct was extended in a turn to the east for about 631 feet, where, descending a 6 per cent. grade, it ended in Third street as relocated. While the main portions of the viaduct on Mt. Vernon avenue and Third street approached each other at an angle of ninety degrees, the actual junction did not form a right angle. A short distance before the viaduct's west line on Mt. Vernon avenue would have joined with its south line on Third street, its direction was broken by a deflection of approximately forty-five degrees to the east for a distance of 37 feet, where it joined the south line of Third street a few feet east of the east line of the Mt. Vernon portion of the viaduct produced southerly across the end of the Third street portion. There is a similar deflection at the south end of the east line of the Mt. Vernon avenue portion of the viaduct for 23 feet, although at a different angle, which forms the extreme east end of the north line of Third street portion of the viaduct. This north line proceeds easterly with two slight changes of direction for about 50 feet to where it joins the regular north line of the Third street portion of the viaduct, where, as on Mt. Vernon avenue, the roadway is 20 feet wide with a 6-foot sidewalk for pedestrians on the south and west sides. This construction gives a roadway on the turn with a maximum width of 32 feet. The roadway of the main or level portion of the viaduct is 32 feet above the ground.

While the terms of the order of the Railroad Commission under review in the case of *San Bernardino v. Railroad Commission*, supra, were sufficiently set forth for the purpose of that case, the details of the order not

having been under attack, as the sole question decided was the power of the commission to make any order apportioning the cost of maintaining the viaduct, they become important here. The order made was as follows:

"Public hearings having been held upon the above-entitled application, briefs having been filed subsequent to the hearings, the matter having been submitted and is now ready for decision,—

"It is hereby found as a fact, that public safety, convenience and necessity require the maintenance and repair of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue, in the City of San Bernardino;

"It is further found as a fact, that public safety, convenience and necessity require that an order be made by this Commission apportioning the cost of such maintenance and repair between The Atchison, Topeka and Santa Fe Railway Company and the City of San Bernardino, in accordance with the order hereinafter contained; and basing its order upon the foregoing findings of fact and upon the opinion preceding this order,

"It is hereby ordered that the cost of maintenance of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue in the City of San Bernardino be borne as follows, to-wit:

"1. Applicant shall maintain, at its sole cost and expense the new level portion of said viaduct, as shown outlined in red, and marked 'Level' on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct extending along Mt. Vernon Avenue from a point 513 feet south of the south line of Fourth Street to a point 39 feet north of the north line of West Broadway.

"2. The City of San Bernardino shall maintain, at its sole cost and expense, the old level portion and both sloping approaches to both old and new level portions, as shown on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct not herein ordered to be maintained by applicant.

"3. The word 'new' as used above in this order, refers to those portions of said viaduct constructed in or subsequent to the year 1916."

The meaning of the foregoing is made somewhat uncertain by the fact that, while a copy of Exhibit No. 1, which is there referred to, is represented in the record here by a photograph of the original, no portion of it is out-

lined in red. The new level portion extended around the turn from the north and south portion on Mt. Vernon avenue a distance of about 25 feet to meet the incline approaching it on Third street. Without the red outlining it is not as clear as it should be that the order of the Railroad Commission placed the duty of maintaining this particular 25 feet of the viaduct on the company. It was probably within the exterior boundary lines of Mt. Vernon avenue existing prior to the abandonment of portions of that street. As the case was tried upon the theory that the order placed the obligation of maintaining this part of the new level portion of the viaduct upon the company, and this position is not questioned in its brief, we will assume that this particular 25 feet was included within the description in the order of that portion to be maintained by the company.

Along the east and north sides of the viaduct guard rails were constructed by mounting 3-inch pipes as upright posts into which were fastened three lateral pipes serving as rails. The upper pipe was 3 inches and the other two were 2 inches in diameter. A further guard was furnished by bolting 4 by 6 inch Oregon pine timbers to the floor of the viaduct along the north edge of the Third street portion. The timbers were so placed that the 4-inch dimension rested on the floor.

As a further protection to the traveling public using the roadway, a curbing had been constructed along the roadway edge of the sidewalk along the entire turn. Four by eight inch Oregon pine timbers were fastened along the upper outer edge of the sidewalk, and these timbers and the sidewalk were faced on the roadway edge with timbers of 3 by 12 inch Oregon pine, so that, when these timbers were newly installed, they presented a vertical, solid 12-inch obstruction to vehicular traffic which might be inclined to mount onto the sidewalk. At one time 16-inch facing timbers had been used, but at and before the time of the accident here in question the 12-inch timbers were in place. For lack of better names we will refer to all of these timbers resting on and along the face of the sidewalk as a curbing and the 3 by 12-inch timbers as the facing.

It does not appear from the record whether the curbing was part of the original construction of the viaduct, and, if not, when or by whom it was installed. The city repaired and replaced timbers of the curbing several times between June 1, 1929, and June 1, 1931.

There were two warning signs that could be observed by travelers crossing the viaduct

from the north. One was a sign about 20 by 20 inches attached to an iron pipe 10 feet high with "Slow Left" and an arrow pointing to the left upon its face. It was about 271 feet north of the turn. The other was an electric "blinker" with a red glass lens about 4 inches in diameter placed in the center of the south end of the Mt. Vernon avenue portion of the viaduct. The light was illuminated about three times each minute. Besides these two signs, photographs introduced in evidence show that the entire portion of the viaduct from the level of Third street to the turn was clearly visible to an automobile driver traveling south on the viaduct for a considerable distance before he reached the turn.

The viaduct accommodated vehicular traffic to the extent of between a minimum of 2,111, and a maximum of 4,496, automobiles each day.

Considerable sand, gravel, wood splinters, and other debris continually accumulated on the west and south side of the roadway, along the turn and to the north and east of it. Between June 1, 1929, and June 1, 1931, employees of the city had cleaned off this debris at intervals. On the day of the accident, it had accumulated in such quantities that it completely covered the portions of the west and south side of the roadway in the turn and in places extended several feet outward from the curbing.

The entire curbing was badly worn and splintered and in a very dilapidated condition on the day of the accident. This was caused by the wheels of vehicles hitting and rubbing against it in making the turn. The eastmost timbers of the curbing, the ones involved in this accident, were particularly dilapidated. The four by eight inch timber resting on the top of the sidewalk was badly splintered. The facing timber had been so worn that its top and front sides formed an oval instead of joining in a rectangle. Its east end had been completely worn away for a portion of its original length. Long splinters had been torn from it and many protruded from its side, all pointing westerly.

Daniel Van Allen Bosqui and his wife, Mary, were on a journey from Seattle, Wash., to Baltimore, Md., on the day on which they were killed. They were traveling in a 1929 model Hupmobile eight-cylinder sedan that had a wheel base of 132 inches. The tragedy was observed by one witness who testified at the trial. He was approaching the viaduct, traveling west on Third street. His testimony may be summarized as follows:

He saw a procession of about 15 cars traveling south on the Mt. Vernon avenue portion of the viaduct led by the Hupmobile, which came to a complete stop when a few feet north of the entrance to the turn. Two cars were traveling west on the Third street portion of the viaduct, with the leading car, a large one, near the turn. The Hupmobile started, and again came to a complete stop at about the middle of the turn close to the curbing. At that time the leading west-bound automobile was directly opposite in the turn on its own right-hand half of the roadway. The Hupmobile started again, and, after proceeding a few feet, it was suddenly tilted with its right front wheel elevated above the roadway. At this point it either came to a stop or was practically stopped. Its wheel suddenly came down from the elevation, and the automobile proceeded at a speed of 6 or 7 miles an hour across the roadway in a northeasterly direction, crashed through the guard rails on the north side of the viaduct, and fell to the ground below, killing Mr. and Mrs. Bosqui.

An officer, a member of the California highway patrol, furnished the only other direct evidence bearing upon the causes of the accident. He arrived at the scene shortly after the crash and inspected the roadway and automobile which was lying on its crushed top with the wheels in the air. There was a smear of red about a foot long on the curbing on the level portion of the viaduct about 6 or 8 feet west of where the incline from Third street joins the level floor. (The Hupmobile wheels were painted red.) Slivers of wood which were newly torn from the facing were on the roadway; one of them being about one foot long. Directly opposite this point was a skid mark about one foot long and about 40 inches from the face of the curbing presumably made by the left front tire of the Hupmobile. Extending back and northerly for about 60 feet was a distinct track of an automobile tire in the debris. The north end of the track started about 2 feet from the west curb on the Mt. Vernon avenue portion of the viaduct and proceeded on a curve to the east, ending where the red appeared on the facing. About 30 feet east from the east side of the Mt. Vernon viaduct and on the north side of the incline to Third street one of the guard timbers had been torn out, together with four upright iron pipes and their connecting pipes. The Hupmobile lay on the ground directly beneath this break. A number of slivers of Oregon pine were forced between the tire and the rim of the right front wheel of the Hupmobile.

The Hupmobile was driven after the accident, and its working parts were found to be

in good order, with the wheels in line and the brakes properly adjusted.

It should be observed that the débris on the roadway over which the Hupmobile passed and the dilapidated timbers of the curbing with which the wheel of the automobile came in contact and mounted were on the portion of the viaduct to be maintained by the company, and the guard rail through which the automobile crashed was on that portion to be maintained by the city under the order of the Railroad Commission as we have interpreted it on this appeal under the evidence before us.

[1] Any liability of the company must arise under the order of the Railroad Commission requiring it to maintain the new level portion of the viaduct at its own cost and expense. This obligation was placed upon it by the order which the Supreme Court has held the Railroad Commission had the power and authority to make. *City of San Bernardino v. Railroad Commission*, supra. While the word "maintain" is used in the formal portion of the order, it is clear from what precedes that it was intended that this maintenance should include keeping the viaduct in a proper state of repair. The Supreme Court of Kansas, in a case construing a contract requiring an electric service company to maintain a transmission line, said: "The ordinary meaning of the word 'maintain' is to keep in a particular state or condition, especially with reference to efficiency; to support; to sustain, to keep up; not to suffer to fail or decline." *Electric Service Co. v. City of Mullinville*, 125 Kan. 70, 262 P. 536, 537. See, also, *Davis Holding Corporation v. Wilcox*, 112 Conn. 543, 153 A. 169; *Plimpton v. New York, N. H. & H. R. Co.*, 221 Mass. 548, 109 N. E. 732; *Board of Education of Earlville Community High School Dist. No. 380 v. Board of Education of Non-High School Dist. of LaSalle County*, 343 Ill. 464, 175 N. E. 810. The duty to maintain and keep in repair related to the structure itself and included a duty to repair or replace weakened or worn portions of the framework, roadway, curbing, or sidewalk. It could hardly include the duty to keep the roadway clean and free of foreign substances. Street sweeping is a work which pertains more to the convenient use, good appearance, and sanitary condition of a roadway or causeway than the maintenance of its integral parts or of the whole structure. The duty to maintain a portion of the viaduct would hardly include a duty to keep the roadway clean and to remove sand, gravel, and other débris falling upon it. The duty to keep the roadway clean rests upon the city, as the viaduct

was part of its system of public streets. *City of San Bernardino v. Railroad Commission*, supra, 190 Cal. 562, at page 568, 213 P. 980.

The liability of the city must arise under the provisions of an act of the Legislature which we will term the Public Liability Act (St. 1923, p. 675). In *Pittam v. City of Riverside*, 128 Cal. App. 57, 16 P.(2d) 768, 769, it was said: "This action was brought under the provisions of section 2 of an act of the Legislature approved June 13, 1923 (Stats. 1923, p. 675). Under this section of the act municipalities are made liable for injuries to property resulting from the dangerous or defective condition of public 'grounds, works and property in all cases where the governing or managing board * * * or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.' * * *

[2] "Under the provision of that portion of section 2 of the act, which we have quoted, the following conditions must exist to support the judgment of the court below: (1) The injuries to respondent through the destruction of his personal property must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice." The question arises: What effect did the order of the Railroad Commission placing the responsibility of maintaining the new level portion of the viaduct upon the company have on the liability of the city for injuries caused on that portion, by its dangerous or defective condition? We conclude that it had none. The entire viaduct remained a public street of the city. The city has control over its streets, and has both the power and the duty of keep-

ing them in repair. Under the terms of the Public Liability Act (St. 1923, p. 675, § 2), the city is made responsible for injuries resulting from their dangerous and defective conditions under the limitations we have outlined. The order of the commission did not purport to relieve the city of this duty and liability, assuming, but not holding, that it might have done so. It merely placed an added duty upon the company without relieving the city from any of its duties or liabilities. It left the company liable with the city for damages resulting from their separate obligations arising on the part of the one under the order of the railroad commission and the other under the terms of the Public Liability Act.

[3-6] The rules governing us in reviewing a judgment entered after granting a motion for nonsuit are clearly stated in *Berger v. Lane*, 190 Cal. 443, at page 452, 213 P. 45, 49, as follows: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. In re *Estate of Arnold*, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most favorable to plaintiffs' claim. *Anderson v. Wickliffe*, 178 Cal. 120, 172 P. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied."

[7] From the evidence in this case the jury might have drawn the conclusions that the deceased persons were traveling south on their right-hand side of the viaduct at a prudent and safe speed, and as they entered the curve a large sedan was approaching the curve from the east; that this required the driver of the Bosqui car to approach close to the curb on his right; that large splinters projecting from the facing came into contact

with the front portion of the right front wheel and were forced into it between the tire and the rim; that this caused the wheel to cramp to the right and mount the curbing and broken side of the facing and mount the curbing. It should be observed that the skid mark made by the left front wheel of the Hupmobile was only 40 inches from the curbing, which was 11 inches in thickness before it was worn by traffic. This would make the left front wheel about 51 inches from the sidewalk side of the curbing or less than the standard tread of an automobile. The jury might have concluded that the right front wheel crossed the curbing and dropped onto the sidewalk on its inside; that the driver had the car in one of its lower gears as he had come to a stop shortly before; that to extricate himself from this difficulty with his front wheels astride of the curbing and the right resting on the sidewalk behind a timber 4 inches high he opened his throttle; that the wheel climbed the obstruction and dropped from the curb onto the roadway; that to complete this maneuver he had to cramp the front wheels to the left; that the impetus given by forcing the wheel over the obstruction and its dropping onto the roadway from a 12-inch curbing with one of the lower gears engaged caused the car to rapidly follow the direction of the cramp of the front wheels; that the jar caused by the drop from the curbing might have displaced the driver from the position where he had complete control of his vehicle; that before he could regain control of the car it crashed through the north guard rail to the street below.

This is but one of several inferences that might be drawn from the evidence, but is one that we feel is justified and is favorable to the case of appellants. From it the conclusion may be drawn that the accident would not have happened but for the splinters entering the wheel and pulling its front sharply to the right where it mounted the curving face of the curbing instead of sliding along it as might have happened had the facing timber not been worn into an oval shape. This disposes of the contention that the evidence demonstrates that the condition of the curbing could not have been a proximate cause of the accident.

[8] The evidence shows that many motor vehicle accidents, some of them involving deaths, had happened at this particular curve prior to the one involved here. This was well known to the responsible officers of the city, including its mayor. It was also known to the street superintendent that the planks and

timbers forming the curbing were rapidly worn away by vehicles coming in contact with them. This constituted sufficient notice of the condition to the officers of the city. *Boyce v. San Diego High School District*, 215 Cal. 293, 10 P.(2d) 62; *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.(2d) 30. There is nothing to show that the city had taken any action immediately prior to the accident to remedy the dangerous or defective condition, if one existed. We believe that the question of whether the condition of the roadway was dangerous or defective should have been left to the jury for determination.

[9-11] Both respondents urge that the driver of the Bosqui car was guilty of contributory negligence as a matter of law; this being the principal defense of the company. They urge that, after the right front wheel had mounted the curb and the car was stopped, it was in a position of safety; that the driver caused it to leave this position and to proceed across and off the viaduct without the use of ordinary care or prudence. Under the conditions presented here, we are required to resolve all reasonable inferences to be drawn from the evidence in favor of appellants. The question of the prudence of the actions of the driver after the right front wheel of the Hupmobile mounted or crossed the curbing is one upon which reasonable minds might well differ. Ordinarily the question of contributory negligence is one for the trier of fact in motor vehicles cases. In *Mast v. Claxton*, 107 Cal. App. 59, 290 P. 48, 49, it was said: "No two cases of automobile collisions are exactly alike, and each must be decided upon its own state of facts. According to the well-settled law of this state, negligence is, generally speaking, a matter of fact, and the same is true of contributory negligence. Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that inference points unerringly to the negligence of the plaintiff contributing to his injury."

[12] The city urges that the Public Liability Act is unconstitutional and in violation of the provisions of section 11 of article 1 of the state Constitution, in that it gives a right of action against cities, counties, and other such public agencies and not against the state for damages resulting from the dangerous or defective condition of public streets. The history of the immunity of a public agency against suit for an injury suffered while it was acting in its governmental capacity takes us back to that doctrine of the common law which gave the sovereign immunity from suit

upon the theory that "it was the 'right divine of kings to govern wrong.'" *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, 672, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106. The doctrine is applied in California, and no action is permitted against the state or its political subdivisions when acting in a governmental capacity without legislative consent, for without such consent the wrong is without a remedy. A somewhat similar contention was made in the case of *Heron v. Riley*, 200 Cal. 507, 289 P. 160, 164, where the constitutionality of section 1714½ of the Civil Code was considered. The Supreme Court said: "It is objected that the section is class legislation, in that it inures to the benefit of a favored class of citizens, that is, only those who are damaged through the negligent operation of automobiles owned by or used in the service of the state, and thereby makes a distinction in their favor as against citizens who may suffer damages through being injured by other state owned and operated instrumentalities, and who are without recourse against the state because it has made no such remedial provision for them. This objection goes only to the policy of such legislation, and the wisdom of the Legislature in enacting it. A right of action to one injured through the operation of an instrumentality used by the state did not exist at common law. It is not an inherent right, and exists only so far, and in favor of such persons, as may be declared by the legislative power of the state. The provisions of the Constitution were not intended to make it necessary that the Legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should, by the same act, declare that all persons who may suffer damages from injuries of that character shall also have such right of action. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 568, 129 P. 989. Consequently, a law, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. *Abeel v. Clark*, 84 Cal. 226, 230, 24 P. 383; *People v. Jordan*, 172 Cal. 391, 397, 156 P. 451. If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included." We can find no merit in this argument of the city.

[13] The defendant city suggests that the Public Liability Act does not apply where the

defective condition of the street or highway concurs with some other efficient cause or act of a third person to cause the injury. It is urged that a strict construction of the statute leads to this conclusion. The question is apparently new in this state. A few decisions from other jurisdictions support this view. See *Grenier v. Town of Glastonbury*, 118 Conn. 477, 173 A. 160. Other courts hold the city liable in such a case. See *Beebe v. Scotts Bluff County*, 92 Neb. 501, 138 N. W. 737; *David, Municipal Liability in Tort in California*, 7 So. Cal. L. Rev. 372, 440. In our opinion, where the thing exists which is denounced by the statute, namely, the neglect to remedy a dangerous or defective condition after knowledge thereof, and it proximately causes the injury, the city is liable under the clear meaning of the law despite the existence of another and concurring cause.

The judgment is reversed.



5 Cal.App.2d 636

**BROWN v. STANDARD ACC. INS. CO. OF
DETROIT, MICH.**

Civ. 8472.

District Court of Appeal, Second District,
Division 1, California.

March 29, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Trial ☞178

Directed verdict may be granted defendant only where there is no evidence sufficiently substantial to support verdict for plaintiff when conflicting evidence is disregarded and every legitimate inference is drawn from plaintiff's evidence.

2. Insurance ☞668(11)

Testimony of insured's physician admitting nontraumatic contributory cause of insured's paralysis resulting from bump sustained in automobile accident held insufficient to make issue for jury whether injury was effected exclusively through accidental means within accident policy.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Oliver R. Brown against the Standard Accident Insurance Company of

Detroit, Michigan. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 41 P.(2d) 373.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for appellant.

Paul Nourse, of Los Angeles, for respondent.

PER CURIAM.

By the terms of a policy of insurance plaintiff was insured by the defendant "against loss resulting from bodily injuries effected directly, exclusively and independently of all other causes through accidental means." At a time when such policy of insurance was in effect, from an automobile accident plaintiff suffered a "bump" that "formed up here on top of * * * (his) head," which plaintiff claimed resulted in a paralysis as to certain muscles of his body, and on account of which he brought an action to recover damages from the defendant in accordance with the provisions of said insurance policy.

On the trial of the action, following the close of the introduction of evidence by the respective parties thereto, on motion of the defendant the trial court ordered a directed verdict by the jury. It is from the judgment that ensued from the return of such verdict that the instant appeal is taken.

Substantially the evidence presented by plaintiff, from a consideration of which appellant urges that he was entitled to have his case submitted to the jury, consisted of testimony given by a doctor at the trial of the action to the effect that the paralysis sustained by plaintiff, and of which he complained, "was due to intracranial hemorrhage" that was caused by "traumatic injury to the head."

[1, 2] A directed verdict is authorized "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." In re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579, 580, and authorities there cited. See, also, *Robbiano v. Bovet*, 218 Cal. 589, 24 P.(2d) 466. But the difficulty in the instant case, in attempting to give full effect to such rule, arises from a consideration

of the fact that, as hereinbefore indicated, the policy of insurance upon which the right of action depended contained the provision in effect that the injury or damage that resulted to plaintiff must have arisen "from bodily injuries effected directly, exclusively and independently of all other causes through accidental means." In that connection, and having the emphasized part of the policy of insurance in mind, the respondent has directed the attention of this court to the exact phraseology of the evidence given by the witness, both on his direct and on his cross-examination, as follows:

"A. Yes, sir. I would say, in my opinion the paralysis was due to an intracranial hemorrhage. * * *

"Q. Now, Doctor, with those same facts in mind, what, in your opinion, was the cause of the intracranial hemorrhage? A. Traumatic injury to the head.

"Q. By 'traumatic injury' you mean what in the language— A. External violence directed to the head—a blow."

Cross-examination:

"Q. Would you give that as the sole cause, Doctor, of the rupture or hemorrhage? A. The sole cause of it?

"Q. Yes. A. That would be very difficult to give as the sole cause of it, bearing in mind certain other facts causing this, the existence of diabetes.

"Q. What other contributing cause would you give? A. I would— Other contributory causes would be his age and the existence of diabetes. That would be contributory, at least in the vast majority of cases we find hemorrhages.

"Q. In this case you found a man 63 years old who was suffering from diabetes; you found he had an accident whereby he ran into a wall and his car then climbed a curb, and he was sitting in the car in an upright position, and was assisted out of it; in diagnosing the case you are giving the direct and immediate cause of the hemorrhage as some blow which, I suppose, you say was because there was a bump there, and as a contributing cause to that the diabetic condition; is that right? A. I do not think you could neglect the diabetic condition, * * *

"Q. You say you cannot neglect the diabetic condition. By that you mean you cannot neglect diabetes as the contributing cause of the rupture of the vein; am I correct in that? A. Yes, it must be borne in mind, yes.

"Q. You mean by 'yes' that I am correct in my statement that it is to be borne in mind, considered as a contributing cause of that rupture? A. Do you want me to amplify that a little?

"Q. I want you to answer my question. A. Well, I have answered it."

It thus appears that, although on his direct examination the witness gave it as his opinion that the paralysis suffered by plaintiff "was due to an intracranial hemorrhage" that was caused by "traumatic injury to the head," at that time he was not asked, nor did he state, whether the "intracranial hemorrhage" was caused solely by the traumatic injury to which he referred. From the cross-examination it also affirmatively appeared that the paralysis was due (not solely) to the blow that he had received, but that "other contributory causes would be his age and the existence of diabetes. * * * diabetes as the contributing cause of the rupture of the vein, * * * must be borne in mind"; that is to say, must be "considered as a contributing cause of that rupture."

We think that such later testimony given by the witness was neither contradictory of nor inconsistent with his former statement; that is to say, that although, as testified on direct examination, the traumatic injury was a cause, on cross-examination it developed that it was not the sole cause, but that the paralysis of which plaintiff suffered was due not only to the traumatic injury that he sustained, but as well to his diabetic condition; and since plaintiff failed to submit evidence for the consideration of the jury to the effect that his injuries were effected directly, exclusively, and independently by a traumatic injury, it follows that no error was committed by the trial court in directing the jury to render its verdict in favor of the defendant.

The judgment is affirmed.

6 Cal.App.2d 27

STUART v. ALEXANDER et al.
Civ. 9797.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1935.

Judgment ☞ 137

Trial court had inherent power to set aside default judgment prematurely entered, though motion for relief was not made by aggrieved party (Code Civ. Proc. § 473).

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by E. D. Stuart against Claire H. Alexander, also known as and sometimes called C. H. Alexander, and others. From an order setting aside a default judgment against named defendant, plaintiff appeals.

Affirmed.

Mark H. Edwards, of Santa Paula (Julius V. Patrosso, of Los Angeles, of counsel), for appellant.

M. G. Gallaher, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff brought this action in Ventura county and served Claire H. Alexander on December 2 in Alameda county. On January 2 plaintiff directed the clerk to enter default of said defendant, which was done. Judgment was entered the same day. On January 4 defendant filed a demurrer, which came on for hearing January 15, and was then objected to by plaintiff because of default judgment theretofore entered. The court, of its own motion, set aside the default on the ground that it had been prematurely entered, in that defendant had the whole day of January 2 within which to appear, because the day prior thereto, January 1, was a legal holiday.

Appellant concedes that the default and judgment were prematurely entered, and that if motion for relief had been made by defendants under section 473 of the Code of Civil Procedure the court would have had jurisdiction to set aside the default, but contends that the court was powerless to thus act because of absence of such a motion. The court had jurisdiction of the cause and the parties, and if it chose to exercise its discretion to correct the error of the clerk in performing a ministerial act (which error we observe was induced by the very party who

now seeks to profit by it), it had the inherent power to do so; and we are unable to say that it was an abuse of discretion to thus act, notwithstanding a formal motion directed to that specific matter had not been made by the party aggrieved.

Order affirmed.

We concur: STEPHENS, P. J.; ORAIL, J.



5 Cal.App.2d 125

VAN FLEET v. WEST AMERICAN
INS. CO. et al.
Civ. 9337, 9338.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1935.

Evidence ☞ 594

Where plaintiff, suing for false imprisonment, reported discovery of stolen automobile but refused to disclose location thereof until paid a reward, undisputed physical facts held sufficient, as matter of law, reasonably to convince arresting officer that plaintiff stole automobile.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

On petition for rehearing.

Rehearing denied.

Former opinion, 42 P.(2d) 378.

Rex Hardy, of Los Angeles (Vernon W. Hunt, of Los Angeles, of counsel), for appellants West American Ins. Co., O. D. Dameron, and I. W. Langeloh.

Ray L. Chesebro, Frederick Von Schrader and D. M. Kitzmiller, all of Los Angeles, for appellant George E. Anderson.

Sparling & Teel, of Los Angeles, for respondent.

PER CURIAM.

We think respondent, in asking us to detail the testimony, is erroneously assuming that there is evidence in the case tending to establish the fact that appellant arrested respondent without believing or justifiably suspecting that he was guilty. There certainly is

nothing in the evidence as to physical facts that makes any part of it inherently improbable. The repetition of the evidence in detail could, therefore, avail respondent nothing. The physical facts are undisputed and, as a matter of law, they could reasonably have convinced the officer that the plaintiff had committed the crime. There is no substantial evidence upon which to base a conclusion that the officer did not in good faith entertain the belief that the plaintiff had committed the crime.

The rehearing is denied.



6 Cal.App.2d 25

ELLIS v. OWEN ROOFING CO., Inc.
Civ. 9706.

District Court of Appeal, Second District,
Division 2, California.
April 5, 1935.

1. Master and servant ☞333

Jury's verdict for employee in action against him and employer for injury to another exonerates employer from liability, where latter is responsible solely as employer and not because of express instruction to agent to do act complained of or acts done directly or through another agent.

2. Master and servant ☞333

Jury held warranted in applying *res ipsa loquitur* doctrine and holding defendant employer liable for injury to employee, struck on head by falling tile, of which employer had exclusive control, even though jury found evidence of codefendant fellow employee's negligence inadequate to support verdict against him.

3. Appeal and error ☞1001(1)

Appellate court cannot invade jury's province and retry facts sufficient to support verdict.

Appeal from Superior Court, Los Angeles County; Oliver O. Clark, Judge.

Action by Lee R. Ellis against the Owen Roofing Company, Inc. From a judgment against named defendant, it appeals.

Affirmed.

Kenneth J. Murphy, of Los Angeles, for appellant.

Delamere F. McCloskey, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued defendant corporation and its employee, one Anderson, for damages. The jury absolved Anderson and gave plaintiff judgment against the corporation, from which the latter appeals.

At the time of the accident complained of, plaintiff was plastering the outside of a new house below the edge of the roof, when a tile fell on his head, causing injury.

[1] It is appellant's contention that the verdict of the jury in favor of Anderson operated to free defendant corporation from liability, on the assumption that the only basis for the liability of the employer was the doctrine of respondent superior. In a case where the employer is responsible solely because of such relationship to an employee and not because of any express instruction to the agent to do the act complained of, or because of any acts done directly or through another agent, the exonerating of the employer must follow the freeing of the employee from liability. *Bradley* by *Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171; *Fimple v. Southern Pacific Co.*, 38 Cal. App. 727, 177 P. 871; *Benson v. Southern Pacific Co.*, 177 Cal. 777, 171 P. 948.

[2, 3] The complaint contained allegations sufficient to support a theory that either the employee Anderson or employer corporation or both were tort-feasors. There was evidence from which the jury might have concluded that Anderson let the tile drop on plaintiff's head, but they apparently concluded otherwise. It was not suggested that any one other than defendant corporation was putting on the roof or had put any tiles at or near the place from which the injuring one fell, and Anderson testified that he, as foreman, and two other men had put them all there. At the time of the accident another employee was working on the roof some distance away from Anderson. When the plaintiff's yell was heard, Anderson said he was working up near the ridge, and that he went to the edge of the roof, looked down, and asked plaintiff if he had been hurt. Anderson nowhere testified that he had dropped the tile. One witness looked up after the tile had fallen and observed a tile missing on the corner of the roof.

We have, therefore, a case in which plaintiff was indisputably injured by a tile falling on his head from the roof where defendant

corporation was in exclusive control of the tile. The jury was warranted in applying the doctrine of *res ipsa loquitur* and holding appellant liable even though it considered the evidence of any negligence of codefendant Anderson inadequate to support a verdict as against him. *Michener v. Hutton*, 203 Cal. 604, 265 P. 233, 59 A. L. R. 480. This court may not under the circumstances undertake to invade the province of the jury and to retry the facts which are sufficient to support the verdict. Under the authority of *Green v. Southern Pacific Company*, 53 Cal. App. 194, 199 P. 1059, the employer was properly held liable.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 700

BOLAND v. GOSSER et al.

Civ. 9487.

District Court of Appeal, Second District,
Division 2, California.

April 1, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Automobiles ⚙️245(32)

Whether independent contractor driving automobile to test work done on automobile radio was driving with implied permission of owner *held* question of fact under evidence in action for injuries, where contractor received automobile from another contractor who in turn received it from automobile dealer to whom owner had delivered car for radio adjustment (Civ. Code, § 1714¼).

2. Appeal and error ⚙️996

Decision of trial court as trier of facts is binding on appeal where circumstances reasonably authorize either of two opposite inferences, one of which trial court adopted.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by Joseph A. Boland against A. J. Gosser and others. From a judgment denying plaintiff recovery except as against defendant Earl Williams, plaintiff appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Paul Nourse, of Los Angeles, for respondent.

CRAIL, Justice.

Respondent Gosser was the owner of a new automobile which he had purchased from defendant Don Lee, Inc. He later purchased an automobile radio from the same source. The reception on the radio was unsatisfactory, and on the day of the accident Gosser telephoned Don Lee, Inc., requesting that it make the proper adjustments. For that purpose Don Lee, Inc., sent one of its men to get the car. After certain repairs were made on the machine itself, the car was sent by Don Lee, Inc., to the place of business of the defendant Fey & Krause, independent contractors, for repair work on the radio. The latter turned the automobile over to defendant Earl Williams, an independent contractor, who made certain adjustments to the radio and took the car out on the road to test the work done. Defendant Williams was driving the car when the accident happened which caused plaintiff's injuries. The court found that defendant Williams was guilty of negligence proximately causing the injuries and damage to the plaintiff and gave judgment for the plaintiff and against the defendant Williams in the sum of \$3,000, but gave judgment against the plaintiff as to the other defendants.

The only question involved is stated by the appellant as follows: "Are the provisions of section 1714¼ of the Civil Code applicable to the facts involved in this appeal?" Said section reads as follows: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, * * * by any person using or operating the same with the permission, express or implied, of such owner. * * *"

[1, 2] Appellant contends that the trial court should have rendered judgment against the defendant A. J. Gosser, under the provisions of said section on the ground that the defendant Williams was using the car with the implied permission of the defendant Gosser. Whether the defendant Williams had such permission was a question of fact to be determined by the trial court upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom. Sometimes conflicting inferences may be

drawn by reasonable minds from the same set of facts. Where, as in this case, the facts and circumstances in evidence may reasonably authorize either one of two opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon the appellate court, the case being in substance the same as where the trial court decides upon the weight of contradictory evidence. *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616; *Haight v. Haight*, 151 Cal. 90, 90 P. 197; *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 P. 659.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



5 Cal.App.2d 595

McSTAY et al. v. CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES.
Civ. 9023.

District Court of Appeal, Second District,
Division 2, California.
March 28, 1935.

1. Innkeepers ⇨10

Innkeeper, within scope of its invitation to luncheon guest, was obliged to exercise ordinary care for guest's safety, which included duty to maintain premises to which guest was expressly or impliedly invited in reasonably safe condition; but, if occupation or use of portion of premises in which guest was injured was without scope of invitation, guest was mere licensee to whom innkeeper owed no duty except to abstain from willful or wanton injury.

2. Trial ⇨165

On motion for nonsuit, evidence must be considered in light most favorable to plaintiff.

3. Negligence ⇨32(2)

In determining status of person upon property as respects duty of care of property owner toward such person, "invitation" to use premises is inferred when there is a common interest or mutual advantage, whereas "license" is inferred when object is mere pleasure or benefit of person using property.

[Ed. Note.—For other definitions of "Invitation" and "License," see Words & Phrases.]

4. Innkeepers ⇨10

Whether relationship of invitee, which attached to luncheon guest when she entered inn, was changed to that of licensee when she entered dining room where lunch was not being served and stood on platform looking over room, *held* for jury.

5. Appeal and error ⇨996

Where different conclusions may be reasonably drawn by different minds from same evidence, decision must be left to jury and is not for appellate court to determine as matter of law.

6. Innkeepers ⇨10

Contributory negligence of inn luncheon guest who fell on steps leading to platform at entrance of dining room *held* for jury.

7. Negligence ⇨66(1)

Forgetfulness of known danger will not always operate to prevent recovery in negligence action, since to forget is not negligence unless it shows want of ordinary care.

8. Negligence ⇨136(26)

Mere abstraction on part of injured person does not constitute contributory negligence as matter of law.

9. Evidence ⇨505

Usually expert witness cannot be asked whether structure is safe one, but all facts may be elicited from witness from which the conclusion follows.

10. Evidence ⇨508

Opinion of witness may be given on question of science, art, or trade when he is skilled therein (Code Civ. Proc. § 1870, subd. 9).

11. Evidence ⇨505

Where conclusions to be drawn from facts stated, as well as knowledge of facts themselves, depend upon professional or scientific knowledge or skill not within range of ordinary training or intelligence, not only facts but conclusions to which they lead may be testified to by qualified experts (Code Civ. Proc. § 1870, subd. 9).

12. Evidence ⇨506

In action by inn luncheon guest for injuries sustained in fall on steps leading to platform at entrance of dining room, expert witness *held* competent to testify whether steps were safe, in connection with other proofs in case, and fact that scientific or customary construction of such steps was not matter within common knowledge (Code Civ. Proc. § 1870, subd. 9).

13. Innkeepers ⇨10

In action by inn luncheon guest for injuries sustained in fall on steps leading to platform at entrance of dining room, evidence

respecting construction and use of steps similar to those in defendant's inn in three other hotels in same city *held* properly excluded, since such limited comparison would not suffice to constitute custom in building construction.

14. Innkeepers ⇨10

In action by inn luncheon guest for injuries sustained in fall on steps leading to platform at entrance of dining room, instruction defining "stairway" as a series of steps ascending or descending to different level, and charging that, if steps involved constituted stairway within State Housing Act, failure of innkeeper to maintain handrails as required by law was negligence, *held* not error as charging that steps involved constituted stairway (St. 1923, p. 812, § 46).

While all "stairways" are series of steps ascending or descending to a different level, all "steps" so ascending or descending are not necessarily stairways.

[Ed. Note.—For other definitions of "Stairway" and "Steps," see Words & Phrases.]

15. Appeal and error ⇨901

Court on appeal may not presume error, but it must be made manifest by those asserting it.

16. Appeal and error ⇨854(4)

Where instructions were properly refused since they covered subjects fairly covered by other instructions, it was immaterial what ground court might have assigned for refusing to give such instructions.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by C. E. McStay and another against the Citizens' National Trust & Savings Bank of Los Angeles. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Lon A. Brooks, of Los Angeles, for appellant.

Walter F. Keen and Holbrook, Taylor, Tarr & Reed, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal from a judgment for damages after verdict by a jury in an action for personal injuries.

Appellant, at the time of the injuries complained of, was operating the Roosevelt Hotel in Hollywood. Opening from the main lobby has an entrance to what was called the "Blossom Room," comprising a foyer, with check

counters for wraps and a lounge, and a dining room, used on Tuesdays and Thursdays at noon for service club lunches and each night for dining and dancing. There were double metal grill and glass panel doors at the foyer entrance, and the entrance from the foyer to the dining room was through an arch, between the lateral columns of which a platform, twenty-one inches high, eight feet long, and five feet eight inches wide, was located. The approach to the top of the platform consisted of two steps, each with seven-inch risers and fifteen-inch treads. In the risers were set glass panels at intervals, with electric light fixtures behind to throw light on the steps. The steps and platform were covered with a blue-black carpet. There was provision for brilliant lighting of the dining room and foyer and platform, as and when required or desired. The main dining room of the hotel was located at the far end of the lobby.

On Monday, February 29, 1932, respondent Mrs. McStay entered the hotel lobby with two lady friends for the purpose of securing lunch in the Blossom Room. Proceeding to the entrance to that room, respondent found one of the double doors half open, and with her friends entered the foyer. The foyer was unlighted and in darkness, except for light coming through the open door and through the arch from a chandelier in the dining room, in which some lights were burning. From the record it is impossible to ascertain the amount or extent of such light. Remarking to her friends that "they are not serving here," she conducted them up the steps to the platform above described and pointed out to them the place where Hollywood's young people and "movie stars" dine and dance. After standing there a few minutes, respondent turned to descend from the platform, and taking one step, which she thought was her next step on the platform, she "just stepped off." She felt her foot touch something before she fell "in a heap" to the floor. She testified that it was her intention when leaving the platform to inquire at the clerk's desk where lunch was being served, so that she and her friends could have their lunch. Through an architect and a safety engineer, called as witnesses, respondent produced evidence to the effect that the steps and platform were not safe or properly constructed because there were no handrails thereon, and also because they were not necessary in the place where they were located. Other than that, both testified that they were well and properly constructed.

A motion for nonsuit on the grounds that no negligence of appellant was shown and that

contributory negligence of respondent Mrs. McStay was shown by the evidence was denied, and such ruling is assigned as error.

[1] Whether appellant failed in its duty towards Mrs. McStay so as to amount to negligence for the results of which it would be responsible depends on their relationship at the time of injury. That respondent entered the lobby of the hotel as an invitee is not questioned. The vital question is: What was the scope of the invitation extended by appellant to Mrs. McStay to visit and occupy its premises on this occasion? For within the scope of that invitation the appellant was obliged to exercise ordinary care for her safety, which included the duty to maintain the premises to which she was expressly or impliedly invited in a reasonably safe condition. But if it is made to appear that the occupation or use of the portion of the premises in which the respondent was injured could not under any rational view be within the scope of the invitation, she would become a mere licensee to whom appellant owed no duty except to abstain from willful or wanton injury. *Powers v. Raymond*, 197 Cal. 126, 239 P. 1069.

[2-4] Viewing the evidence in a light most favorable to respondents, as the rule requires when considering a motion for nonsuit, we cannot, as a conclusion of law therefrom, say that the relationship of invitee which attached to Mrs. McStay when she entered appellant's hotel was changed to that of licensee by reason of the facts and circumstances intervening after she entered the lobby entrance to the foyer. Her purpose to procure lunch remained steadfast, and from the excursion to the platform it may reasonably be inferred that she still thought lunch was being served in the Blossom Room. The invitation to use the premises of another is inferred when there is a common interest or mutual advantage. A license is inferred when the object is the mere pleasure or benefit of the person using them. Under the evidence the court or jury might well infer that throughout this entire episode there remained in respondent's mind the original purpose of patronizing the hotel, and that her visit to the Blossom Room platform was in pursuit of that purpose and not for mere pleasure or personal benefit.

[5-8] On the question of contributory negligence of respondent Mrs. McStay, the evidence of her information, acts, and conduct leading up to and surrounding her injury is of such nature as peculiarly calls for the determination thereof by triers of facts. It cannot be concluded therefrom that as a matter

of law respondent was guilty of contributory negligence. Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury. And herein it is clear that whether or not the information possessed by Mrs. McStay was sufficient to impress upon her mind the danger incident to the use of the platform and steps in question was for the jury to decide as an issue of fact. *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078; *Hayward v. Downer*, 65 Cal. App. 450, 224 P. 265. Even forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. *Roseberry v. Edward F. Niehaus & Co.*, 166 Cal. 481, 137 P. 232; *Rosella v. Speros Paxinos*, 110 Cal. App. 299, 294 P. 39. And it has been repeatedly held that mere abstraction on the part of the injured person does not constitute contributory negligence as a matter of law. *Hodge v. Weinstock, Lubin & Co.*, 109 Cal. App. 393, 293 P. 80. The question of contributory negligence was, therefore, properly submitted to the jury.

[9-12] Appellant complains of the trial court's ruling admitting testimony of two experts in respect to the construction and safety of the steps and platform. The witness Winslow, an architect, testified over objection that the steps were not scientifically constructed for two reasons: First, that they were unnecessary at the place where constructed and used; and second, that they had no guard or handrails for people to hold on to. The witness Lefferts, a safety engineer, was permitted over objection to answer the question whether or not the steps as he saw them were safe or unsafe. His answer was that in his opinion they were not adequately safeguarded for users by reason of absence of handrails. Usually an expert cannot be asked whether a structure is a safe one, but all the facts may be elicited from the witness from which the conclusion follows. *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 P. 1010. The opinion of a witness may be given on a question of science, art, or trade, when he is skilled therein. Section 1870, subd. 9, Code Civ. Proc. Where conclusions to be drawn from facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence, not only the facts but the conclusions to which they lead may be testified to by qualified experts. *Long v. John Breuner Co.*, 36 Cal. App. 630, 172 P. 1132. The scientific or customary construction of the steps or stairways in hotel

buildings was not a matter within common knowledge, and conceding that the testimony given was in the strictest sense opinion testimony, nevertheless we are of the belief that it was proper to an enlightened consideration and determination of the questions whether appellant was negligent in the maintenance of the steps and platform where respondent was injured, and, if so, whether such negligence was the proximate cause of her injuries. *Long v. John Breuner Co.*, supra. In view of the answer of the witness Lefferts, considered in connection with the other proofs in the case, we deem the error in overruling the objection to the question harmless. We find no error in the rulings affecting the testimony of the witness Winslow.

[13] There was no error in sustaining objections to the question and tender of proof respecting the construction and use of steps similar to those described in this case in three other hotels in Los Angeles. Such limited comparison would not suffice to constitute a custom in trade or building construction so as to exonerate one from a charge of negligence in a given case of this peculiar character.

Several instructions given at the request of respondents are questioned by appellant. The instruction numbered 20 in appellant's "Group I" is harmless, in view of the decision herein that respondent Mrs. McStay was an invitee when she entered the foyer. Number 16 fairly states the law respecting the duty of appellant to maintain the premises in a reasonably safe condition, and it properly submitted to the jury the question whether the exercise of ordinary care in such maintenance required or included the maintenance of handrails on the steps. We find no error in this instruction which could prejudice appellant's rights.

[14, 15] Instruction No. 17 informed the jury of the provisions in the State Housing Act (St. 1923, p. 812, § 46) respecting the construction and maintenance of handrails on stairways of certain dimensions, and that if the jury found that the steps involved in the case constituted a stairway, the failure of appellant to maintain handrails as required by law was negligence as a matter of law. This instruction by itself is not improper, but in a later instruction, numbered 23, given at respondents' request, the court defined the word "stairway" as a series of steps ascending or descending to a different level. Appellant contends that this was in effect telling the jury that the steps involved herein constituted a stairway as affected by the State

Housing Act. We do not so view it. At the most it was only informing the jury as to what it already knew in common with all others, and the court having left to the jury the question whether these steps did constitute a stairway, the dictionary definition of the word "stairway" would not be likely to mislead. While all stairways are series of steps ascending or descending to a different level, all steps so ascending or descending are not necessarily stairways. Nor may prejudicial error in instruction No. 17 be predicated on failure of proof that the hotel in question was built after the effective date of the State Housing Act, which was not retroactive in application to existing buildings. We may not on appeal presume error; it must be made manifest by those asserting it.

We have examined instructions numbered 19, 18, 15, 5, and 6, comprising appellant's "Group II," relating to the subjects of negligence, which are claimed to be erroneous, and find no prejudicial error therein. Read in connection with other related instructions, they fairly and correctly state the law pertinent to the issues involved.

Appellant's "Group III" comprises a number of instructions dealing chiefly with the subject of contributory negligence. While subject to criticism for repetition and emphasis of isolated elements going to constitute a full definition of contributory negligence, and the burden and source of evidence establishing the same, they do not constitute prejudicial error when read in connection with other general instructions correctly embracing the subject.

[16] We have examined the instructions offered by appellant and refused by the court. It is immaterial what ground the court may have assigned for refusing to give an instruction if it was justified in so doing by any sufficient reason. Those refused cover subjects fairly covered by other instructions given; and having read the instructions in their entirety, we are satisfied that no prejudicial error occurred in the giving or refusing of the instructions pointed out. In view of the decision of this court of the points and questions herein, it follows that there was no abuse of discretion in denying the motion for new trial.

The judgment is affirmed.

I concur: CRAIL, J.

Note: This case was duly assigned to Mr. Justice Pro Tempore WILLIS for opinion, the other two justices assigned to the case being the PRESIDING JUSTICE and Associate

Justice CRAIL. Associate Justice ORAIG is, and during all of the time the case was under consideration, was on vacation. The PRESIDING JUSTICE, deeming himself disqualified, does not join in the opinion nor in the decision.



5 Cal.App.2d 749

ROADMAN v. TRAEGER, Sheriff, et al.

Civ. 9269.

District Court of Appeal, Second District,
Division 1, California.

April 4, 1935.

Rehearing Denied May 1, 1935.

Hearing Denied by Supreme Court
June 3, 1935.

1. Attachment ☞344

Sureties cannot complain of want of demand upon them for payment of judgment, where they set up defense of exoneration on bond given to secure release of attached bank account, thus showing that demand would have been refused had it been made.

2. Parties ☞76(1)

Failure of sureties to object, by demurrer or answer, to capacity of trustee for corporation to sue for payment of judgment by sureties on bond given to secure release of attached bank account, held waiver of objection that trustee could not recover without showing that claim was assigned to him by corporation (Code Civ. Proc. §§ 430, 434).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Roy C. Roadman, trustee for the Associated Sales Company against Wm. I. Traeger, Sheriff, J. W. Patterson, Elizabeth Patterson, and others. From a judgment in favor of plaintiff, defendants J. W. Patterson and Elizabeth Patterson appeal.

Affirmed.

Hickcox, Thomson & O'Connor, of Los Angeles, for appellants.

John F. Clark, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The appellants are sureties on a bond given to secure the release of a bank account attached in an action previously brought by Associated Sales Company, Inc.,

a corporation, and this action was brought to recover the amount of the judgment subsequently rendered in its favor. On appeal from the judgment rendered against them, appellants present two points: First, that the complaint does not allege nor did the trial court find that any demand was ever made upon them for payment; and second, that plaintiff cannot recover without showing that the claim had been assigned to him by the corporation.

[1] The complaint alleged the circumstances of the execution and delivery of the bond in the litigation then pending, the subsequent rendition of judgment and its affirmance on appeal, and that a writ of execution had been returned wholly unsatisfied. Appellants, by their answer, denied all of these allegations, with the exception that they admitted the execution and delivery of the bond, and pleaded an additional defense of exoneration. It thus appears that they denied any liability upon their obligation. They cannot, therefore, complain of the want of demand. "The legitimate object of a demand is to enable a party to perform without a suit at law. *Mullally v. Townsend*, 119 Cal. 47, 50 P. 1066. It is sometimes unjust and inequitable to subject a defendant to litigation without first notifying him of plaintiff's claim. *Cox v. Delmas*, 99 Cal. 104, 33 P. 836. But where the defendant has refused to pay, the defense of want of demand becomes a technical one; and it has been held that where it is plain from the answer that if a demand had been made it would have been refused, it does not lie in the mouth of an appellant to object that no demand was made. *Turton v. Shinn*, 32 Cal. App. 751, 164 P. 38; *Ashton v. Dashaway Ass'n*, 84 Cal. 61, 22 P. 660, 23 P. 1091, 7 L. R. A. 809; *Parrott v. Byers*, 40 Cal. 614." *Goldberg v. Rempp*, 95 Cal. App. 452, 455, 273 P. 63, 64.

[2] As to the second point, plaintiff does not claim under any assignment, but on behalf of the corporation which was the attachment plaintiff in the action in which the bond here sued upon was given. The complaint in this case alleges that the corporation is now out of business and that plaintiff "is now trustee for the same." The appellants did not demur to the complaint upon the ground that plaintiff had no legal capacity to sue on behalf of the corporation, and they did not object to his capacity by their answer. They therefore waived any objection thereto. Sections 430 and 434, Code Civ. Proc.; *Hayt v. Bentel*, 164 Cal. 680, 180 P. 432; *Los An-*

geles Ry. Co. v. Davis, 146 Cal. 179, 79 P. 865, 106 Am. St. Rep. 20; 1 Cal. Jur. 42.

The appeal is without merit, and the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 608

SMITH v. KIGER.

Civ. 8420.

District Court of Appeal, Second District,
Division 2, California.

March 28, 1935.

1. Parent and child ⚡2(1)

Father may forbid the house to prospective suitor of daughter of whom he does not approve.

2. Husband and wife ⚡324

Knowledge of marriage is essential to liability for alienation of affections of one of the spouses.

3. Evidence ⚡317(2)

In action against father-in-law for alienation of wife's affections, plaintiff's evidence, that wife had told him that her parents were opposed to the marriage and were trying to keep plaintiff and wife apart, *held* competent only to show state of wife's affections, as exception to hearsay rule, but could not be relied on by plaintiff as evidence of malice.

4. Husband and wife ⚡333(1)

Presumption is that parents harboring married daughter acted for best interest of child and not from malice.

5. Husband and wife ⚡324

Father cannot be held liable for alienation of daughter's affections from her husband, where daughter, solely of her own volition, determines to abandon her husband, and father merely assists her in carrying out such purpose.

6. Appeal and error ⚡1003

Jurors are sole judges of weight of evidence, but their discretion must be exercised legally and in subordination to rules of evidence.

7. Husband and wife ⚡333(1)

Husband suing father-in-law for alienation of wife's affections must show that de-

fendant knowingly and wilfully influenced his daughter to withdraw her affections and companionship from plaintiff, and that this was done in a spirit of malice and ill will towards plaintiff.

8. Husband and wife ⚡333(9)

Facts that before learning of daughter's secret marriage father forbade supposed suitor the house, that his sentiments concerning daughter's husband, when informed of marriage, were profanely expressed, that daughter was told she might remain in home or go with her husband, but that she could not do both, and that daughter remained in home *held* insufficient to show malice on part of father so as to render him liable to husband for alienation of wife's affections.

9. Husband and wife ⚡325

Parents are justified in giving counsel and advice to daughter who had contracted marriage with man believed by them to be unfit to make her happy, and to support her properly, where they act without malice towards daughter's husband and are prompted by affection and solicitude for daughter's happiness.

CRAIL, J., dissenting.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Emory L. Smith against Earl L. Kiger. From a judgment for plaintiff, defendant appeals.

Reversed, with instructions.

J. Vincent Hannon, Wm. F. McLaughlin, and Bernard L. Herlihy, all of Los Angeles (Oscar Lawler and Patrick F. Kirby, both of Los Angeles, of counsel), for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

SPROUL, Justice pro tem.

The defendant, Earl L. Kiger, is the father of plaintiff's wife, and is sued for recovery of damages on account of the alleged alienation of the wife's affections. The action was brought against both Mr. and Mrs. Kiger, but at the close of the evidence a motion for nonsuit was granted in favor of Mrs. Kiger; hence she is not a party to the judgment, nor is she a party to this appeal. This case was tried before a jury, and upon the verdict of the jury a judgment was rendered against the defendant, Earl L. Kiger, in the sum of \$10,000. From this judgment defendant appeals.

The plaintiff, Emory L. Smith, and Mildred Moiso Kiger, the daughter of the defendant

herein, were married in the city of Ventura on the 21st day of September, 1929. The defendant Kiger, together with his wife and two daughters, Mildred and Marian, resided in Los Angeles prior to said marriage.

Mr. and Mrs. Kiger knew of plaintiff and that he had shown some attention to their daughter. Mrs. Kiger hardly knew plaintiff and had never talked to him one hour in all their acquaintance before the marriage of her daughter. Prior to the marriage, plaintiff had called at the home of defendant several times and had often telephoned Mildred. It does not appear from the record herein that the father, Mr. Kiger, had ever seen plaintiff prior to September 21, 1929, the date of the marriage. The plaintiff's wife testified it was the plan to keep the marriage secret until her husband was able to support her, which would be about the first of the year 1930. She was to live at home with her parents and plaintiff was to live apart from her with his parents. Plaintiff's wife, while on her trip to Ventura to be secretly married, testified that she was then beginning to feel rather cheap about the secrecy of their marriage but went through with it. After the marriage she testified she regretted it more so, and thought how wonderful her folks had been to her and how inconsiderately she had treated them by being secretly married. Two weeks after her marriage the plaintiff's wife was advised by a friend, one Mrs. Sanders, to consult an attorney in Long Beach regarding an annulment or divorce. The attorney reported that neither could be obtained.

The wife continued to live with her parents and the husband with his folks. The husband did not call at the home of the wife's parents after the marriage until December 8, 1929, but met his wife on downtown streets of Los Angeles and took her for a drive about twice a week. On returning from drives, plaintiff formed a habit of letting his wife out a couple of blocks from home so she could tell her parents she had been out to dinner or had gone to a show with a girl friend.

Some time in September or October, 1929, defendant met the plaintiff on the street and told him that he did not approve of plaintiff's taking his daughter out for long hours, and that he should confine himself to three or four hours at a time. Some time later, before the defendant learned of the secret marriage, he again met plaintiff near his home, told him he did not see any future in him and was not favorably inclined toward him as a suitor for his daughter's hand, and limited plaintiff's calls to every three weeks. Plaintiff at no

time revealed the marriage, but did state that he was in no position to get married and that there was no need to worry at all.

In October, 1929, while ignorant of the marriage, defendant wrote plaintiff a letter asking him to absolutely discontinue phoning or calling on his daughter.

The secret marriage continued to worry the daughter, and on November 30, 1929, when she was confined to her home with illness, Mrs. Sanders, to whom she had previously confided her marriage, called at the home of the defendant and informed Mrs. Kiger, the mother of plaintiff's wife, that her daughter was married to the plaintiff. Mildred's mother became highly hysterical and collapsed. About a half hour later the defendant arrived and Mrs. Sanders informed the defendant that his daughter Mildred was married. This was on November 30, 1929, about one month after defendant had written to plaintiff telling him to discontinue calling on his daughter or phoning her. There is no evidence in the record that the father had any knowledge of this marriage prior to November 30, 1929. Mrs. Sanders spent the night at the Kiger home and was driven home the following Sunday afternoon.

When the father confronted Mildred with the marriage and wanted to know what she intended to do about it, Mildred's answer was: "I don't know. I am sick and I don't care." Mildred's father testified that her mother had completely collapsed, and she suggested that she and her mother, in order to get away and have a little rest, take a boat trip to San Diego.

On December 5, 1929, the mother and daughter left on a boat trip to San Diego and returned December 10, 1929. Before leaving, plaintiff's wife gave instructions to her father and younger sister, Marian, who remained at home, to tell no one where she was, and at the same time she told her father that she had been trying to secure a divorce or annulment from her husband.

On December 7, 1929, the plaintiff ascertained that his wife was not working at the usual place and telephoned the Kiger home. He was informed by Marian that Mildred was not in, but plaintiff apparently was not satisfied and made several more telephone calls, but was again told that Mildred was not in but would be in later.

Sunday, December 8, 1929, accompanied by two witnesses, plaintiff called at the Kiger home and after a short conversation, in which defendant used some profanity and harsh language toward the plaintiff, defendant ordered

the plaintiff off the premises. However, before leaving the premises plaintiff was given permission to look through the house, but did not find his wife.

Defendant, when called under section 2055, Code of Civil Procedure, contradicted plaintiff's testimony in many particulars. In substance, defendant denied that he saw an attorney or was ever present in any attorney's office with his daughter, Mildred. Defendant further stated that he heard a divorce was filed by his daughter against the plaintiff but he had nothing to do with it and paid no attorney whatsoever. Defendant said that plaintiff did not say that he loved Mildred or ask defendant not to interfere with their relations. Defendant added that he assisted plaintiff to the door and told him to get out and stay out, and that plaintiff said, "All right, old dear." Defendant also testified that he told his daughter: "You are married, and you can either go to your husband or stay at home."

Defendant met his wife and daughter at the railroad station when they returned from San Diego and informed them that plaintiff was on a rampage and requested his daughter to tell the plaintiff to call at the Kiger home. Plaintiff came to the Kiger home and, according to the defendant's version, he got the young couple together and told them he would have nothing to do with their affairs, and that they would have to settle their difficulties between themselves. The version is corroborated in the record by plaintiff's wife and Mrs. Kiger. The plaintiff's version varied slightly with the above testimony.

Plaintiff and Mildred continued to live separate and apart. However, they did go out and look for a house to rent, but for financial reasons found no suitable home.

Certain other facts here merit notice, in that plaintiff's wife testified she never knew what salary her husband was making; that he never told her. She further testified that she was not even working at that time and tried to make him understand why it was utterly impossible to start out housekeeping; that plaintiff accused her folks of interfering, which was entirely untrue. In a later conversation Mildred told her husband she would not live with him until he had something set aside to take care of illnesses, unemployment, or emergencies. Mrs. Smith further told her husband, the plaintiff herein, that he could not support her and that it would simply be suicide for them to attempt to go out and live together then, and that it would be foolish and disastrous; that they

could not make it go; that they should have at least \$1,000 to fall back on; that plaintiff agreed and at his request his wife, Mrs. Smith, wrote and signed a little memorandum to that effect, which writing the plaintiff, however, denied; but the plaintiff's testimony and his letters to Mildred clearly prove the agreement.

Plaintiff and his wife continued to correspond for several months thereafter.

Indeed, it seems to be the attitude on the part of plaintiff's counsel that the parents sought to alienate the wife from plaintiff and that she refused to live with him. That is not a fair legal inference, and it finds no support in the testimony or letters introduced in evidence.

As has been suggested by plaintiff's counsel, there is some testimony of profanity and harsh language, likewise unfriendly comment by the father when plaintiff told him for the first time he had married his daughter, but this standing alone, and in view of what took place thereafter, can hardly be said to support the verdict.

Further testimony by the defendant when called under section 2055 of the Code of Civil Procedure did not prove any attempt of alienation whatsoever. Defendant related the story heretofore set out of what occurred when plaintiff called at defendant's home while plaintiff's wife and her mother, Mrs. Kiger, were in San Diego; but plaintiff introduced no evidence to show that either defendant or Mrs. Kiger ever made any attempt by conversation or action to alienate their daughter's affections or to influence her intention or behavior toward her husband, the plaintiff herein. No witnesses testified that the defendant ever made any statements or remarks to his daughter that were derogatory to plaintiff, or that he ever exercised any coercion, menace, or restraint upon her whatsoever. Certain other facts should be added to complete this narration.

On July 2, 1930, Mildred went with her parents to Warner Hot Springs to spend the Fourth of July. After returning, she went to Yosemite with her younger sister. Just before the trip to Warner Hot Springs plaintiff met his wife on the sidewalk near her home, at her request, and took her for a drive to the beach, where she had a pleasant visit. The husband voiced no objections to the trip to Warner Hot Springs, except that he told his wife he wished she would stay with him. Before Mrs. Smith returned from her trip to Yosemite plaintiff filed suit against his wife's parents for alienation of his wife's affections.

The marriage was entirely unknown to the father until he heard it from Mrs. Sanders, November 30, 1929, more than ten weeks after the secret marriage had taken place.

[1, 2] It is settled law that a father has a right to forbid a prospective suitor to call upon his daughter and is under no obligations whatsoever to allow one of whom he does not approve as a prospective husband to enter his home. Without knowledge of the marriage there can be no liability for alienation of affections. See *Newson v. Howley*, 205 Cal. 188, 270 P. 364.

[3] Plaintiff testified to numerous conversations with his wife, in which she stated, according to his testimony, that her parents were opposed to him and were trying to keep the young couple apart, but this evidence was not competent to prove anything other than the state of the wife's affections and was admitted only for that purpose.

The plaintiff cannot rely upon hearsay testimony, however effective it may have been with the jury.

[4] There is nothing in the record from which malice can be either inferred or presumed. The law on this subject is well settled. Whatever may be the rule as to the position of a stranger who shelters or counsels a wife, that rule does not apply where the parents of one of the parties are concerned. In such cases every presumption is that the parent acted with the best interest of his child in view, and malice must be affirmatively proven. See *Hall v. Hall*, 174 Cal. 718, 164 P. 390, 393; *Bourne v. Bourne*, 43 Cal. App. 516, 185 P. 489; *Kleist v. Breitung* (C. C. A.) 232 F. 555; *Young v. Young*, 8 Wash. 81, 35 P. 592; *Crowell v. Jeffries*, 79 Ind. App. 513, 134 N. E. 908; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Wilson v. Wilson*, 115 Me. 341, 98 A. 938; *McLery v. McLery*, 186 Wis. 137, 202 N. W. 156; *Ward v. Ward*, 102 Okl. 24, 225 P. 964; *Birchfield v. Birchfield*, 29 N. M. 19, 217 P. 616; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812; *Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574, 583; *Cripe v. Cripe*, 170 Cal. 91, 148 P. 520; *Noll v. Carlin*, 101 Or. 203, 199 P. 596; *Smith v. Smith*, 192 Mich. 566, 159 N. W. 349.

[5] Where the determination of the wife to abandon her husband was the result of her own volition and not influenced by any willful or malicious act of the father, the latter cannot be held responsible because he assisted her in carrying out her purpose and no

presumption of a bad motive arises from the mere fact that he gave her such assistance.

[6] While the jurors are the sole judges of the weight and sufficiency of the evidence, their province, in receiving or rejecting evidence as they were by the court instructed, is not arbitrary but is to be exercised with legal discretion and in subordination to the rules of evidence.

[7, 8] Two conclusions must be established by the plaintiff in this case to support a verdict against defendant, first, that the defendant knowingly and willfully influenced his daughter to withdraw her affection and companionship from the husband, the plaintiff herein; and, second, that this was done in a spirit of malice and ill will toward the plaintiff. The circumstances proved and attempted to be proved of harsh and unkind words of criticism of plaintiff by the defendant and assistance given to his daughter, the plaintiff's wife, do not prove or even raise an inference of act or effort to alienate her affections from the plaintiff.

Hutcheson v. Peck, 5 Johns. (N. Y.) 196, is universally referred to both in California and other states of the Union as the leading case. The decision was written over 100 years ago by Justice Kent. Our Supreme Court in the case of *Hall v. Hall*, supra, quotes a passage from that opinion which has been perhaps more liberally quoted than any other American decision of which we know. It reads: "If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest. * * * A father's house is always open to his children, and, whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum, * * * and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father, than against a stranger."

The rule is even more lenient in cases where there has been an elopement or secret marriage, as in the case at bar. Parents have special rights and antagonism is to be expected where there has been a secret elopement or a secret marriage against the wishes of parents or where the child has married into an objectionable social status. Under the circumstances, we find no substantial evidence of malice in the conduct of the defendant towards the plaintiff in regard to keeping the

daughter from the husband. There is no doubting appellant's severe feelings toward respondent nor that he exercised them freely in his home. The daughter chose to remain home notwithstanding these expressions. In the circumstances, it would seem appellant was entirely within his rights. Had the young couple not chosen to begin the married life in secret and had openly assumed the marital relation in a domicile of their own or in the plaintiff's home with permission, the situation would have been entirely different. The use of strong language by the girl's father to the young man and his criticism of their actions in marrying secretly and precipitously in the circumstances, all of which is shown by the transcript, cannot of itself establish actionable alienation of affection of the girl from her young husband.

[9] Parents are justified in giving counsel and advice to a daughter who contracted a marriage with a man who is believed by them to be wholly unfitted to make her happy and to support her properly, and, if they act without malice and are prompted by affection for their daughter and solicitude for her health and happiness, they cannot be held liable for alienation. *Kleist v. Breitung*, *supra*.

Nor do we think that defendant did anything out of the way when he stated to his daughter that she might take her choice, either go to her husband or remain under her father's roof, but that she could not do both. The cases that we have cited and quoted from abundantly support this proposition.

There is no substantial conflict in the evidence as to the foregoing facts. The entire situation shows a lack of malice. There must be proof that her affections were actually alienated as the result of the machinations of the defendant. *Codoni v. Donati*, 6 Cal. App. 83, 91 P. 423.

Inasmuch as the judgment must be reversed, it would serve no useful purpose to take up the numerous other points urged by the appellant.

The judgment is reversed and, since the case was fully tried and no evidence developed against the appellant upon which a judgment could be based, the superior court is instructed to enter judgment for the defendant.

I concur: STEPHENS, P. J.

CRAIL, Justice.

I dissent. I feel that the majority opinion states the evidence in the light most favorable

to the appellant, whereas it is our duty on appeal to view the evidence in the light most favorable to the respondent. The evidence reviewed in the light most favorable to the plaintiff is fully set out in the responder's brief with citations as to where it may be found. I feel that there is some substantial evidence to support the implied finding of malice and that reasonable inferences fairly deducible from the facts and circumstances in evidence support the finding of the alienation of the daughter's affections by the defendant, and for that reason I believe that the judgment should be affirmed.



5 Cal.App.2d 573

PEAK v. JURGENS.

Civ. 9250.

District Court of Appeal, First District,
Division 1, California.

March 28, 1935.

Rehearing Denied April 27, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Contracts ⇨153

Contract generally should be so construed as to give effect to all its parts.

2. Brokers ⇨52

Payment of broker's commission for selling real estate *held* dependent upon payment of purchase price and conveyance of title, though agreement called for payment of commission upon "consummation of sale," where agreement was appended to completed sales contract.

3. Brokers ⇨64(1)

Broker, whose right to commission is dependent upon payment of purchase price and conveyance of title, can recover from vendor on purchaser's breach of contract if vendor sues for damages or specific performance, but cannot recover commission if vendor elects to rescind.

4. Brokers ⇨64(1)

Broker whose right to commission from vendor for selling land was dependent upon payment of purchase price and conveyance of title *held* not entitled to recover commission where, on purchaser's default, vendor sued escrow holder to recover forfeited deposit and thereafter compromised suit by accepting lesser sum.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by George Peak against W. C. Jurgens, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. Don Duncan, of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

JAMES, Justice pro tem.

This is an action brought by the appellant to recover a real estate broker's commission which he claimed to be due him from respondent. Judgment went for defendant and respondent in the court below, on a trial; and this appeal is taken from that judgment.

The facts as disclosed by the record, or such of them as are necessary to the determination of the issues presented by the appeal, are these: The plaintiff was a licensed real estate broker. The defendant was the owner of certain lands in San Rafael, Marin county, known as the "Hotel Rafael Property." Plaintiff procured from George and Louis J. Cohn an agreement to purchase this property for the purchase price of \$125,000. The agreement was in the form of a receipt to the purchasers of the sum of \$5,000 as a deposit on such sale, and in which the terms and conditions of the sale were set forth with reasonable certainty. It was signed by the plaintiff as "Agents for Seller," with an explanatory clause added, "Subject to approval of Seller." Below this was the sentence: "The undersigned, hereinabove designated as the purchasers, hereby agree to purchase the above described property for the price and according to the conditions above specified." To this was attached the witnessed signatures of the Cohns, the proposing purchasers. Up to this time plaintiff had no employment or agency for defendant, and there was no brokerage contract between them. The instrument, in that form, was presented to defendant by plaintiff, and the sale was approved by defendant by subscribing to the sentence, at the end of the instrument, these words: "hereby approve the sale of said property above described upon the terms and conditions hereinabove set forth and agree to pay to George Peak, upon consummation of sale, the sum of sixty-two hundred fifty (\$6250) dollars for services rendered." Plaintiff's action is based exclusively on this latter agreement.

The sales agreement contains the usual provisions for examination of title, and time to correct any defects, etc., likewise for return of the deposit payment if title proves invalid, or its forfeiture in case of default by the purchasers.

After examination, certain objections were made to the title, and the seller undertook to remedy the same; but the purchasers refused to accept the title as remedied, claiming the title to be still unmerchantable, and the sale was not consummated.

When the deposit was taken by the plaintiff at the beginning of the transaction, it was in the form of the purchasers' check for \$5,000. This was, with defendant's approval, deposited with the California Pacific Title & Trust Company to await the result of the title examination.

After the purchasers had finally refused to go through with the sale, the seller, defendant here, brought suit against the California Pacific Title & Trust Company and the Cohns, to recover the \$5,000 deposit. The issue of this latter action dependent upon the validity of the title tendered the Cohns. If the title were a merchantable title, then their refusal to accept and pay the purchase price constituted a breach of their agreement which would entitle the seller to claim and retain the deposit (or pursue any other remedy he might have in the premises). On the other hand, if the objections to the title were valid, then the purchasers were entitled to recover back their deposit.

The contentions which appellant makes on this appeal are these:

1. That, having brought to the seller a purchaser, ready, able, and willing to buy at a price and on the terms acceptable to the seller, and they having entered into a valid agreement of sale, the plaintiff became entitled to his commission under his agreement with the seller, indorsed on the contract of sale, regardless of whether the sale was thereafter actually consummated or not; that when the agreement of sale was executed by both parties, the agent's duties were completed and, so far as he was concerned, the transaction was consummated.
2. That by the action of the seller, in suing to recover the deposit, he thereby stood on the contract and sought and obtained damages for its breach; appellant's contention being that in such case the broker would be entitled to his commission.
3. That the sale failed because of the failure of the seller to furnish a merchantable

title, in which case the broker would be entitled to his commission.

4. Appellant also makes some point of failure of the seller to deposit the form of trust deed agreed upon, thereby affording the purchasers a ground for refusal to consummate the transaction.

These contentions we will dispose of in the order in which they are herein set forth.

[1, 2] 1. Plaintiff's right of action is based solely upon the written agreement at the end of the sales contract. His rights may not be enlarged or restricted beyond the terms of that agreement. It is at once the measure and limit of his rights. By its terms he is to receive the sum of \$6,250 from the defendant "upon consummation of sale." Appellant's contention that this means the execution of the valid agreement of sale does violence to a reasonable construction of the terms used, particularly in view of the circumstances under which they were used. It is a general rule that a contract should be so construed as to give effect to all its parts. At the time of the signing of the commission agreement, the sales agreement had already been signed and accepted, and if that constituted a "consummation of the sale," then the commission became due immediately upon the signing of the commission agreement and there could have been no purpose in inserting the clause "upon consummation of the sale," as, under appellant's construction, the sale had already been consummated. We are not unmindful of the rule that under a general brokerage contract a broker's commission becomes due when he has found a purchaser ready, able, and willing to purchase at the price and on the terms agreeable to the seller and they enter into a valid sales contract. But appellant did not have a general brokerage contract with respondent. He had no contract whatever until the sales agreement had been made and he then entered into his commission agreement with respondent, and they were at liberty to make any kind of an agreement that was satisfactory to them both. They could have agreed upon a commission to be paid at once; or they could have made it payable a year from that date; or they could, as they did in this case, make it conditional upon the consummation of the sale. They could have attached any conditions they chose. Obviously, the seller was contemplating an actual consummation of the sale itself, according to the terms of the sales agreement, when he agreed to pay this commission; and by actual consummation of the sale, he meant the doing of the things which constituted the sale, to

wit, the payment of the purchase price and the conveyance of the title. Neither the reasoning of appellant, nor his cited authorities to the contrary, are convincing to us. We are of the opinion that the clause in question in the commission agreement was intended to render the payment of plaintiff's commission dependent upon the consummation of the sale in the sense indicated, to wit, the payment of the purchase price and the conveyance of the title.

[3, 4] 2. Assuming that the contract of sale was breached by the purchasers, there were several courses open to the seller: He could tender a deed and sue for the balance of the purchase price, standing on the contract; or, still standing on the contract, he could sue for damages for its breach; or, he could treat the contract as at an end, being relieved of all obligations thereunder, himself, and retain whatever had been paid thereon. Any other course he may take is not pertinent here. In the first two instances it may be conceded that the broker would be entitled to his commission. In the third, he is not. If he sues for damages, he is enforcing the contract for his own benefit and may not disregard the rights of the broker. If he sues in specific performance, he is, in effect, forcing the consummation of the contract, and thereby bringing about the performance of the condition upon which the broker's compensation is dependent, and the broker would be entitled to recover. But, in the third instance, he is doing none of these things. He has simply stood upon the right given him by the law to retain all moneys theretofore paid by the vendees and to terminate the contract, forfeiting all rights of the vendees in the premises. In such case, of course, the sale cannot be regarded in any sense as being consummated; and it follows that, the condition precedent to the broker's recovery not being fulfilled, the broker would not be entitled to his commission. The vendor was under no obligation to pursue the other remedies, and his election to take the third course was within his rights and could not advantage the broker in any sense.

Appellant cites with much vigor and confidence the case of *Lesser v. W. B. McGerry & Co., Inc.*, 121 Cal. App. 193, 8 P.(2d) 1058, 1060. We are not in accord with his application of that case, nor do we concede the facts to be analogous. On the contrary, the court in that case expressly excepted from the rule therein laid down such a one as the instant case; the court therein saying: "Under the authority of *Ford v. Brown* [120 Cal. 551, 52

P. 817], supra, and *Dunne v. Colomb* [192 Cal. 740, 221 P. 912], supra, it is clear that, if appellant herein had terminated the contract and forfeited the deposit upon the default of the buyers, respondents would be in no position to claim their commission." If the position of this respondent is that of one who has merely terminated the contract and forfeited the deposit upon the default of the buyers, then, under all the authorities cited, the broker would not be entitled to his commission, where, as we have held here, it was dependent upon the actual consummation of the sale, as we have construed that clause. But appellant further contends that because respondent sued to recover the forfeited payment, and thereafter compromised the same by accepting a lesser sum, he thereby brought himself within the rule of the lesser case. We find no merit in his argument. The payment of \$5,000 was deposited with the title company in escrow. If, as we have said before, the contract were breached by the vendees, vendor, on his election, could consider the contract at an end and become entitled to have and retain the escrowed payment. On the other hand, if a failure of consummation was the result of a breach by the vendor, the vendees would be entitled to recover the payment. The purpose of escrowing this payment was obviously to place it within the reach of either who might be entitled thereto, if there was a controversy between the parties on that score. The suit by the respondent here was necessary. It was not a suit to recover damages; it was not a suit in specific performance; it was not, strictly speaking, a suit to enforce the contract at all. It was one to have the rights of the vendees terminated and, incidentally, to have the depository turn over the deposited sum to its rightful owner. Under those conditions, the broker had no interest in that deposit. It belonged to the vendor. He could do with it what he pleased. If he chose to yield part of it to the vendees, it would be no more the affair of the broker than if he bestowed the whole of it upon some charitable purpose. In principle, we can see no difference between the case of the vendor retaining a payment actually in his possession under such circumstances and his suing to recover the same from an escrow holder.

3. Appellant next contends that even if his commission were dependent upon the consummation of the sale, as we have construed it, that, nevertheless, if the sale fails through fault of the vendor, because of his failure to

furnish a merchantable title, the broker is still entitled to his commission. This would appear to be the general rule. Considerable space is devoted in the briefs in this case to a discussion of the validity of the title tendered by respondent. Without extending this opinion by a discussion of the minutiae of that question, we are satisfied that Jurgens' title was made good within the ninety-day period allowed by the contract of sale and that he was not in default in that respect.

4. The further contention that respondent was in default under the contract of sale by reason of certain objectionable provisions of a deed of trust finds its answer in the fact that there was no deed of trust provided for in the contract of sale and, hence, there could be no default in such respect.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



6 Cal.App.2d 30

MORRIS v. NEW YORK LIFE INS. CO.
Civ. 1520.

District Court of Appeal, Fourth District,
California.
April 5, 1935.

1. Insurance ☞362

Insurer's receipt of proof of insured's disability held condition precedent to waiver of payment of premiums under life insurance policy, providing that if insurer received due proof that insured was wholly disabled, insurer should waive payment of premiums thereafter due during such disability.

2. Insurance ☞367(2)

Life insurance policy lapsed in its entirety on nonpayment of premium due before insurer received proof of insured's total disability, so that no money due insured was in insurer's hands for payment of premiums because of policy provision for payment of benefits to insured from year after proof of such disability, payment of premiums being condition precedent to payment of such benefits.

3. Constitutional law ☞70(3)

Argument that insurance company, as matter of public policy, should not be permitted to write insurance contracts likely to lead ordinary man into feeling that he is relieved

from payment of premiums on becoming disabled, without further action on his part, must be addressed to legislative or administrative branch of government, not courts, which can only interpret contracts as made.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Max Morris against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

David R. Rubin, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to recover certain disability benefits under a policy of life insurance issued to him by the defendant in January, 1916. The policy provided that the payment of a premium should not maintain the policy in force beyond the date when the next payment became due, except as therein provided. Another clause provided for thirty days' grace in the payment of any premium after the first, during which time the policy was to continue in force. There was also a provision for disability benefits, the material parts of which read as follows:

"Section 3—*Disability Benefits.*

"A. *Waiver of Premiums.*—If, after this Policy shall have been in force one full year and before default in the payment of any premium, the Company receives due proof that the Insured before attaining the rated-up age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the Company shall waive payment of each premium as it thereafter becomes due during the Insured's said disability. * * *

"B. *Instalment Payments.*—In addition to waiving payment of premiums as aforesaid, if such disability shall have occurred before the Insured attained the rated-up age of sixty years, the Company, one year after said proof of such disability, shall pay to the Insured one-tenth of the face amount of the Policy and a like amount in each insurance year thereafter during the continuance of

such disability prior to the maturity of the Policy; the Policy must be returned to the Company for the endorsement thereon of each payment. * * *

The trial court found that the plaintiff paid all premiums coming due under said policy prior to January 14, 1929; that the premium coming due on that date was never paid or tendered to the defendant; that in accordance with its terms the policy lapsed for nonpayment of the premium due on that date; that the plaintiff became wholly disabled by bodily disease and was thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit from 1925 down to and including the time of the trial; that the defendant had no notice of such disability until informed thereof by letter from the plaintiff's attorney in January, 1931; and that no evidence of such disability on the part of the plaintiff was delivered to the defendant and no proof of such disability was made until September 17, 1931. As conclusions of law, the court found that the policy in question lapsed for nonpayment of the premium due and payable on January 14, 1929; that the receiving of proof of disability by the defendant before default in the payment of any premium due was a condition precedent to be performed by the insured in order to effect a waiver of the payment of premium and in order to recover disability benefits provided for in the policy; and that the plaintiff did not before default in the payment of the premium due on January 14, 1929, perform said condition precedent by delivering to the defendant due proof that he had become disabled within the meaning of the policy. Judgment was entered for the defendant, and the plaintiff has appealed.

[1] Most of the points raised are based upon the contention that, under the terms of this policy, the furnishing of proof of disability prior to any default in the payment of a premium is not a condition precedent to the waiver of payment of the premium by the respondent and to the accrual of disability benefits where the disability has, in fact, occurred prior to any default in the payment of a premium. A similar contention was decided adversely to appellant in the recent case of *Cochens v. Prudential Insurance Co. of America* (Cal. App.) 40 P.(2d) 902. The language of the policy here in question relating to the waiver of premiums, while not identical with that of the policy involved in the case referred to, is precisely similar in effect, and brings this case squarely within the principle there laid down. Under the

terms of this policy, the receipt by the company of proof of disability is clearly made a condition precedent to a waiver of payment of premiums.

[2] It is further argued that clause B of section 3 of this policy provides an additional benefit in case of disability, that an additional premium was charged for this, and that the fact of disability created a liability for the payment of such benefit and thus provided a fund in the hands of the insurance company which could and should have been used by it for the payment of the premiums due.

This argument assumes that the policy is in force and that a liability for the payment of the benefit referred to has accrued. The additional charge for this benefit was included in the premium which was not paid. It will be noted that the language used in clause B relates and connects the same to clause A. Not only is no payment for disability to be made until one year after proof thereof is made but the entire provision for such disability is an additional benefit to the waiver of the payment of premiums and the same is to accompany or follow that other benefit. The two clauses must be read together and the payment of a premium and the keeping of the policy in force is as much a condition precedent to the one benefit as to the other. When the policy lapsed for the nonpayment of the premium, it lapsed in its entirety and no money due to the appellant was in the hands of the respondent which could have been used for the payment of premiums.

This same point was involved in the case of *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230, 231, 76 L. Ed. 416, where the insured also sought to recover disability benefits under a clause providing that the insurer would pay to the insured a monthly income of 1 per cent. of the amount of the policy, which clause, like the one here in question, was related to another provision providing for the waiver of premiums in case of disability, both clauses being based upon a provision that proof of the disability should be furnished to the insurer. In that case, the court said:

"Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof. The provi-

sion to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare *Brams v. New York L. Ins. Co.*, 299 Pa. 11, 14, 148 A. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. *Mutual L. Ins. Co. v. Hurri Packing Co.*, 263 U. S. 167, 174, 44 S. Ct. 90, 68 L. Ed. 235 [238], 31 A. L. R. 102; *Stipcich v. Mutual L. Ins. Co.*, 277 U. S. 311, 322, 48 S. Ct. 512, 72 L. Ed. 895 [900]. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.

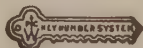
"Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense. *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 462, 463, 14 S. Ct. 379, 38 L. Ed. 231 [235, 236]. As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. *Klein v. New York L. Ins. Co.*, 104 U. S. 88, 91, 26 L. Ed. 662 [663]; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 30, 31, 23 L. Ed. 789 [791] [19 Am. Rep. 512, note]; *Pilot L. Ins. Co. v. Owen (C. C. A.)* 31 F.(2d) 862, 866. And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles."

[3] It is further urged that as a matter of public policy an insurance company should not be permitted to write insurance contracts of this nature since they are likely to deceive the unwary and lead the ordinary man into feeling that he is relieved from the payment of premiums upon becoming disabled, without further action on his part. While this argument is not without its force, it is one that must be addressed to the legislative or administrative branch of the government and not to the courts. We can only interpret the contract as made and it is not within our

province to say that the parties may not agree to such a condition as that in question.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



5 Cal.App.2d 746

BAEFF v. KLEIBER MOTOR TRUCK CO.

et al.

Civ. 8703.

District Court of Appeal, Second District,
Division 1, California.

April 4, 1935.

1. Automobiles ⇨246(2)

Instruction that test in determining whether automobile host used slight care, which was all that was required of him, was whether host did what an ordinarily inattentive and thoughtless person would have done in same or similar situation *held* error.

2. Automobiles ⇨246(3)

Instruction that it was as much duty of guest to avoid automobile accident as it was duty of defendants *held* error, as leading jury to conclusion that guest was under legal duty of watching traffic and in general taking all those precautions which driver was legally bound to observe.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Slavia Baeff against the Kleiber Motor Truck Company, M. P. Correia, and others. From an order granting plaintiff a new trial after a verdict for defendants, M. P. Correia and others appeal.

Order affirmed.

David D. Stuart, of Los Angeles, for appellant Lobar.

John M. Hall and Louis Lombardi, both of Los Angeles, for respondent.

YORK, Justice.

The plaintiff seeks to recover damages for injuries sustained in a collision between the automobile in which she was riding as a guest of the defendant Lobar and a truck driven by defendant Ramalho, as agent of defendant

Correia. Upon trial of the action, the jury brought in a verdict in favor of defendants, whereupon plaintiff made a motion for a new trial, which was granted, and the following order was entered: "Plaintiff's motion for a new trial herein having been heretofore presented, argued and submitted, it is now ordered that said motion for a new trial herein be and the same is hereby granted."

This appeal is taken from the order granting motion for new trial by defendants Lobar, Ramalho, and Correia; defendant Lobar alone presenting a brief. In his brief he contends that, since insufficiency of the evidence was not specified in the order granting the motion for new trial, the grounds therefor necessarily were errors of law, and that since there were apparently no errors in the admission of evidence, the only complaint of error known to this appellant is the contention advanced by plaintiff on her motion for new trial, i. e., that the court erred in its instructions to the jury. Respondent concedes that the court granted the motion for new trial because of certain errors occurring at the trial, and that such errors are to be found in certain of the instructions given to the jury.

[1] Instruction No. 10: "You are instructed that in deciding whether defendant Lobar was guilty of gross negligence, you will view the matter as it looked to him before the accident occurred rather than by reflection and after-thought by yourselves after the accident occurred. As viewed after the occurrence, we can readily see how an accident could have been avoided; but that is not the test. The test is in determining whether Leo Lobar used slight care (which was all that was required of him): Did he do what an ordinarily inattentive and thoughtless person would have done in the same or similar situation?, and if you so find, then your verdict should be for him and against the plaintiff."

Appellants maintain that this instruction, which was requested by defendant Lobar and given, was correctly given when considered in connection with other instructions. Respondent, on the other hand, maintains that the first two sentences of this instruction are erroneous as limiting the consideration of the jury solely to such evidence as tended to show what actual knowledge of danger the driver of the automobile had at the time of the accident. Respondent also maintains that this instruction is erroneous in that it lays down an incorrect test concerning the conduct of defendant Lobar. While defendant Lobar owed to his guest only the duty of slight care,

"what an ordinarily inattentive and thoughtless person would have done in the same or similar situation" is hardly qualified, standing alone, as a definition of slight care, for the reason that very often the acts of an ordinarily inattentive and thoughtless person amounts to gross negligence. We believe this instruction was erroneously given, and was not cured by other instructions correctly given.

[2] Instruction No. 39: "It was as much the duty of the plaintiff to avoid the accident as it was the duty of the defendants, and if you believe that the plaintiff could have avoided the accident by the use of ordinary care, and that such failure on her part was a proximate cause of the accident, then your verdict will be for the defendants, A. S. Ramalho and M. P. Correia."

There appears to be no evidence in the record tending to show that the plaintiff, as guest of defendant Lobar, had any control over the car in which she was riding. That part of the instruction declaring that "it was as much the duty of plaintiff to avoid the accident as it was the duty of defendants" may have led the jury to the conclusion that the plaintiff was under the legal duty of watching traffic on the highway and in general taking all those precautions which the person actually operating the vehicle was legally bound to observe.

The order granting motion for a new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



5 Cal.App.2d 333

**REUTER v. PACIFIC MUT. LIFE INS. CO.
OF AMERICA.**
Civ. 9682.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1935.

Rehearing Denied April 12, 1935.

Hearing Denied by Supreme Court
May 17, 1935.

1. Insurance Ⓒ579

Contract of settlement of insured's action on disability policies was entered into by mistake of fact, entitling insured to rescind

contract, where both parties mistakenly believed insured's disability was result of syphilis, out of which had developed insurer's contention that insured had been so afflicted when he took out policies and that his concealment of that fact had been fraudulent (Civ. Code, §§ 1565, 1567, 1577, 1689).

2. Appeal and error Ⓒ930(4)

In support of verdict for insured on appeal in action on disability policies brought on theory that previous contract of settlement and release were entered into by mistake, it would be presumed that jury concluded that release and settlement were entered into by mistake, and were therefore properly rescinded (Civ. Code, §§ 1565, 1567, 1577, 1689).

3. Judgment Ⓒ603

Dismissal of insured's prior action on disability policies with prejudice after contract of settlement and release held not to bar action by insured to recover monthly disability installments which had accrued subsequent to dismissal, since subsequent installments were not the subject-matter of former action and were not included therein.

4. Limitation of actions Ⓒ51(2)

Insured's action to recover monthly disability installments which had accrued subsequent to dismissal with prejudice of prior action after contract of settlement and release held not barred by limitations, where amount paid by insurer under contract of settlement would include installments extending to a date within less than four years from filing of instant action (Code Civ. Proc. § 337).

5. Limitation of actions Ⓒ43

Statute of limitations begins to run against cause of action as soon as right of action has accrued and not before (Code Civ. Proc. § 337).

6. Insurance Ⓒ666

In insured's action for breach of policies providing for payment of monthly disability benefits, insured held entitled only to recover amount of installments.

7. Election of remedies Ⓒ12

In insured's action for breach of policies providing for payment of monthly disability benefits in which insured sought to recover on count for anticipatory breach and on count for accrued payments only, insured's election at trial to proceed on count for anticipatory breach held not election of remedies which would deprive insured of right to recover accrued payments, since pleading of count on which he proceeded to trial was sufficient to support recovery for accrued payments to which he was entitled.

8. Appeal and error ⇐1201(6)

In insured's action for breach of policies providing for payment of monthly disability benefits, insured could file verified supplemental complaint setting out amount of installments accruing up to time of filing thereof, where case had to be remanded for determination as to amount of accrued installments.

On Petition for Rehearing.

9. Limitation of actions ⇐47(1)

Where written contract provides for payment of indemnity in event of happening of contingency, of which there may be a series, statute of limitations does not start to run until happening of contingency for which recovery is sought.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Herman A. Reuter against the Pacific Mutual Life Insurance Company of America. From a judgment for the plaintiff, the defendant appeals.

Reversed, with directions.

Knight, Boland & Riordan, of San Francisco, and Loeb, Walker & Loeb, of Los Angeles, for appellant.

Erwin P. Werner and Joseph L. Fainer, both of Los Angeles, and Clifton Hildebrand and Thomas F. McCue, both of San Francisco, for respondent.

SCOTT, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff on certain policies of disability insurance.

In November of 1923, upon application of plaintiff, defendant issued to him four policies of disability insurance, each providing benefits of \$100 a month. In March of 1928 plaintiff notified defendant that he was permanently and totally disabled, declaring that he was at that time suffering from syphilis. Defendant refused to pay, asserting that plaintiff was thus afflicted when the policy was applied for, and his concealment of that fact was fraudulent. Plaintiff denied he was thus afflicted in 1923, and, upon defendant's refusal to pay, filed suit against defendant. After some negotiations, defendant paid plaintiff \$2,000 on each policy, totaling \$8,000, by way of settlement. That action was then dismissed with prejudice in April, 1929.

About November, 1933, plaintiff and his physicians discovered (and defendant does not dispute it) that he was not suffering from

syphilis, but that his case was then and had been one of encephalitis or sleeping sickness, a disease which is different from syphilis in origin and character, although resembling it in some of its aspects. It appears from the record that, if plaintiff in 1928 had been afflicted with syphilis which was of a stage as advanced as indicated by the physicians, there would have been some probability that he had suffered from it when he took out the insurance; whereas, when encephalitis rather than the other malady was discovered to be the disease from which plaintiff was suffering, such probability of syphilitic infection at the time of the issuance of the insurance policy was removed.

Plaintiff thereupon in 1933 notified defendant that he rescinded the contract of settlement above referred to, offered to return to defendant the money received thereunder and filed this suit on the original insurance policies, acknowledging as payment on each the sum received as such settlement. In its answer defendant pleaded the contract of settlement and dismissal of the prior action. Upon trial by jury, a verdict was returned in favor of plaintiff for "the then present value on 23rd day of May, 1928, of the sum of \$400 per month for the plaintiff's life expectancy of 23 years from and after the 23rd day of May, 1928, less the sum of \$8,000 paid plaintiff April 17, 1929, with interest on said \$8,000 at the legal rate." Judgment for plaintiff was entered thereon for \$55,341.60.

Appellant contends that the compromise was improperly set aside, that this action is barred by the dismissal of the former action and also by the statute of limitations, and that a judgment for present value of all future installments is erroneous.

[1, 2] The contract of settlement was entered into under a mistaken belief on the part of both plaintiff and defendant that the former at the time of settlement was suffering from syphilis, and from that mistaken belief developed some contention as to whether plaintiff had been thus afflicted when he took out the policies. Such belief was a mistake of fact under Civ. Code, § 1577, which reads: "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not ex-

isted." "An apparent consent is not real or free when obtained through * * * mistake" (Civ. Code, § 1567); and "the consent of the parties to a contract must be free" (Civ. Code, § 1565). "A party to a contract may rescind the same * * * if the consent of the party rescinding * * * was given by mistake." Civ. Code, § 1689. In support of the verdict it will be presumed that the jury concluded that the release and settlement were entered into by mistake, and were therefore properly rescinded. *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 28 P.(2d) 433.

[3-5] The causes of action upon which plaintiff was entitled to recover in this case were the installments which had accrued under the policies subsequent to dismissal of the prior suit. Since they had not matured at that time and were not the subject-matter of the former action, they cannot be held to have been included in such dismissal nor to be barred by it. Nor would they be barred by the statute of limitations, since this suit was commenced in June of 1933, and the amount already paid by defendant would include installments extending to a date within less than four years from filing of this action. Code Civ. Proc. § 337. "The statute of limitations begins to run against a cause of action as soon as the right of action has accrued" and not before. *Lattin v. Gillette*, 95 Cal. 317, 30 P. 545, 546, 29 Am. St. Rep. 115.

[6] Plaintiff is not entitled to judgment for the present value of future installments. His recovery is limited to such installments as have accrued. *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; *Cobb v. Pacific Mutual Life Ins. Co.* (Cal. App.) 40 P.(2d) 574; *Brix v. People's Mutual Life Ins. Co.* (Cal. Sup.) 41 P. (2d) 537.

The complaint in the instant case pleaded each policy as the basis for two counts, the first seeking the total sum that would be due as damages for breach of each contract under the theory of anticipatory breach, the second being for accrued installments only.

[7] At the trial court's request plaintiff made an election, choosing to proceed to trial on the counts setting up the larger amounts. Such purported election would not operate to deprive plaintiff of his remedy, since the pleading of the counts on which he proceeded to trial were sufficient to support the recovery to which he is entitled. They necessarily included every element that would have been essential to recovery if he had been suing for the accrued payments only.

[8] Since the case must be remanded to the trial court for determination as to the amount of accrued installments, the respondent may file a verified supplemental complaint setting out the amount of installments that have accrued up to time of filing thereof. If controverted, the trial court shall determine the amount; otherwise judgment shall be entered for respondent for the amount accrued, plus 7 per cent. interest from due dates of such installments.

Judgment reversed, with directions to the trial court to proceed in conformity with the course above indicated.

We concur: STEPHENS, P. J.; CRAIL, J.

PER CURIAM.

On petition for rehearing appellant professes inability to distinguish the instant case from one in which a contract providing installment payments is involved and insists that the case of *Baker v. Eilers Music Co.*, 175 Cal. 657, 166 P. 1008, would preclude further suit after the dismissal of the prior action.

It appears quite clear that the first suit between these parties was for payments on account of disability, which was a contingent hazard and which recovery, if any, under the cases cited in our opinion in this case would be limited to those payments which had accrued by reason of the happening of the contingency. The dismissal with prejudice could not serve to foreclose plaintiff from the enforcement of a right subsequently accruing. Appellant filed a cross-complaint in the first case, asking cancellation of the insurance contract for the reasons which it advanced in urging that it was nonenforceable. That cross-complaint was dismissed with prejudice at the same time the complaint was dismissed.

We assume appellant was aware that the only issue under which the trial court in the first case could have canceled the insurance contract was the issue raised by the cross-complaint which was thus dismissed with prejudice at appellant's own request. When the trial court properly determined in the instant case that the policy was still in effect, there was nothing to prevent recovery by plaintiff of amounts accruing by reason of the subsequent happening of the contingency assured against.

[9] It is this same principle of law which keeps the statute of limitations from applying until the happening of the contingency. It is elementary that where a written contract provides for payment of indemnity in the

event of the happening of a contingency, of which there may be a series, the statute does not start to run until the happening of the very contingency for which recovery is sought.

Rehearing denied.



5 Cal.App.2d 593

Ex parte TRAINOR.

Cr. 2702.

District Court of Appeal, Second District,
Division 1, California.

March 28, 1935.

Hearing Denied by Supreme Court
April 26, 1935.

1. Habeas corpus ⇨53

Petition stating only that petitioner was being held, serving county jail sentence in violation of probation orders, *held* insufficient to entitle petitioner to habeas corpus, where court was required to infer that, in some action wherein petitioner was convicted of public offense, he had been sentenced by court's judgment to serve term in county jail, and no fact was stated from which it could be determined or inferred that such judgment had any relation to probation orders.

2. Habeas corpus ⇨53

Petition, failing to show that previous application for habeas corpus which was denied was presented to judge as judge of any court of state, nor that such application was on same alleged facts, or that it was by or on behalf of same person, *held* insufficient to entitle petitioner to habeas corpus (Rules of the Supreme Court and the District Courts of Appeal, rule XXVI).

In the matter of the application of Fred Trainor for writ of habeas corpus.

Petition denied.

Anna Zacsek, of Los Angeles, for petitioner.

PER CURIAM.

[1] On reading the amended petition, it is the opinion of the court that petitioner has failed to state facts entitling him to the writ. The petition does not say that petitioner is being detained under purported authority of the probation orders described, or either of them. It is stated only that he "now is being held, serving a county jail sentence

in the county jail * * * in violation of the probation order hereinbefore cited." We must infer that in some action wherein petitioner was convicted of a public offense he has been sentenced, by judgment of the court, to serve a term in the county jail. No fact is here stated, from which it can be determined or inferred, that such judgment has any relation whatever to the said probation orders.

[2] Moreover, it does not appear that the application for a writ of habeas corpus which was denied by "Judge Scott" was presented to him as a judge of any court of this state; nor that such application was upon the same alleged facts, or even that it was by or on behalf of the same person. Rule XXVI of the Supreme Court and the District Courts of Appeal.

The petition is denied.



5 Cal.App.2d 729

PEOPLE v. LACHUK.

Cr. 2671.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1935.

Hearing Denied by Supreme Court
May 3, 1935.

1. Criminal law ⇨1032(1)

Permitting amendment of information during trial to change date of offenses alleged *held* not prejudicial, where accused made no objection to amendment, raised no question at trial as to its propriety, and did not suggest surprise or request continuance (Pen. Code, § 1008).

2. Rape ⇨54(1)

In prosecution for statutory rape, prosecutrix' testimony need not be corroborated to authorize conviction.

3. Criminal law ⇨507(7)

In prosecution for incest committed with daughter of accused under age of consent, daughter was not "accomplice" whose testimony required corroboration to authorize conviction.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

4. Criminal law ⇨913(6), 1028

Where accused made no plea of once in jeopardy when arraigned, question of once in

jeopardy could not be raised on motion for new trial or on appeal.

5. Criminal law ☞198

In prosecution for rape and incest allegedly committed on specified dates, plea of once in jeopardy would not be sustained by former acquittal of charges of rape and incest allegedly committed on another date, although evidence as to acts upon which current prosecution was based had been introduced in former trial.

6. Criminal law ☞369(1)

Competent evidence of other crimes of same nature is not rendered inadmissible because accused has been acquitted on trial wherein he was charged with such other crimes.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

John Lachuk was convicted of rape and incest, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

The defendant was charged in four counts of an information with the separate crimes of rape and incest with his own sixteen year old daughter, alleged to have been committed on July 12, 1934, and on July 27, 1934. A plea of not guilty was entered and the case tried before the court without a jury, defendant being convicted on all four counts.

[1] During the trial the court permitted the prosecution to amend the information by changing the date of one of each of the offenses of rape and incest from July 12, 1934, to June 20, 1934. No objection was made by defendant to the amendment, nor did he raise any question whatever at the trial as to its propriety; nor did he suggest surprise or request a continuance to prepare to meet the new issue as to date. The amendment was authorized by section 1008 of the Penal Code and no prejudice to defendant is made to appear as a result of such change of date. *People v. Anthony*, 20 Cal. App. 586, 129 P. 968; *People v. Marshall*, 99 Cal. App. 224, 278 P. 258.

[2, 3] Appellant's contention that the evidence is insufficient to sustain the conviction on the several counts is without merit. The testimony of the prosecutrix was not inher-

ently improbable, and it was corroborated in substantial detail, notwithstanding that the testimony of the prosecutrix in charges of rape on a female under the age of consent requires no corroboration as a matter of law. *People v. Meraviglia*, 73 Cal. App. 402, 411, 238 P. 794. And the daughter in this case, being under the age of consent, was not in law an accomplice in the crime of incest, and therefore her testimony was legally sufficient to support the conviction without corroboration. *People v. Stoll*, 84 Cal. App. 99, 257 P. 583.

[4] During the trial a witness, George C. Exley, a deputy sheriff, was called by the people and without objection on the part of defendant gave testimony of witnessing acts of a sexual nature between the prosecutrix and defendant on July 18, 1934. On cross-examination he stated that he had testified against defendant on charges of rape and incest founded on this date of July 18, 1934, in a trial in which defendant was found not guilty. On that meager record defendant now contends that the acquittal referred to constituted basis of the plea of once in jeopardy and was a bar to prosecution of any similar offense alleged to have previously occurred. No plea of jeopardy was made by defendant when arraigned herein. The question of once in jeopardy was therefore foreign to the case and cannot be raised for the first time on a motion for new trial, as was attempted herein, nor on appeal. *People v. Bennett*, 114 Cal. 56, 45 P. 1013; *People v. Frank*, 134 Cal. App. 211, 25 P.(2d) 486. Had such a plea been entered, the question would then have become one of fact for the trier of facts to pass upon.

[5] Assuming that the record shows that defendant had been previously acquitted of charges of rape and of incest alleged to have been committed on July 18, 1934, still it cannot be said that a subsequent charge of the same nature on other dates would constitute double jeopardy. The acts of June 20, 1934, and of July 27, 1934, charged in the second information, were distinct and separate crimes from the acts of July 18, 1934, involved in such former trial. The acquittal of defendant of the latter acts was not a finding as to the truth of the charges covering the acts of June 20, 1934, and of July 27, 1934, even if evidence of these latter acts had been used at the former trial. *People v. Wilson*, 79 Cal. App. 709, 250 P. 879.

[6] Evidence of other crimes of the same nature being admissible at the trial of defendant herein, such evidence does not be-

come inadmissible, as claimed by defendant, solely because the defendant had been acquitted on a trial of a charge of such other crime. *People v. Follette*, 74 Cal. App. 178, 212, 240 P. 502.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 648

ISHAM et al. v. TRIMBLE.
Civ. 5216.

District Court of Appeal, Third District,
California.

March 29, 1935.

Rehearing Denied April 27, 1935.

1. Evidence ⇨594

Fact that defendant presented no evidence and was not called to witness stand by plaintiffs did not require trial court to accept plaintiff's theories nor show that there was no conflict in evidence.

2. Trial ⇨143

Substantial conflicts in evidence may arise when all evidence is produced by one party, and it is then jury's sole province to determine questions in issue.

3. Automobiles ⇨244(44)

Evidence in action for death of automobile driver in collision with another automobile held sufficient to warrant conclusion by trial court that decedent was negligent in failing to drop back behind truck, which he had started to pass from rear, after seeing defendant's automobile coming straight at him at high speed with driver apparently unaware of plaintiff's attempt to pass truck.

4. Automobiles ⇨245(81)

Evidence in action for death of automobile driver in collision with another automobile held insufficient to warrant conclusion as matter of law that decedent was justified in continuing in middle lane of highway after starting to pass truck ahead of him.

5. Automobiles ⇨245(81)

Statutory presumption that man takes ordinary care of his own concerns created, at most, conflict in evidence on question whether automobile driver, killed in collision with another automobile in middle lane of highway, saw latter automobile in left lane when he first started to pass truck ahead of him, and

court was not bound to resolve conflict in favor of such presumption (*Code Civ. Proc.* § 1963).

6. Automobiles ⇨204

Motorist must use due care at all times to avoid colliding with another and be ever alert and watchful so as not to place himself in danger.

7. Automobiles ⇨206

Motorist may assume that others will exercise due care, but cannot, for that reason, omit any care demanded of him by law.

8. Negligence ⇨67

One who is not negligent may rely on presumption that others will exercise due care, and his failure to anticipate danger, which can come only from another's violation of law or duty, is not negligence, but reliance on such presumption does not excuse one who is negligent.

9. Automobiles ⇨206

Motorist, turning into middle lane of highway to pass truck ahead of him when no automobiles were in left lane, was not entitled to rely on duty of automobilist approaching in middle lane to turn into left lane, unless he himself was free from negligence (*St.* 1931, p. 2125, § 123 (b)).

10. Appeal and error ⇨1011(1)

Appellate court cannot hold contrary to trial court's findings against appellants on conflicting evidence.

11. Automobiles ⇨244(59)

Evidence in action for death of motorist in collision with automobile driven by defendant held to warrant trial court's implied finding that defendant did not actually become aware of decedent's danger in time to avoid accident, and hence did not have last clear chance to avoid it, though he should have seen decedent's dangerous position.

12. Negligence ⇨83

Last clear chance doctrine applies only to defendant actually perceiving plaintiff's predicament and danger in time to avoid accident by exercise of due diligence, and defendant cannot be held liable on theory that he would have discovered plaintiff's peril but for his own remissness.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Lillian Isham and others against Joseph E. Trimble. Judgment for defendant, and plaintiffs appeal.

Affirmed.

A. B. Reynolds and J. Francis O'Shea, both of Sacramento, for appellants.

Gerald M. Desmond and Stanley W. Reckers, both of Sacramento, for respondent.

PAULSEN, Justice pro tem, delivered the opinion of the court.

This action was commenced by the heirs at law of Walden L. Isham, deceased, to recover damages for his death, which resulted from the collision of two automobiles. The case was tried by the court sitting without a jury. After finding that the negligence of the defendant was a proximate cause of the accident the court also found that Isham was guilty of contributory negligence and accordingly rendered judgment for the defendant. Plaintiffs have appealed from the judgment. Two points are presented: First, that the evidence is insufficient to support the finding of contributory negligence; and, second, that even if such finding was justified, the court should have found, as a matter of law, that the defendant had the last clear chance to avoid the collision.

The accident occurred on the Auburn boulevard shortly after two o'clock a. m., December 17, 1933. Some distance north of Sacramento, Auburn boulevard is intersected by the North Sacramento levee and proceeds thence northeasterly and in a straight line through and beyond the Western Pacific subway. The mid-point of the subway is 240 feet from the levee. Between these two points the highway is divided into three lanes and the lanes are marked with the usual white lines. Throughout the trial of the case the lane along the northwesterly edge of the highway was referred to as the "left-hand" lane and for convenience it will be so designated herein.

At the time of the accident, Isham was driving a Buick coupé from Sacramento toward North Sacramento. Occupying the single seat with him were three companions: William Frees, Marshall Brousliman, and Ruth Sheldrick. He had followed a truck for a considerable distance before reaching the levee. The truck was making twenty-five miles an hour and both were driving in the right-hand lane. Respondent was approaching from the opposite direction and was somewhere near the subway when Isham passed over the levee. While there is some dispute as to respondent's exact position in the lanes as he passed under the subway, it is undisputed that he was either wholly or partly within the middle lane as he drove from the subway to the point of collision and that he

was traveling between fifty and sixty miles an hour. There were no cars in the left-hand lane to prevent him from driving therein. Shortly after leaving the levée, Isham turned toward the middle lane to pass the truck and thereafter the left front wheel of his car collided violently with the left rear wheel of respondent's car.

[1, 2] At the trial no evidence whatever was presented by respondent and he was not called to the stand by appellants. But this did not require the trial court to accept appellant's theories; nor does it support their assertion that there was no conflict in the evidence. Substantial conflicts may, and often do, arise when all of the evidence is produced by one party and it is then the sole province of the jury to determine the questions in issue. *Frazee v. Fox Film Corporation*, 45 Cal. App. 661, 188 P. 286.

[3] No useful purpose will be served by discussing all of the evidence and it may be conceded that there is evidence from which the court might have found the facts to be as stated by appellants. But there is also other substantial evidence from which it could, and did, reach very different conclusions. Apparently it is appellants' contention that the Isham car came abreast of the truck before respondent turned into the middle lane and that Isham had no opportunity to avoid the accident. They appear to draw this conclusion from certain testimony that "we coasted along with the truck." The truck driver testified that the accident occurred at the left rear corner of his truck; that he never saw the Isham car at his left. Frees testified in part as follows:

"Q. Had you got alongside of the truck?
A. Yes. Not clear up with it.

"Q. You mean up with it or past it? A. We just got part way up with it.

"Q. Was the front of your car alongside of the truck? A. About half way past the truck."

There was other testimony bearing upon this point and the trial court heard each of the witnesses testify with reference to positions on the map. It may well have concluded that Isham saw respondent's car at the time he first started to turn out; that the front of his car was never far enough past the rear of the truck to prevent him from turning back into the right-hand lane; and that as respondent was apparently unaware of his attempt to pass the truck and was driving straight at him at a high rate of speed, it was the part of a reasonably prudent man to drop back behind the truck.

[4, 5] Nor is the evidence such that the court should have concluded, as a matter of law, that Isham was justified in continuing in the middle lane at all. While Frees stated that respondent's car was in the left-hand lane when he first saw it, both Brousliman and Miss Sheldrick testified that they saw it as soon as Isham started to turn out to pass and at that time it was in the middle lane. Brousliman testified: "If you want to know what happened, I looked up and saw a blaze of light and the thing was coming for us." It is true that he also stated that the collision did not occur instantly, and there were other statements to the effect that "we coasted along with the truck." However, there was a conflict as to the exact place of the accident, and when we consider the distances and speeds involved, it is at once apparent that the two cars would have traveled the distance between the subway and the levee in approximately two seconds and the time that elapsed after Isham saw respondent's car and started to slow down might have been much less. Appellants contend, however, that if Frees was able to see respondent's car at a position in the left-hand lane when Isham first started to turn out, then we must indulge the presumption created by section 1963 of the Code of Civil Procedure that a man takes ordinary care of his own concerns, and therefore that Isham must have seen the car at that point also. The trial court was not required to believe Frees' testimony on this point. Moreover, in the light of the other testimony in the case, this presumption could not, at most, do more than create a conflict in the evidence, and the court was not bound to resolve the conflict in favor of the presumption. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529.

[6-10] Appellants insist also that as the middle lane was for passing only and as no cars were in the left-hand lane, Isham had an absolute right to rely upon the assumption that respondent would obey the law and turn into the left-hand lane. "A vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Subdivision (b), § 123, California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2125). "A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of

him." *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, 194; *Barton v. Studebaker Corp. of America*, 46 Cal. App. 707, 189 P. 1025; *Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471. "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another. * * * But reliance upon this presumption does not excuse one who is himself negligent." *Carroll v. Central Counties Gas Co.*, 74 Cal. App. 303, 240 P. 53, 55; see, also, *Holahan v. McGrew*, 111 Cal. App. 443, 295 P. 1059. Isham was not entitled to rely upon the duty of respondent to obey the law unless he himself was free from negligence. It was his duty at all times to be alert and exercise reasonable precautions to avoid danger, to see that he could turn out in safety before he occupied the middle lane. Upon conflicting evidence, the court found against appellants on these issues and upon well-settled principles, which require no citation of authority, this court is not at liberty to hold otherwise.

[11, 12] The contention that the evidence shows, as a matter of law, that respondent had the last clear chance to avoid the accident is without merit. In the comparatively recent case of *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.(2d) 915, 917, the Supreme Court, speaking of the doctrine of last clear chance, said: "The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." We have shown above that there was substantial evidence to support the conclusion that Isham was never unaware of his danger or was never in a position from which it was physically impossible, with the exercise of ordinary care, to escape. Moreover, Isham's companions all testified that respondent drove straight toward them until almost the very instant of the impact.

Brousselman stated: "Just as he got to us he swung over, trying to get over to his side of the road. He must have spotted us then." And again: "Just as he got right on top of us, just as we were going to crash it seemed like he jack-knifed his wheel." These statements, considered with the other evidence discussed above, warranted the implied finding that respondent did not actually become aware of Isham's danger in time to avoid the accident. The fact that respondent should have seen Isham's position of danger, if such was the fact, would not be equivalent to actual knowledge of it. "It is a well-settled rule in this state that this doctrine is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence. A defendant cannot be held liable upon the theory that he would have discovered the peril of the other but for remissness on his part." *New York L. Oil Co. v. United Railroads*, 191 Cal. 96, 215 P. 72, 74, and cases there cited.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 507

**BREEZE v. SOUTHERN PETRO TANK
LINE CO. et al.**
Civ. 9614.

District Court of Appeal, Second District,
Division 2, California.
March 25, 1935.

1. Appeal and error ⇨933(4)

Order granting new trial not stating that new trial was granted on ground of insufficiency of evidence to support verdict will be presumed on appeal not to have been made on that ground (Code Civ. Proc. § 657).

2. Appeal and error ⇨933(4)

On appeal from order granting new trial not stating new trial was granted on ground of insufficiency of evidence to support verdict, court is precluded from considering sufficiency of evidence, unless insufficient in law and without material conflict (Code Civ. Proc. § 657).

3. New trial ⇨137

Notice of intention to move for new trial must designate grounds on which motion will be made and whether it will be made upon affidavits or minutes of court or both (Code Civ. Proc. § 659).

4. New trial ⇨137, 157

Requirement that notice of intention to move for new trial must designate whether motion will be made upon affidavits or minutes of the court or both is mandatory, and, on hearing of motion, moving party is confined to records specified in notice (Code Civ. Proc. § 659).

5. Appeal and error ⇨933(4)

Court will presume that order granting new trial was not based on grounds of irregularity in proceedings, accident or surprise, or newly discovered evidence, where affidavits specifying such grounds were not filed as required by statute (Code Civ. Proc. § 658).

6. Appeal and error ⇨977(3)

Order granting new trial will not be disturbed on appeal except on showing of clear and manifest abuse of discretion.

7. Appeal and error ⇨854(6)

Order granting new trial, general in its terms, will be affirmed if it could properly have been granted upon any of grounds upon which motion was predicated.

8. Appeal and error ⇨277

Erroneous instruction given to jury is error of law that is considered excepted to as matter of law.

9. New trial ⇨39

Instruction that duty of motorist on public highway was to keep "close" lookout held to require new trial, since word "close" enlarged degree of care required by law.

10. Automobiles ⇨246(23)

In automobile accident case, instruction using expression "or reasonably should have been able" in connection with "able to either stop or avoid a collision" as used in connection with statement of law of contributory negligence held erroneous, in that it left to conjecture what was meant thereby.

11. New trial ⇨39

New trial was properly granted in personal injury suit, where instruction erroneously limited damages to actual pecuniary loss suffered, although correct instruction was also given (Civ. Code, § 3333).

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Bertha Breeze against the Southern Petro Tank Line Company, Walter H. Cook, and Vincent J. Maxwell. Judgment for defendants, and, from an order granting plaintiff's motion for new trial, last two named defendants appeal.

Affirmed.

John J. Beck, of Los Angeles, for appellants.

Russell H. Pray, of Long Beach, for respondent.

WILLIS, Justice pro tem.

This is an appeal from an order granting a new trial after verdict and judgment in favor of defendants, appellants herein, in an action for damages for personal injuries resulting from a collision of automobiles. The motion was based on all the statutory grounds excepting that relating to excessive damages, and recited that it would be made upon the minutes of the court and the entire records and files. Notwithstanding no mention is made therein of intent to use affidavits in support of any ground stated, respondent presented and filed two affidavits relating to alleged misconduct of a juror, which affidavits were used on the hearing of the motion. The order granting the motion was as follows: "Plaintiff's motion for a new trial, heretofore submitted, is now by the court granted."

[1, 2] In the absence of a statement in the order that a new trial was granted upon the ground of the insufficiency of the evidence to justify the verdict, it must be presumed on this appeal that the order was not made upon that ground. Section 657, Code Civ. Proc. This precludes this court from a consideration of the sufficiency of the evidence to sustain the verdict, unless it is insufficient in law and without material conflict. *Phillips v. Powell*, 210 Cal. 39, 290 P. 441. Upon examination of the record before us, we cannot say that there is no real conflict on any material point, and that the evidence, therefore, as a matter of law, does not justify the verdict for defendants.

[3-5] The notice of intention to move for a new trial must designate the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court, or both. Section 659, Code Civ. Proc. This latter requirement is mandatory, and on the hearing of the motion the moving party must be confined to the records specified in his notice. *Schmitt v. White*, 172 Cal. 554, 158 P. 216. In view of our con-

clusions reached herein, we deem it unnecessary to consider whether the court considered the affidavits used on the motion in support of the ground of misconduct of the jury, or whether the order granting a new trial was based on that ground. And we must presume that the order was not based on the grounds either of irregularity in proceedings, accident, or surprise or newly discovered evidence, for the reason that section 658 of the Code of Civil Procedure requires that application for a new trial on either of the grounds above specified must be made upon affidavits, and no affidavits in support of either of these grounds were noticed or filed. By this process of elimination there is left for consideration but one ground upon which the order might be founded, viz., errors in law occurring at the trial, other than that of insufficiency of the evidence as a matter of law, above disposed of.

[6-8] It is a long-established rule that an order granting a new trial will not be disturbed on appeal except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to granting the same, and that, where the order granting the motion is general in its terms, it will be affirmed if it could properly have been granted upon any of the grounds upon which the motion was predicated. *Scott v. Times-Mirror Co.*, 178 Cal. 688, 174 P. 312. It is also a settled rule in California that an erroneous instruction given by the court to the jury is an error of law that is considered excepted to as a matter of law. In determining the question whether there was error in giving an instruction, it frequently requires an examination of the evidence in the case, for the reason that an instruction should not be considered as merely an abstract statement of a principle of law, but it must relate to, and be measured by, the circumstances of the case in which it is given. *Pitt v. Southern Pacific Co.*, 121 Cal. App. 228, 9 P.(2d) 273. Having in mind these rules, we have examined the evidence as produced here by bill of exceptions, together with certain instructions which we believe were erroneously given to the jury and for which errors the trial court could properly grant the motion for a new trial.

[9] Instruction No. 7, given at defendants' request, was as follows: "It is the duty of a driver of an automobile while operating her car upon a public highway to keep a close lookout, and she should use such reasonable precautions as the circumstances require, and it is negligence on her part not to do so."

By the use of the word "close" in connection with "lookout," the court went beyond the requirements of the law. Instructions stating that a "proper lookout" shall be kept by the driver of an automobile have been repeatedly given and approved on appeal, solely on the ground that to keep a proper lookout means only the exercise of that degree of care which a prudent man should use under like circumstances and which is the degree of care which the law imposes. *Ballos v. Natural*, 93 Cal. App. 601, 269 P. 972; *Godfrey v. Brown*, 220 Cal. 57, 29 P.(2d) 165, 93 A. L. R. 1092. By the use of the word "close," the court enlarged the degree of care required by law, and the trial court in the exercise of its discretion may well have deemed the error prejudicial.

[10] Instruction No. 12, given at defendants' request, in its use of the expression "or reasonably should have been able" in connection with "able to either stop or avoid a collision," is subject to the objection that it leaves to conjecture and surmise what is meant thereby, and as used in connection with the statement of the law of contributory negligence is erroneous.

[11] Instruction No. 17, given at the request of defendants, erroneously states the rule as to measure of damages in personal injury cases. Section 3333 of the Civil Code fixes the measure as "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." By this instruction No. 17, the court charged the jury "that damages can only be given for the actual pecuniary injury or loss suffered by the parties complaining," etc. Upon search it appears that this instruction was copied from one given and reviewed in the case of *Burk v. Arcata & Mad River R. Co.*, 125 Cal. 364, 57 P. 1065, 73 Am. St. Rep. 52, which was an action brought by heirs for the death of a brother under section 377 of the Code of Civil Procedure wherein it is provided that such damages shall be given as, under all the circumstances of the case, may be just, and which damage has been held to be limited to pecuniary loss suffered by the person, for whose benefit the right of action is given, from the death of the victim. *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The trial court may well have believed that in giving this instruction, notwithstanding it also gave another correctly stating the rule for damages, the jury may have been so misled

thereby that it founded its verdict on the proposition that there was no proof that plaintiff had suffered any pecuniary loss, ignoring the element of pain and suffering or other detriment not embraced by the definition of "pecuniary damage or loss."

The order granting a new trial is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



NORTON et al. v. CITY OF POMONA et al.*
Civ. 9599.

District Court of Appeal, Second District,
Division 2, California.

March 29, 1935.

Rehearing Granted April 25, 1935.

Opinion Adhered to May 29, 1935.

Rehearing Denied June 20, 1935.

1. Electricity ⇨16(1)

Maintenance of light pole along property side of curb line and flush with curb, as authorized by statute, was not a "nuisance," rendering electric company liable to motorist colliding with pole (*Gen. Laws 1931, Act 2720; Civ. Code, § 3482*).

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

2. Electricity ⇨19(5)

Evidence held to support finding that maintenance of electric pole on property side of curb and flush with curb was negligence causing collision resulting in injuries to motorists, and that motorists were not contributorily negligent.

3. Appeal and error ⇨1010(1)

Trial court's findings supported by evidence are conclusive and cannot be substituted by reviewing court's deductions.

4. Abatement and revival ⇨58(1/2)

Cause of action founded on tort to person does not survive death of either person to or by whom wrong is done.

5. Judgment ⇨273(1)

Power to enter judgments *nunc pro tunc* is inherent in courts.

6. Judgment ⇨273(2)

When state of record or minutes show that suitor was entitled to particular judgment which was not entered when it might have been, judgment may subsequently be entered so as to relate back to time when it

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 952.

should have been entered, providing delay was not occasioned by applicant, and such order should be granted or refused as justice may require in particular case.

7. Judgment Ⓒ326

Court has authority to order findings of fact and conclusions of law, required to be filed in decision of case tried without jury, to be filed nunc pro tunc (Code Civ. Proc. §§ 632, 633).

8. Judgment Ⓒ273(5)

Statute providing for entry of judgment after party's death on verdict or decision before death does not dispense with rule authorizing court to direct that its decision, so far as necessary to protect parties' rights, shall be entered nunc pro tunc as of day anterior to party's death (Code Civ. Proc. § 669).

9. Judgment Ⓒ273(5)

Court held authorized after plaintiff's death to file findings and enter judgment in action for injuries tried without jury nunc pro tunc as of date of order for judgment to prevent abatement of action (Code Civ. Proc. §§ 632, 633, 669).

10. Municipal corporations Ⓒ812(2)

Failure to file verified claim for damages with legislative body of city before filing suit for injuries resulting from dangerous condition of street held to preclude recovery against city (Gen. Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1).

11. Municipal corporations Ⓒ812(4)

Failure to file verified claim for damages with legislative body of city within ninety days as required by statute held to bar recovery against city for injuries, notwithstanding accident happened eight and one-half months before effective date of statute, where there were three and one-half months remaining before cause of action would be barred by limitations (Gen. Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1; Code Civ. Proc. § 340).

12. Constitutional law Ⓒ169, 191

Municipal corporations Ⓒ812(4)

Enforcement of act requiring person suing city for injuries first to file verified claim for damages with legislative body of city would not make act retroactive and invalid as to plaintiffs whose cause of action arose before effective date of act, since remedial changes may be made applicable to pending actions or to causes of action not yet sued on, provided that vested rights are not destroyed or obligations of contracts impaired (Gen. Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1).

Action by Alma A. Norton and Ed. Norton against the City of Pomona and the Southern California Edison Company, Limited, wherein Alma A. Norton, executrix of the estate of Edwin S. Norton, sometimes known as Ed. Norton, deceased, was substituted as plaintiff. From a judgment for plaintiffs, last-named defendant appeals, and from a judgment for first-named defendant, plaintiffs appeal.

Affirmed.

Kelley & Hews and Joseph Seymour, all of Riverside, for appellants-respondents Norton.

Chas. R. Stead, of Pomona, for respondent City of Pomona.

Roy V. Reppy, B. F. Woodard, and E. W. Cunningham, all of Los Angeles, for appellant Edison Co.

WILLIS, Justice pro tem.

There are two appeals herein. One is by defendant Southern California Edison Company, Limited (hereinafter referred to as "Edison Company") from a judgment for damages in favor of plaintiffs, Alma A. Norton and Ed Norton, wife and husband, for injuries to person and property resulting from a collision of their automobile with an electric power and light pole erected and maintained by the Edison Company in the parkway near the corner of a street in the city of Pomona. The other is by plaintiffs from a judgment in favor of defendant City of Pomona, a municipal corporation.

Plaintiffs commenced the action on December 31, 1931, and by their second amended complaint sought to charge defendant city of Pomona with maintaining a public street in a dangerous or defective condition, and charged both defendants with negligence in maintaining an electric power and light pole at a place on said dangerous and defective portion of said street in a dangerous and unguarded position thereon, as a result of which plaintiffs, without knowledge on their part of such dangerous condition, drove their automobile into and collided with said pole, causing the damage complained of. After trial before the court without a jury, the cause was, on April 14, 1933, ordered submitted on filing of briefs. On June 2, 1933, the court made its minute order for judgment in favor of plaintiffs and against defendant Edison Company for \$6,065 damages, and in favor of defendant city of Pomona. The record fails to show that findings were waived. On June 23, 1933, plaintiff Ed Norton died by his own hand, and on July 24, 1933, letters testamentary were issued to

Appeals from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Alma A. Norton as executrix of his estate. On August 22, 1933, plaintiff Alma A. Norton, individually and as executrix of the estate of Ed Norton, moved the court for an order to file findings and judgment in the case nunc pro tunc as of the date of June 2, 1933. On November 1, 1933, the court granted the same and on the same date signed and filed its findings and conclusions and the judgment herein appealed from, which judgment was entered by the clerk on November 6, 1933, nunc pro tunc as of June 2, 1933, pursuant to the order of court so to do, incorporated in the judgment. On November 10, 1933, Alma A. Norton, as executrix, was substituted in the place and stead of Ed Norton as plaintiff, the defendants reserving all objections to entry of the findings and judgment nunc pro tunc as of June 2, 1933. On November 14, 1933, Alma A. Norton and Alma A. Norton as executrix filed notice of appeal from the judgment in favor of city of Pomona only, and on November 15, 1933, defendant Edison Company filed its notice of appeal from the judgment against it.

Appeal of Edison Company.

On this appeal it is urged (1) that the fact established by the undisputed proof that the pole was in a parkway of a public street and there maintained under governmental authorization, was a complete defense as a matter of law, inasmuch as it showed that the maintenance of such pole did not constitute a nuisance; (2) that the company was not guilty of any negligence in the maintenance of said pole; (3) that plaintiffs were guilty of contributory negligence as a matter of law; and (4) that the action abated upon the death of the husband, Ed Norton, and that it was error to order judgment in favor of plaintiffs nunc pro tunc as of a date prior to his death, and particularly in favor of said deceased plaintiff.

To comprehend the nature and significance of the problems presented on both appeals herein it is necessary to reproduce the scene and circumstances of the accident in some detail. At the time of the accident, Fifth street in the city of Pomona ran east and west, and in its course intersected San Antonio avenue at right angle, both being public streets of said city. West of the intersection Fifth street was 100 feet wide between property lines and 68 feet wide between curb lines, and was paved and used from curb to curb. East of the intersection Fifth street was 70 feet wide between property lines and 46 feet wide between curb lines, the reduction in width being approximately 11 feet on each

side, the portion between curb lines being paved and generally used for vehicular travel. On the southeast corner of this intersection there was a curb erected, forming a rounded corner and thence proceeding along the respective streets, the street pavement on the one side and the ground level on the other side being even with the top of the curb. The 12 foot space between property line and curb line at this corner, on the south side of Fifth street, consisted of earth filled to the curb level, with no sidewalk constructed thereon.

At a point on the property side of the curb on the south side of Fifth street, and flush with the curb, there stood in a vertical position an ordinary electric light and power pole, about 12 inches in diameter near its base, its west surface being about 16 feet from the easterly curb line of San Antonio avenue, being unpainted and of a neutral color, with no lights or warning signs thereon. The pole in question had been erected and was maintained by the Edison Company under constitutional franchise and under an ordinance of the city of Pomona adopted under authority of the Broughton Act (Act. No. 2720, Deering's Gen. Laws, p. 1244), by the terms of which the company was given the right to select the place of location of its poles along the property side of curb lines and flush with said curb. At least two previous collisions of automobiles with this pole were shown by the evidence as tending to show the dangerous character of such pole. *Gorman v. County of Sacramento*, 92 Cal. App. 656, 664, 268 P. 1083. The space between the curbs and property lines at this corner had in the past been used by the public in turning that corner, and the surface of such space up to the pole was clear and level with the curb and street pavement and in wet weather and darkness would present the appearance of a used highway.

About 8 o'clock on the night of January 1, 1931, plaintiffs drove their automobile eastward along the south side of Fifth street, about 8 feet from the curb at a speed of 10 or 12 miles per hour as it entered the intersection at San Antonio avenue, plaintiff Ed Norton driving. It was raining and very dark, and the windshield of the automobile was obscured by moisture, a wiper working on the driver's side over a portion thereof. The headlights of the automobile were lighted, but there were no lights on or near the pole nor at this intersection, except at a filling station at the southwest corner, and a small light on a gooseneck attached to the pole on the westerly side of the intersection. As the automobile entered the intersection,

plaintiffs were unaware of the narrowing of the street and a course was maintained in a straight line eastward, the wheels running over the level curb line on the easterly side onto the dirt space at the corner and directly against the pole above described. Both plaintiffs at the same instant saw the pole for the first time when some 10 or 12 feet from it, when the driver put on the brakes but could not stop the car in time to avoid collision.

On these facts above stated and substantially found by the trial court, it was also found "that the erection, maintenance and permission of said pole at said time and place was negligently done and permitted by the defendant, Southern California Edison Company"; "that said pole, so negligently placed and maintained, constituted a hazard to the travelling public and to plaintiffs herein"; and that "the negligent location and condition of said pole caused the automobile driven by the plaintiff, Ed Norton, in which the plaintiff Alma A. Norton was riding, to run into and collide with the said pole." The court further found that there was no contributory negligence on the part of plaintiffs, and that they had not filed any claim for damages with the legislative body of the city of Pomona, as required by the act relating to liability and damages of municipalities, etc., approved June 19, 1931, and in effect August 14, 1931. From these facts, the court concluded that plaintiffs were not entitled to recover from the city of Pomona, but were entitled to judgment against the Edison Company for \$6,065.

[1] That the maintenance of the pole in the place and under the circumstances shown herein cannot be deemed a nuisance is settled by section 3482 of the Civil Code and decisions of our appellate courts, for nothing which is done or maintained under the express authority of law can be deemed a nuisance. *Carson v. Central R. Co.*, 35 Cal. 325; *Barry v. Terkildsen*, 72 Cal. 254, 13 P. 657, 1 Am. St. Rep. 55; *Barrett v. Southern Pac. Co.*, 207 Cal. 154, 277 P. 481. But while the erection and maintenance of the pole herein appear to have been authorized by ordinance, there still exists a liability on the part of the Edison Company for any consequential injuries arising from its negligence in exercising its right and power granted to erect and maintain poles within the city of Pomona. *Carson v. Central R. Co.*, *supra*; *Barrett v. Southern Pac. Co.*, *supra*.

[2, 3] Herein plaintiffs sued upon the theory of negligence—not that of nuisance—and contend that the city of Pomona negligently

permitted a dangerous and hazardous condition of a public street to exist, and that the Edison Company negligently maintained a pole in such dangerous place, the two acts concurrently operating to proximately cause the injuries to plaintiffs. In this case it became a question of fact for the court to determine whether under the circumstances shown the maintenance of the pole and the street, separately or together, constituted negligence on the part of either or both defendants (*Barrett v. Southern Pac. Co.*, *supra*), and whether such negligence, if any, proximately caused the injuries to plaintiffs, without contributory negligence on their part. The evidence establishing the facts and circumstances herein is such that reasonable minds might draw different and opposite inferences both as to negligence and contributory negligence. The court found that the defendant Edison Company negligently erected and maintained the pole in the place shown; that such placing and maintaining constituted a hazard to the traveling public and caused the happening of the collision; and that there was no negligence on the part of plaintiffs contributing thereto. There was ample evidence to support the conclusions deduced therefrom by the court, and under the well-known rule these findings are binding and conclusive on this appeal and cannot be substituted by any of our own deductions.

This disposes of the first three points presented by the Edison Company, and leaves for determination the question of the propriety and validity of the act of the court in filing its decision and judgment after death of plaintiff Ed Norton, nunc pro tunc as of the date of making its order for judgment on June 2, 1933.

[4] A cause of action founded on tort to the person, such as the instant action for personal injuries, does not survive the death of either the person to or by whom the wrong is done. This is the common-law rule adopted by this state, and there is no statute changing the rule as affected by the situation herein. *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142; *Munchiando v. Bach*, 203 Cal. 457, 264 P. 762. Hence the cause of action in favor of plaintiff Ed Norton abated upon his death on June 23, 1933, unless such abatement was avoided by the action of the trial court in filing its findings and entering its judgment nunc pro tunc as of June 2, 1933, a date prior to his death.

[5-8] The power to enter judgments nunc pro tunc is inherent in the courts. Where the party is not at fault, the determinative

consideration moving the court is whether or not the action at the death of the party was ready for rendition of final judgment. When the state of the record or the minutes kept by the court or clerk show that a suitor was entitled to a particular judgment but that the judgment was not entered when it might have been, such judgment may subsequently be entered so as to relate back to the time when it should have been entered, providing the delay was not occasioned by the party applying. Such an order should be granted or refused as justice may require in view of the circumstances of a particular case. *Estate of Pillsbury*, 175 Cal. 454, 166 P. 11, 3 A. L. R. 1396. Notwithstanding sections 632 and 633 of the Code of Civil Procedure make it essential to a decision of a case tried without a jury and in which findings are not waived, that findings of fact and conclusions of law must be made and filed, the court has the same authority to order such findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. The decision which the parties have invoked the court to make is not necessarily the statutory and technical "decision" referred to in section 633, but it is the final determination of the rights of the parties and includes every step or act of the court which is requisite to a final judgment upon their rights. These rights are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve them. Nor does section 669 of the Code of Civil Procedure, which provides for entry of judgment after death of a party on a verdict or decision before death, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties shall be entered nunc pro tunc as of a day anterior to the death of a party. *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 P. 328; *Leavitt v. Gibson* (Cal. App.) 28 P. (2d) 41.

[9] In view of the facts as revealed by the record herein, measured by the rules above stated and which were applied to a similar set of facts in the cases cited, we conclude that the trial court was fully justified in making and carrying out its nunc pro tunc order. This conclusion renders it unnecessary to consider the question of the effect of abatement as to one spouse by death upon the rights of the other in respect to commu-

nity property represented by the cause of action.

Appeal by Plaintiffs.

On this appeal it is urged (1) that the evidence showed that defendant city of Pomona was guilty of negligence proximately contributing to cause the accident and injuries to plaintiffs by reason of the condition in which it maintained the street at the place of the accident, and (2) that failure to file a verified claim for damages with the legislative body of the city before filing suit does not preclude plaintiffs from a recovery. We will first determine the second point, as it logically comes first in order of consideration.

[10] In 1931 the Legislature enacted, and on August 14, 1931, there became effective, an act which, in its principal parts, provided that "whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with [such officer and] the clerk or secretary of the legislative body of the municipality * * * within ninety days after such accident has occurred." Act No. 5149, § 1, Deering's Gen. Laws. On the same day another act duplicating the language above quoted, but with the words "and/or the negligence or carelessness of any public officer" inserted after the words "works or property," went into effect. Act No. 5150, § 1, Deering's Gen. Laws. Act No. 5149 also contains a provision (section 4) authorizing the municipality to compromise and pay any such claims. Act No. 5150 omits this provision. Nowhere in either act is there any provision requiring the filing of such claim as a condition precedent to commencing or maintaining action for the damages referred to. Nor does the charter of the city of Pomona contain any provision requiring the filing of such or any claims as a condition to maintenance of action thereon. Stats. 1911, p. 1913.

To hold that it is not essential to file a claim in accordance with this statute before bringing suit would have the effect of rendering the statute nugatory, a meaningless and purposeless legislative gesture, permitting a claimant to file a claim only if he chose to do so. This conclusion finds convincing support in the decision of *Bancroft v. City of San Diego*, 120 Cal. 432, 52 P. 712, 714, wherein the charter of the city in question provided that "all claims for damages against the city must be presented to the common

council and filed with the clerk within six months after the occurrence from which the damages arose." In deciding the case the court said: "But it is argued the charter does not say that no action shall be brought unless the claim is so presented, nor is there a limitation as to the right to sue. To hold that the city may be sued upon such demand after the expiration of six months, and without having presented the same, would be to hold that, notwithstanding the charter, such demand need not be presented. I can imagine no motive for the requirement unless a failure to so present the demand is fatal. If the law had read, 'Claims must be presented within six months, but a failure to so present them shall not affect their validity,' we should have been at a loss to understand the purpose of the law. It would have been a self-professed absurdity. I think the implication that a failure to present a claim is fatal to it is as plain as would have been an express declaration to that effect." This decision was expressly approved in the later case of *Western Salt Co. v. City of San Diego*, 181 Cal. 696, 186 P. 345, wherein it was held that a general demurrer was properly sustained to a complaint against the city of San Diego for damages suffered by reason of the collapse of the "lower Otay dam," which contained no allegation of prior presentation of a claim for damages.

[11, 12] In the case of *Crescent Wharf, etc., Co. v. City of Los Angeles*, 207 Cal. 430, 278 P. 1028, 1030, in reviewing and approving the two cases above cited, the court quoted with approval the following portion of the latter decision: "The reason for this type of legislation, requiring claims to be first presented to the legislative body of a city or county before suit is brought is thus stated in an early case in this state: 'We think the intention of the legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit.' * * * This reason applies with like force to all claims against a city, however originating." In view of the foregoing statement of the law, we must assume that in its enactment of the act of 1931 the Legislature took notice of the law as thus interpreted and announced, and deemed it unnecessary to express in terms that which the law would imply. The inclusion of the clause authorizing a compromise of such claims supports this assumption.

tion. It would therefore appear that the failure to file their claim before bringing suit would bar plaintiffs from recovering against the city of Pomona. But plaintiffs contend that inasmuch as the accident happened some eight and one-half months before the effective date of this act, they could not comply therewith in respect to the requirement of filing their claim within ninety days after the accident occurred. This is true, but they still had, on August 14, 1931, three and one-half months remaining before their cause of action would become barred by the statute of limitation applicable to it. Section 340, Code Civ. Proc. They did not in fact commence their action thereon until December 31, 1931. During the intervening period, they had ample opportunity to comply with the statute by filing their claim. No advantage could rightfully be claimed or gained by the city by reason of the fact that the claim was not filed within ninety days after the occurrence of the accident, because in this case that requirement of the new law could not attach. Nor were any rights of the plaintiffs impaired by this action of the Legislature; nor can it be said that to enforce the provisions of the act would result in making it retroactive, for the act is remedial in nature and the Legislature has power to change rules of procedure or remedies, and such changes may be made applicable to pending actions or to causes of action not yet sued upon, provided that vested rights are not destroyed or obligations of contracts impaired. *Thompson v. County of Los Angeles*, 140 Cal. App. 73, 35 P.(2d) 185. In the case just cited this court held that failure to file a claim for damages resulting from an accident arising from a defective condition of a highway, which occurred two weeks before this act under consideration went into effect, was fatal to the action brought thereon.

For the foregoing reason and upon the authorities cited, we are constrained to hold that the failure of plaintiffs to file their claim prior to commencing their action herein bars them from recovery from the city of Pomona. These conclusions render it unnecessary to consider the question of liability of the city under the evidence.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ORAIL, J.

On Rehearing.

After exhaustive reconsideration upon rehearing we adhere to our original opinion.

WADE et al. v. THORSEN et al.

Civ. 9122.

District Court of Appeal, First District,
Division 2, California.

April 2, 1935.

Hearing Denied by Supreme Court
May 29, 1935.

1. Waters and water courses ¶172

Liability of person who installs, maintains, or operates structures to protect his property against flood waters depends on whether his acts were reasonable under circumstances.

2. Waters and water courses ¶179(4)

In action for diverting flood waters onto plaintiffs' land, finding that defendants negligently diverted waters of creek and that they negligently piled sacks of sand along road for purpose of diverting waters upon their lands, for irrigation purposes, could not be sustained in absence of evidence that defendants acted negligently, since they were entitled to irrigate or to release flood waters to protect levees so long as act was not negligently done.

3. Appeal and error ¶1001(1), 1010(1)

Reviewing court will set aside finding or verdict, based on evidence inherently improbable or physically impossible.

4. Appeal and error ¶1011(1)

Finding that defendants diverted flood waters for purpose of irrigating their lands and that flood waters would not have damaged adjoining landowners' crop had not defendants diverted waters, based on conflicting evidence, will not be disturbed.

5. Trial ¶375

Knowledge gained by court from view of premises is independent evidence to be considered in determining issues.

6. Waters and water courses ¶172

Defendants who opened flood gates on another person's property for purpose of irrigating their own property held liable for damages to plaintiffs' crop caused by overflow of waters, as against contention that defendants had opened flood gates for purpose of protecting levees, where trial court found that such was not purpose of act.

7. Damages ¶163(4)

Where damage results from independent cause as well as from action of defendants, plaintiffs must show what portion of damage is attributable to defendants' acts, since defendants cannot be held liable for total damage.

8. Waters and water courses ¶178(2)

Defendants who opened flood gates for purpose of irrigating their lands held liable

for total damages caused by overflow to plaintiffs' crop where finding failed to sustain contention that waters released by defendants were only part of those which flooded plaintiffs' lands.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Ben Wade and others against William R. Thorsen and others. From a judgment in favor of plaintiffs, defendants appeal.

Reversed in part, and affirmed in part.

For prior opinion, see 34 P.(2d) 1036.

Herbert C. Jones and Lloyd A. Mason, both of San Jose, for appellants.

Rea & Caldwell, of San Jose, for respondents.

STURTEVANT, Justice.

In the winter season of 1931-1932 plaintiffs were growing a crop of cauliflower on property of plaintiff W. W. Henley, being a part of the lowlands of Santa Clara Valley in an area between the towns of Alviso and Milpitas, and only a short distance from the southern margin of San Francisco Bay. These lands were from seven to nine feet above sea level. The crop was located on land on both sides of Zanker road and west of the Coyote river. Zanker road runs north from the road known as the Alviso-Milpitas road. Defendant Charles Boots owns a farm lying just north of and adjoining the Alviso-Milpitas road, extending from Coyote river on the east to what would be the prolongation southerly of Zanker road, if the same extended south of the Alviso-Milpitas road. Defendant William R. Thorsen owns an orchard adjoining and immediately north of the Alviso-Milpitas road and adjoining and immediately west of Zanker road. The other defendant, Eric Thorsen, is the son of William R. Thorsen and acts as manager of the elder Thorsen in the care of his orchard. Between the Thorsen property and that portion of plaintiffs' crop grown on the west side of Zanker road are two farms, that of B. W. Curtner, adjoining Thorsen, and that of Florence Zanker, immediately north of Curtner, and adjoining plaintiffs' crop. The portion of plaintiffs' crop east of Zanker road lay between the road and Smith slough. Between the Thorsen property and the Coyote river are three farms. The Coyote river is the largest stream flowing into Santa Clara valley and is subject to tor-

rential floods. It drains an area of more than two hundred square miles and empties into San Francisco Bay. During the rainy season floods occur and become most aggravated when a second heavy rainfall follows close after a first rainfall which has already saturated the earth where it cannot absorb and hold further precipitation. Such conditions occurred in December, 1931. Through the ages the floods which came down the Coyote river overflowed the banks of the stream depositing silt on either side. This deposit has gradually raised the bed of the river so that the river "rides" above the surrounding country, similar in this respect to the bed of the Colorado river in Imperial Valley and the Sacramento river in Colusa, Yolo, and Sutter basins. To guard against the floods of the Coyote, the defendant Boots, and his father before him, year by year heightened and strengthened the levee along the west bank of the Coyote. The father of defendant Boots first constructed a levee about the year 1860, since which time it has gradually been strengthened year after year. As early as 1906 he put in concrete retaining walls constructing therein three concrete spillways, which spillways in going upstream are designated for the purpose of this action as overflow gate No. 1, gate culvert or tunnel, and overflow gate No. 2. Overflow gates 1 and 2 are in the form of weirs or notches cut in the top of the bank, protected on the outside by concrete foundations and concrete aprons. They are regulated by removable flashboards. The culvert located between the two overflow gates is in the form of a tunnel about six by six feet in dimensions, lined with concrete and piercing the bank. It is controlled by a gate which lets down from the top.

[1] It is the settled law in this state that the liability of one who installs, maintains, or operates structures to protect his property against flood waters depends on whether the acts of the owner of such structures were reasonable under the circumstances. *Jones v. California Development Co.*, 173 Cal. 565, 576, 160 P. 823, L. R. A. 1917C, 1021. But the pleadings did not put in issue and the court made no finding on said subject-matter. However, the plaintiffs' amended complaint contained an allegation that the defendants negligently piled sacks of sand for the purpose of diverting said waters upon their said lands. But it was not alleged that said sacks of sand were placed in the Coyote river.

The action was tried by counsel on two wholly conflicting theories. The defendants

contended that waters were discharged through the Barber break, overflow gate No. 1, gate culvert, and overflow gate No. 2, over-spread the territory, intermixed, and all more or less flowed over the lands of the plaintiffs. They also contended that the waters from overflow gate No. 1, gate culvert, and overflow gate No. 2, were released solely for the purpose of preserving the levees of the defendant Boots from being broken. They further contended that if the boards had not been removed the flood waters were so high they would have flowed, and did flow, at an elevation above the tops of the boards before the boards had been removed. On the other hand, the theory of the plaintiffs was that the action of defendants on the evening of December 27, 1931, was taken for the purpose of irrigating the lands of defendants; that no waters except those from the gates and culverts caused the damage; that the defendant Thorsen by digging ditches, by making and installing dikes of sacks filled with sand, and by making and placing dams of boards, led and diverted the waters from two overflow gates and the gate culvert, and caused such waters to flow westerly to the lands of Thorsen and then negligently allowed said waters, in large quantities, to flow and discharge upon the lands and plants of the plaintiffs to their damage, etc. There was evidence introduced from which the trial court could have adopted either theory. It adopted the theory of the plaintiffs and made findings in their favor.

[2] Although the plaintiffs joined as defendants William R. Thorsen, the owner of one tract of land, Eric Thorsen, his manager, and Charles Boots, the owner of another tract of land, in one action, the proof introduced does not show all defendants acted jointly. On Saturday, December 26, 1931, the Coyote river was running large quantities of water. The defendant Boots opened overflow gate No. 2. He also opened the gate culvert about halfway for the purpose of irrigating his land. None of that water flowed over the land of the defendant Thorsen nor on to the land of the plaintiffs. The next day the Coyote river was at flood tide. It was overflowing on the easterly side but such waters did not overflow the lands on the westerly side of the river. On the evening of that day the defendant Thorsen asked permission to release overflow gate No. 1. He was given permission to remove one board. There is evidence he removed all of the boards. At that time there was a break further down stream and water was flowing westerly at

least to Smith slough. Even after overflow gate No. 1 was opened the waters did not in large quantities flow to the Thorsen property. To cause them to flow there in a quantity sufficient to irrigate his property the defendant Thorsen and his agents placed the dams and dikes and thus diverted the waters which flowed over the land of the plaintiffs. But there is no evidence that the defendant Boots participated in installing any part or portion of said dams and dikes nor that he negligently caused or allowed water to flow through or over his said outlets. It follows that finding No. III, "That on said 27th day of December, A. D. 1931, said defendants, for the purpose of irrigating their said lands, negligently and carelessly diverted the waters of the Coyote creek upon their lands; that they negligently piled sacks of sand along said San Jose-Alviso Road for the purpose of diverting waters upon their said lands * * *," is too broad. Whether the Coyote was at flood tide or at ordinary tide, whether the defendant Boots took the water out of the Coyote or out of a well, he was entitled to irrigate. If the Coyote was at flood tide and about to destroy his restraining levees he was entitled to protect his levees. But he was not entitled to act so negligently as to injure another. There is no evidence that he did any negligent act. It follows that as to him the judgment must be reversed.

We pass now to the case as presented by the defendants William R. Thorsen and Eric Thorsen and in using the expression "defendants" it will be understood that we are speaking of the case as presented by those defendants. They contend that the trial court erred in finding III that defendants diverted flood waters on December 27, 1931, for the purpose of irrigating their lands and that said finding is not supported by the evidence and is against the law. A like contention is made that the court erred in finding No. X, that only an inconsiderable amount of water would have flowed over any of the spillways on the Boots property and that the flood waters of the Coyote would not have damaged the plaintiffs' crop had not the defendants diverted water by removing boards from flood gates on the Boots property. In so far as the attack on finding No. X is concerned, defendants admit there is a conflict in the evidence, but argue that the evidence supporting the finding of the trial court is "contrary to immutable physical laws," and they support this contention by referring to certain maps introduced in evidence and the testimony of a surveyor called by defendants

showing that water from portions of the Coyote, other than from gate No. 2, actually overflowed and that such waters must have overflowed the land of the plaintiffs because of the contour of the land.

[3-5] Without doubt innumerable cases support the proposition of law that a reviewing court will set aside the finding of the trial court, or the verdict of a jury, when such finding or verdict is based either upon evidence inherently improbable or when there is physical impossibility of the evidence being true. *Austin v. Newton*, 46 Cal. App. 493, 189 P. 471; *Neilson v. Houle*, 200 Cal. 726, 254 P. 891. The record in this case does not present facts calling for the application of that rule. It shows a substantial conflict in the evidence not only as to finding No. X but as to finding No. III, and, this being true, the reviewing court will not disturb the finding of the trial court. In this connection it must also be borne in mind that upon stipulation of counsel the trial judge viewed the premises and it is well settled that "the knowledge gained by the court from a view of the premises is independent evidence to be taken into consideration by the court in determining the issues of the case." *Hatton v. Gregg*, 4 Cal. App. 537, 88 P. 592, 594; *Vaughan v. County of Tulare*, 56 Cal. App. 261, 205 P. 21. From all the evidence in the case we believe the trial court was justified in its findings in the particulars mentioned.

[6] Defendants further contend they had a legal right to divert the flood waters in order to lessen the strain on the Boots levees; that their action was reasonable, and even assuming, only for the purpose of argument, that the crops of plaintiffs were damaged by their acts, such damage is *damnum absque injuria*. They cite many cases. None is helpful on the real question before us. In the case at bar the damages claimed arose not from building the levees, from maintaining them, nor from opening the gates; but, after they had been opened, the manner in which the water was diverted and discharged on plaintiffs' land. In other words, the evidence shows that at the time in question, namely, December 27, 1931, defendants deliberately opened overflow gate No. 2 so as to irrigate the land of defendant Thorsen and then negligently failed to control such waters but allowed them to go beyond the Thorsen land and overflow the cauliflower crop of plaintiffs. From all the testimony in the case it is reasonable to assume that the trial court did not form the opinion that defendants loosened the waters over the spillway of gate No. 2 in an ef-

fort either to protect the Boots property or to deal with the flood waters as a common enemy, but that the water was deliberately caused to flow over the spillway to help defendant Thorsen irrigate his land, and that the attempted defense of dealing with the water as a common enemy was not in the minds of the defendants at the time of opening gate No. 2.

Defendants contend that, as defendant Boots built the levees, he could legally authorize these defendants to take out water in order to protect the levees. But the trial court has found such was not the purpose of the acts of the defendants.

[7, 8] The last point raised is that when the evidence shows damage results from an independent cause as well as from the action of defendants, plaintiffs must show what portion of damage is attributable to the acts of defendants and that it is error under such circumstances to hold the defendants liable for all of the damage. We agree with the principle of law stated. *Learned v. Castle*, 78 Cal. 454, 18 P. 272, 21 P. 11. However, as we have shown above, the trial court found that no independent cause was involved.

As to the defendant Charles Boots, the judgment is reversed. As to the other defendants, the judgment is affirmed. The defendant Boots will recover his costs on appeal. As against the other defendants the plaintiffs will recover their costs.

We concur: NOURSE, P. J.; SPENCE, J.



5 Cal.App.2d 154

HINE v. LEPPARD et al.

Civ. 8937.

District Court of Appeal, Second District,
Division 1, California.

April 1, 1935.

Automobiles 245(69)

In automobile accident case, court was not required, as condition precedent to defendant's liability, to determine whether plaintiff was operating automobile with defective headlights or that he so operated them that they failed to comply with statute, where lights were not shown to have been

other than law required, and were not, as to any element of construction, in defective condition (St. 1927, p. 1433, § 101, par. 7).

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 42 P.(2d) 339.

W. I. Gilbert, of Los Angeles, for appellants.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

PER CURIAM.

On petition for rehearing. Petitioner says: "The point which appellants make here, as a basis for rehearing is that, as a condition precedent to appellants' liability, it became the duty of the trial court as well as it becomes the duty of this court, to determine whether or not, at the time and place of the accident, respondent was operating his automobile forward with his headlights in a defective condition, or that he so operated his headlights that they failed to comply with the statutory requirements expressly provided by the California Vehicle Act in force and effect at the time of the accident, to-wit, January 25th, 1931."

The lights of plaintiff's automobile were not shown to have been other than such as the law requires. They were not as to any element of their construction, in a defective condition. In section 101 of the California Vehicle Act (St. 1923, p. 546, § 101, par. 7, as amended by St. 1927, p. 1433), following paragraph 7, it is "provided, it shall be lawful, when the above requirements and limitations are otherwise complied with, to so construct or equip the headlights of motor vehicles as to permit that the beams of light projected therefrom be depressed downward not more than three degrees of arc below the level otherwise required under this section but without diminishing the amount of light projected from the lamp bulb when so depressed."

If there was any fault chargeable to plaintiff in this case, it must have been a fault consisting in some misuse of the lights. If under the then existing circumstances he did not use reasonable care in choosing the time, place, and duration of his lowering of the lights, he would be guilty of negligence. This was a question of fact, upon which the deci-

sion of the court is reflected in the findings. Since the evidence is sufficient to support these findings, they must stand as made.

The petition for rehearing is denied.



5 Cal.App.2d 696

PEOPLE v. LA CROSSE.

Cr. 1832.

District Court of Appeal, First District,
Division 2, California.

April 1, 1935.

Hearing Denied by Supreme Court
April 29, 1935.

1. Criminal law ☞286

In robbery prosecution, denial of defendant's motion made at inception of trial and after defendant had answered "ready" to permit defendant to add to his plea of "not guilty" a special plea of "not guilty by reason of insanity" *held* not error.

2. Constitutional law ☞257

Failure of trial court to add a special plea of "not guilty by reason of insanity" to general plea of not guilty entered for defendant by court when defendant, accused of robbery, refused to plead on arraignment, *held* not a denial of due process, in view of ample opportunity had by defendant to enter such special plea prior to trial (Pen. Code, § 1016).

3. Constitutional law ☞257

Criminal law ☞286

Provision of Penal Code that one who fails to make plea of not guilty by reason of insanity shall be conclusively presumed to have been sane at time of commission of offense charged *held* constitutional (Pen. Code, § 1016).

4. Criminal law ☞351(3)

In robbery prosecution, testimony as to what occurred after robbery *held* properly admitted for purpose of showing connection between defendant and accomplice and their efforts to flee from seat of crime.

5. Criminal law ☞807(1)

In robbery prosecution, instruction tendered by defendant emphasizing liability of mistake in identification *held* properly refused as argumentative.

6. Criminal law ☞829(9)

In robbery prosecution, proffered instruction warning jury that burden of proof was on prosecution *held* properly refused, where matter had been fully covered by instructions given.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Joe La Crosse was convicted of robbery under an information charging a prior conviction, and he appeals.

Affirmed.

Marshall B. Woodworth, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sifton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried before a jury on an information charging robbery and a prior conviction. He had refused to plead when arraigned, whereupon the trial court directed the clerk to enter a plea of not guilty. He later admitted the prior conviction, and on the trial was found guilty as charged in the information. He has appealed from the judgment on the verdict and from the order denying a new trial.

[1] His first point is that the trial court erred in refusing to permit defendant to add to his plea of not guilty a special plea of "not guilty by reason of insanity." The motion was made at the inception of the trial and after defendant had answered "ready." The point is without merit. It was determined adversely to the contentions here made in *People v. Hall*, 220 Cal. 166, 170, 30 P.(2d) 23, 996, and an appeal in that case to the Supreme Court of the United States was dismissed, 292 U. S. 614, 54 S. Ct. 869, 78 L. Ed. 1473.

[2, 3] The second point is that defendant was denied due process because, when he refused to plead on arraignment, the trial court should have added to the general plea of "not guilty" the special plea of "not guilty by reason of insanity." The point has less merit than the first. The defendant had ample opportunity to enter the special plea if he had desired and no statute or rule of law denied that right if exercised within a reasonable time. The defendant was arrested on July 27, 1934. He was arraigned and his trial was set for September 24th by consent. The trial commenced on October 18th, at which time he asked leave to change his plea. He was represented by counsel when arraigned and at all subsequent proceedings. Thus there has been no denial of the constitutional guaranty of due process, but merely a failure to use the due process provided for his benefit. In support of the point, the appellant argues that section 1016 of the Penal Code

Is unconstitutional, in that it declares that one who fails to make the plea "shall be conclusively presumed to have been sane at the time of the commission of the offense charged." The same question was decided adversely in *People v. Troche*, 206 Cal. 35, 48, 273 P. 767.

[4] The third point relates to the admission of testimony of what occurred after the robbery. The appellant, with an accomplice, entered a bank in the city of Berkeley at about 11 o'clock a. m. on July 27, 1934. The appellant carried a sawed-off shotgun; his accomplice carried a revolver. With the threat of these weapons, they took \$1,480 from the bank employees. At about 7 o'clock p. m. of the same day the appellant was arrested in a private garage which he had rented the day before. From his person the officers took several rolls of silver and \$250 in currency, which was carried in one of his shoes. From his automobile the officers took the shotgun, the teller's cash box, and a canvas sack, which the parties had used in the robbery. While the arrest was being made, another car was seen parked near the garage containing a man and a woman. As the officers approached this car, it was suddenly driven off, but shots fired by one of the officers wounded the male occupant. This car was found in a private garage later in the evening at a place which had been rented by appellant's accomplice and a woman companion. A search of the premises disclosed the hat of the accomplice with two bullet holes, and also fingerprints of the appellant. The accomplice with his companion had left the premises, but he was later captured in Los Angeles. All the testimony objected to was offered for the purpose of showing the connection between the appellant and his accomplice and their efforts to flee from the seat of the crime. It was clearly admissible for that purpose. 8 R. C. L., § 186 et seq.

[5, 6] The final point relates to the refusal to give a proposed instruction. The appellant did not take the stand in his behalf. His sole defense rested on the testimony of the ever-available alibi witnesses. Two were offered for this purpose—a woman who conducted a rooming house in San Francisco and her husband. The first testified that she had rented a room to appellant about three days before the robbery and that she had seen him in the premises about noon of the day the robbery was committed. On cross-examination she explained that this testimony was based on information given her by her hus-

band, and that she had not seen the appellant herself. Her husband testified that he could not remember whether he had seen appellant in the premises on the day of the robbery or on the day before. For the prosecution four eyewitnesses positively identified the appellant as one of the participants. Two others saw him in the vicinity immediately following the robbery. The appellant tendered an instruction emphasizing the liability of mistake in identification and warning the jury that the burden of proof was on the prosecution. The latter portion was fully covered by instructions given. The rest of the proposed instruction was purely argumentative and was properly rejected. There is no error in the record.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 618

HUDGINS v. STANDARD OIL CO. OF CALIFORNIA et al.

RENISON v. SAME.

Civ. 5190, 5191.

District Court of Appeal, Third District, California.

March 28, 1935.

1. Appeal and error ☞1180(1)

Reversal of judgment for defendant entered on special verdicts, notwithstanding general verdict for plaintiff, did not establish law of case on merits of defenses, but left case in same position as if judgment were originally entered upon general verdict, where reversal was based on absence of conflict between special and general verdicts.

2. Automobiles ☞226(1)

Occupants of automobile who agreed with driver to proceed along highway after dark without lights when lighting system of automobile unexpectedly ceased to function held guilty of contributory negligence as matter of law, precluding recovery for injuries sustained when their automobile was struck by truck coming without lights from opposite direction.

3. Automobiles ☞226(2)

Where collision occurs between two vehicles, each violating ordinance or other regu-

lation, concurrent negligence of each is proximate cause of accident, and neither can recover from other.

4. Release 34

Releases signed by persons injured held to bar recovery for injuries, where jury found that releases were delivered without misrepresentations as to contents or legal effect thereof.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Actions by Irwin E. Hudgins and Russel B. Renison against the Standard Oil Company of California and another. Judgments for plaintiffs, and defendants appeal.

Reversed.

Rich, Weis & Carlin, of Marysville, for appellants.

Ivan C. Sperbeck, of Marysville, for respondents.

PULLEN, Presiding Justice.

This is an action for damages for personal injuries alleged to have been received by plaintiffs in a collision between an automobile in which they were riding and a truck of defendant Standard Oil Company of California.

Some time after 6 o'clock on the evening of October 17, 1931, plaintiffs were riding in a model T Ford touring car in a northerly direction on what is known as the Tahoe-Ukiah or Browns Valley highway in Yuba county. When they reached a point about three or four miles from the city of Marysville, the driving lights of the Ford suddenly went out; the dim or parking lights were then switched on, and the Ford proceeded a short distance further when the dim lights went out. After an examination, it was found that it was then impossible to repair the lighting system. A consultation was held among those in the car as to the proper course, and it was determined to proceed. One of the plaintiffs testified that they talked the matter over and decided they could make it home without an accident. It was then quite dark.

After proceeding about a mile, a collision occurred between the Ford and a Standard Oil truck. The south-bound truck was also proceeding without lights and apparently on its left side of the highway. Both cars were traveling about 15 miles an hour at the moment of the impact.

There was some conflict as to whether there were any places where the Ford could have

been driven off the paved portion of the highway after the lights failed. Hudgins, one of the plaintiffs, testified the paved portion of the highway where the accident occurred was 18 feet wide and that the shoulder on their right side was about 20 inches and on the left side about 3 or 4 feet. Plaintiff Renison testified that on their left of the highway there were a few places where one could get a car off the highway, but it would require careful driving to do so. In their verified complaints, however, it was alleged that at the point of the collision and for several miles immediately in either direction the highway was approximately 40 feet in width, and the main traveled portion thereof approximately 18 feet in width.

At the conclusion of the testimony, certain interrogatories were submitted to the jury in reference to releases signed by plaintiffs, and in answer thereto the jury found that each plaintiff, for a specified amount, executed and delivered a release of any claim against defendants. The jury also found that neither the defendants nor any one acting for them made any misrepresentation to plaintiffs as to the contents, character, or legal effect of such instruments, nor that defendants nor their representatives said or did anything to prevent plaintiffs from becoming familiar with the contents or legal effect of the instruments before plaintiffs affixed their signatures thereto.

The jury brought in a general verdict in favor of plaintiff Hudgins in the sum of \$1,000 and a verdict in favor of Renison in the sum of \$500. Upon motion of defendants, however, the court entered judgment for defendants on the ground that the special verdicts were contrary to the general verdicts.

Upon appeal, Hudgins, Appellant, v. Standard Oil Company et al., Respondents (Renison, Appellant, v. Standard Oil Company et al., Respondents), 136 Cal. App. 44, 28 P.(2d) 433, 434, this court held there was no conflict between the general and special verdicts, as the jury under the evidence might have found the releases were executed on account of the mutual mistake of the parties, and reversed the judgment and directed the trial court to enter judgments upon the general verdicts, which was done. Upon the entry of such judgments in favor of plaintiffs, defendants then moved for a new trial, which was denied, and the matter now comes before us upon that record.

Appellants urge two points for the granting of a new trial: First, that the releases ex-

ecuted by plaintiffs bar their right to recover any damages from defendants, and also that plaintiffs were guilty of contributory negligence as a matter of law.

[1] Respondents object to the consideration of either of these contentions at this time, claiming both of these issues were before the court in the former appeal and have become the law of the case and cannot now be questioned. Respondents, however, are in error. This court specifically omitted passing upon these questions in the former opinion, *Hudgins v. Standard Oil Company et al.*, *supra*, there stating: "Whatever may be our views as to the merits of the respondents' contention that the plaintiffs were equally guilty of negligence with the driver of the Ford truck belonging to the respondent corporation, and whatever wrong said driver was committing, plaintiffs were likewise committing, we are precluded from considering this contention of the respondents by reason of the fact that respondents are not appellants and are not in a position to present the question of contributory negligence for our consideration."

This court having reversed the judgment in favor of the defendants and directed judgments in favor of plaintiffs, the case now stands in the same position as if judgments were originally entered in favor of plaintiffs upon the general verdict of the jury. *Klauber v. San Diego Street Car Co.*, 98 Cal. 105, 32 P. 876; *Milo v. Prior*, 210 Cal. 569, 292 P. 647; *Truffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 P. 69; *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539.

[2, 3] An examination of the evidence in this case compels us to hold that plaintiffs were guilty of contributory negligence as a matter of law. It is undisputed that they were driving upon a public highway about 18 feet wide at night without lights in the darkness, unable to see more than 15 or 20 feet ahead, as testified by plaintiff Renison, and as plaintiff Hudgins said: "You could see a little but you couldn't see any distance." Plaintiff Hudgins testified also: "If either one of us had lights the other one would have seen it." Also Virgil Cox, the driver of the Ford, testified:

"If he (the driver of the truck) had lights I would have seen him.

"Q. If you had head lights there wouldn't have been any collision? A. No sir."

Plaintiffs attempt to excuse their negligence upon the ground they were confronted

with an unexpected danger or peril and were entitled to use such means for avoiding the danger as would appeal to a person of ordinary care and prudence in like situation, without being held to a strict accountability as to whether the course chosen was the most judicious.

There is no doubt about the rule, but the facts here do not bring it within its application. Plaintiffs had ample time to weigh and decide as to which of the many courses open before them was proper. It is not necessary to enumerate the many things that a careful and prudent person could have done under the circumstances, but it is plain that the course adopted by plaintiffs was not one that would suggest itself to a person of ordinary prudence; plaintiffs, however, decided to take a chance and the collision occurred.

Plaintiffs were guilty of the same negligent act which they charge against defendants and upon which they base their cause of action. Inasmuch, however, as the doctrine of comparative negligence is not accepted in this state, the negligence of the defendants is not here an issue. It is the general rule that, where a collision occurs between two vehicles, each violating an ordinance or other regulations, the concurrent negligence of each is held to be the proximate cause of the accident and neither can recover from the other. *Cook v. Miller*, 175 Cal. 497, 166 P. 316; *Berges v. Guthrie*, 51 Cal. App. 547, 197 P. 356. The violation of an ordinance requiring vehicles to be operated at night with lights has frequently been held to constitute contributory negligence. *Garns v. Halpern*, 193 Cal. 198, 223 P. 545; *Jones v. Sunshine Grocery (Tex. Civ. App.)* 236 S. W. 614; *Rapolla v. Goulart*, 105 Cal. App. 417, 287 P. 562. It therefore appears that plaintiffs were guilty of contributory negligence as a matter of law and proximately contributed to the accident, barring their recovery.

[4] So, too, we must hold with appellants in regard to the contention of appellants that the causes of action by plaintiffs are barred by the execution of the releases. This phase of the case seems to come within the rule laid down in *Rogers v. Atchison, etc., Railway Co.*, 38 Cal. App. 343, 176 P. 176.

The judgments in the above-entitled actions should be reversed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

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PEOPLE v. THOMPSON et al.

Civ. 5215.

District Court of Appeal, Third District,
California.

March 29, 1935.

I. Eminent domain ☞75

Mere filing of affidavit by state for extension of time of payment of award in eminent domain action does not automatically work such extension of time, but hearing must be had thereon in order to prevent the arbitrary placing of cloud upon title and thereby depriving landowner of property without "due process of law" which imports an orderly proceeding adapted to the nature of the case in which a person is accorded an opportunity to be heard and to defend, enforce, and protect his rights (Code Civ. Proc. § 1251).

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

2. Affidavits ☞17

Affidavit by state for extension of time of payment of award in eminent domain action held insufficient, as setting forth only conclusions and opinions of affiant (Code Civ. Proc. § 1251).

Affidavit recited that affiant, chairman of state park commission, was familiar with condition of state park fund from which award in condemnation was to be paid; that there was not sufficient money in fund or in any other fund available for that purpose with which to pay award; that it would be necessary to sell bonds of the state in order to provide funds to pay award; and that affiant therefore made affidavit for purpose of extending time one year within which, after entry of final judgment, the sum of money ordered to be paid to defendants may be paid, as provided in Code of Civil Procedure.

3. Affidavits ☞17

Affidavit which sets forth only conclusions or opinions of affiant is insufficient.

4. Eminent domain ☞75

Affidavit for extension of time of payment of award in eminent domain action to take property for state park system is not conclusive, but landowner may offer evidence to contradict affidavit (Code Civ. Proc. § 1251; St. 1927, pp. 1477, 1479, 1480).

5. Constitutional law ☞46(1)

Constitutional questions will not be considered, unless necessary to determination of cause.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action in eminent domain by the People against Agnes E. Thompson and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Nell Cunningham, Deputy Atty. Gen., for the People.

H. L. Preston, J. W. Kingren, and Wayne P. Burke, all of Ukiah, for respondents.

PER CURIAM.

This appeal involves the correctness of a judgment of the trial court dismissing an action in eminent domain, in which action the plaintiff sought to take from the defendants certain of their property known as the "Hargrave Ranch," situate on the Mendocino coast in Mendocino county, and add the same to the State Park System in Mendocino county known as "Russian Gulch State Park." In the eminent domain action the plaintiff had judgment for the condemnation of the property. The cause was tried by a jury, and the value of the property fixed at \$3,500. Severance damages were allowed in the sum of \$50. The court made its findings and entered judgment on the 21st day of August, 1933. The defendants' cost bill in the sum of \$568.45 was allowed by the court.

On the 19th day of August, 1933, the plaintiff filed an affidavit seeking the extension of time of payment provided for in section 1251 of the Code of Civil Procedure. This affidavit was simply filed with the clerk of the court, but was never called to the attention of the court, and no order of the court was ever made thereon allowing the extension of time specified in the section of the Code, supra. The award not having been paid, the defendants, on the 9th day of October, 1933, filed a notice of motion to dismiss the action in eminent domain, pursuant to the provisions of section 1255a of the Code of Civil Procedure (as amended by St. 1933, p. 790).

The following questions are tendered for our consideration upon this appeal:

(1) Does the filing of an affidavit, without any hearing had thereon, or action by the court having jurisdiction of the eminent domain proceedings, automatically extend the time of payment one year?

(2) Was the affidavit filed in behalf of the plaintiff sufficient in substance?

(3) Is the affidavit mentioned in section 1251, supra, conclusive, or may the defendant offer evidence to contradict the same?

(4) Is that part of the section of the Code providing for an extension of time to certain litigants, to the exclusion of others, constitutional?

Section 1251, supra, so far as involved in this action, reads as follows: "In case the plaintiff is the state of California, or is a public corporation, and it appears by affidavit that bonds of said state or public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided, further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made."

[1] The language of this section does not specifically provide that the mere filing of the affidavit shall work an extension of time, nor does the section designate to whom it shall be made to appear that it is necessary to sell bonds. The language simply is: "And it appears by affidavit," etc. In connection with the true interpretation of this language, we may mention that the section of the Code is absolutely silent as to any additional compensation being made to a property owner either by way of damages or interest on the award fixed by the jury on account of the delay for the period of one year in the first instance, or a still longer delay in the event of litigation affecting the validity of the bonds to be issued.

While the argument is advanced in this case that the mere filing of an affidavit automatically works an extension of time, there is no explanation offered as to whom the facts are to be made to appear in the affidavit filed in the proceedings. It will not be questioned that the court, and not a litigant, has jurisdiction of the action, and is the only identity created by law having power to make and direct the entry of orders affecting the action or proceeding pending before it. The litigant may present facts, as in this case, by an affidavit, but it must be made to appear, to some authority. What might appear to be unquestionably sufficient to a litigant might appear to the court as having no evidentiary power whatever. It does not seem reasonable that the Legislature ever in-

tended that, by the mere filing of an affidavit which appeared sufficient to the affiant therein, a cloud should be placed upon the title of one's property for the period of one year or more. Such an interpretation divests the court of its authority, and places it in the power of some one acting in behalf of the plaintiff.

A somewhat similar question was before this court in the case of Hurley v. Lake County, 113 Cal. App. 291, 298 P. 123, 125, where it was claimed that the mere filing of an affidavit in the action without the introduction of the affidavit as testimony, or calling the attention of the court thereto, was sufficient.

In holding that the mere filing of an affidavit in an action without presenting the same to the court in testimony unavailing, this court said: "The respondents call our attention to section 2009 of the Code of Civil Procedure, which permits the use of affidavits in proving the fact of notice being mailed. The respondents' reference to this section is well founded so far as the claim is made that affidavits of giving notice may be admitted in evidence to prove the fact of notice having been given, but the unfortunate predicament in this case, so far as respondents are concerned, is that the notice and affidavit were not admitted in evidence. All that the transcript shows as certified to as being full and correct by the trial court is that one of the respondents' counsel stated that there was an affidavit filed in the cause of notice having been mailed. The contention is now made that the court takes judicial notice of its own records. This contention is true, but the affidavit and notice referred to are not a part of the records of the court, are not papers of which a court takes judicial notice until they have been properly introduced in evidence, and, if they are sufficient in form and substance to prove the fact of notice being given, then and in that case the court is warranted in acting thereon, but not until such proof is made. The filing of an affidavit among the papers of a cause no more proves any fact in controversy than would the filing of a deposition which is not introduced in evidence be proof of the matters to which the witness has deposed."

The mere filing of an affidavit, with the clerk, is not the presentation to the court of any of the matters contained therein, and we find no logical reason for holding that facts are made to appear simply by such filing, or that the appearance of the necessity for an extension of time can be determined or adjudi-

cated by any other than the court in which the action is pending.

While the section of the Code which we have set forth does not provide, in so many words, for a hearing, we think that the rule of law that no one shall be deprived of his property without due process of law necessitates a hearing before the court as to the merits of the affidavit and whether a showing is sufficiently made to justify the court in allowing what may be a year or a longer extension of time in which to make payment of the award. No provision is made, as we have stated, for allowing interest upon the award, on account of the delay, or for allowing any additional damages. However, during the extension of time, a cloud is placed upon the title, and the owner is deprived of the power of making sale thereof in the event of a more advantageous or valuable offer being made therefor, or in the event that changed economic conditions render the property more valuable. This enforces again the thought that the prohibition of such right and the placing of a cloud upon the title to one's property should not be left arbitrarily, or otherwise, to the opinion or conclusion of a litigant, or any one simply making an affidavit in behalf of the litigant.

The language found in 5 California Jurisprudence, p. 865, § 18, we think directly applicable, to wit: "The purpose of the constitutional guaranty as to due process is to exclude from every branch of the government arbitrary and unreasonable exertions of power, and to give protection against arbitrary interference with rights. It is a restraint upon all departments of government—legislative, executive and judicial. The essential rights of the individual cannot be taken away by any mere declaration of the legislative will. Guaranty is a direct prohibition upon the legislature from passing any law * * * taking away their liberty or divesting them of property, whether real or personal, except by a due and regular proceeding shall, only upon the judgment of a court of justice of competent jurisdiction, render any proceedings in which such person shall have had his rights fairly adjudicated in accordance with the established rules of law, applicable to such cases." The meaning of the words "due process of law" is clearly expressed in the following quotation taken from the case of *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 283 P. 298, 308: "As applied to judicial proceedings the phrase 'due process of law' imports an orderly proceeding adapted to the nature of the case in which a person is accorded an opportunity

to be heard and to defend, enforce, and protect his rights. *County of Santa Clara v. Southern Pac. R. Co. (C. C.)* 18 F. 385. It has the same meaning as the expression 'by the law of the land,' as used in *Magna Carta*. *Den ex Dem. Murray's Lessee v. Hoboken Land, etc., Co.*, 18 How. 272, 15 L. Ed. 372. It means a process which, 'following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.' *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. Ed. 569. [See, also, *Rose's U. S. Notes*.] This implies a hearing whenever one's right to payment within 30 days after the entry of judgment in eminent domain proceedings is to be deferred for the period of one year or for any longer time. The time for fixing the value of the property is designated in the statute, and, when the judgment is entered, the owner of the property is entitled to payment within 30 days if the proceedings are not abandoned. If abandoned, he is entitled to his costs, and then to the exclusive use of the property and the unhampered privilege of making disposal thereof. On the other hand, if the property is actually taken, the owner is entitled to the amount of the award in order that he may use the same either in his own business or in placing the award on interest. In either case it is a pecuniary right which is valuable to the owner of the land sought to be condemned, and he cannot arbitrarily be deprived of such right.

In the case of *Ekern v. McGovern*, 154 Wis. 157, 245, 142 N. W. 595, 619, 620, reported also in 46 L. R. A. (N. S.) 796, the court voices the law in the following pertinent language: "Under the general and the special guaranties as well, no right of an individual, valuable to him, peculiarly or otherwise, can be justly taken away without its being done conformably to those principles of natural justice which afford due process of law and the equal protection of the laws—a fair hearing and judgment upon evidence. * * * That the protection of due process of law extends to rights, in the broadest sense of the term, has always been fully recognized here. * * * It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice, one of the most familiar of them being the right and oppor-

tunity for a hearing, to meet opposing evidence and oppose with evidence, according to the established principles of fair investigation to determine the justice of the case."

That due process of law requires notice to be given, and an opportunity to be heard, before any one can be deprived of his rights either as to person or property, is considered at length in the case of *Violett v. City of Alexandria*, 92 Va. 561, 23 S. E. 909, 913, 31 L. R. A. 382, 53 Am. St. Rep. 825. In that case a special assessment was levied by executive officers, without notice or opportunity to property owners to be heard. In answer to the contention that notice was unnecessary, the court said: "But it is clear to my mind that this does not sustain appellee's contention, as the court there declares, in plain language, that whenever the laws there discussed provide a mode for contesting the charge imposed in a court of justice, with such notice to the person, or such proceedings in regard to the property, as are appropriate to the nature of the case, then they do not deprive a person of his property without due process of law; thus clearly making the constitutionality of the law dependent upon its giving notice to the party to be affected, and an opportunity of contesting the charge. In every case that I have been able to examine which has gone to the Supreme Court of the United States, and in which the question under consideration was considered, that court has upheld the validity of the laws upon the ground that notice and hearing had been provided for, or held the laws to be unconstitutional and void because notice to the party to be affected and an opportunity to be heard were not provided for. *McMillen v. Anderson*, 95 U. S. 37 [24 L. Ed. 335]; *Davidsen v. New Orleans* [96 U. S. 97, 24 L. Ed. 616], *supra*; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663 [28 L. Ed. 569]; *Spencer v. Merchant*, 125 U. S. 345, 8 S. Ct. 921 [31 L. Ed. 763]; *Walston v. Nevin*, 128 U. S. 578-582, 9 S. Ct. 192 [32 L. Ed. 544-546]; *Lent v. Tillson*, 140 U. S. 316, 11 S. Ct. 825 [35 L. Ed. 419]; *Paulsen v. Portland*, 149 U. S. 30, 13 S. Ct. 750 [37 L. Ed. 637]; *Pittsburg, C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114 [38 L. Ed. 1031]. But for extending the discussion of this question to too great a length, if such is not already the case, innumerable decisions of the courts of other states might be cited and reviewed, wherein assessments for local improvements were held to be void, and were vacated, because made, levied, and confirmed without any notice to property owners affected." See, also, *State v. Taylor*, 27 N. D. 77, 145 N. W.

425, and *Carstens v. Pillsbury*, 172 Cal. 572, 158 P. 218.

[2] If entitled to notice and hearing as to the sufficiency of the affidavit to authorize a court to extend the time of payment for a year or more, and thus place a cloud upon the title to one's property, it follows as a matter of course that the property owner in such an instance has a right to controvert the showing made by the affidavit, and in this manner protect his property rights. The affidavit filed in behalf of the plaintiff, so far as necessary to be considered herein, is in the words and figures following: "William E. Colby, being first duly sworn, deposes and says: That he is a member and chairman of the State Park Commission of California; that he is familiar with the condition of 'The California State Park Fund of 1927' from which fund the award in condemnation in the above entitled proceeding will be paid; that there is not sufficient money in said fund or in any other fund available for that purpose with which to pay the award in the above entitled proceeding, and that it will be necessary to issue and sell bonds of the State of California under and pursuant to the California State Park Bonds Act of 1927 (Stats. 1927, p. 1480) in order to provide funds with which to pay the said award. Affiant therefore makes this affidavit for the purpose of extending the time one year within which, after the entry of final judgment in the above entitled proceeding, the sum of money assessed and ordered to be paid the above entitled defendants by plaintiff may be paid, as is provided in Section 1251 of the Code of Civil Procedure."

The sufficiency of this affidavit is challenged by the defendants, and testimony controverting the conclusions therein stated was admitted by the trial court. We may admit that the affidavit is sufficient in form, but it does not appear to us that any facts are therein stated other than the conclusions of the affiant. The affiant does state that he is familiar with the condition of the California state park fund of 1927, but there are no other facts stated as to the condition of that fund, or how much money that fund contains, whether any allocations have been made therefor, and, if so, of what they consist. The opinion is expressed in the affidavit that there is not sufficient money in the fund, or in any other fund, available for the purposes of paying the award. That, of course, is a statement only of the conclusion of the affiant. Again, we repeat, that is not a statement of the money in the fund, or of what moneys are available upon which the court

could draw a conclusion or make an order suspending the rights of the defendants for the period of at least one year, or perhaps longer.

The statement is then made that it will be necessary to sell bonds of the state of California to pay the award. Without any statement as to the amount of money in the California state park fund of 1927, the court could not conclude that a suspension of time was necessary in order that bonds might be sold. The opinion of the affiant, as expressed in the affidavit, may or may not have been correct, but, without any facts stated in the affidavit upon which the opinion of the affiant was expressed, it does not appear that anything of substance was presented justifying the court in making an order extending time and suspending the rights of the defendants, even though the affidavit had been called to the attention of the court and a hearing thereon had.

[3] That an affidavit which sets forth only conclusions or opinions of the affiant is insufficient is sustained by a long list of cases. The rule as to the sufficiency of affidavits is clearly stated in 2 C. J. p. 350, as follows: "Facts should be stated positively and with legal definiteness and certainty. * * * The statement in an affidavit of mere matters of opinion, or of legal conclusions is not sufficient. The facts on which such conclusions are based should be set forth so that the court may draw its own inferences. Thus, where a remedy is given by statute in certain specified cases, an affidavit is not sufficient which merely alleges that the case is one of those mentioned in the statute, without stating the facts from which such conclusions may be drawn."

Likewise, in 1 California Jurisprudence, p. 670, the rule is set forth as follows: "An affidavit which merely repeats the language or substance of the statute is not ordinarily sufficient. The statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the details to be supplied by the affidavit, from the circumstances of the particular case. * * * The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which the ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which, it is the special office of the affiant." Thus the affidavit in the instant case should have disclosed the facts necessary to give the court jurisdiction to extend the time of payment.

As said in 10 California Jurisprudence, p. 385, the statutory power of taking property without the owner's consent is one of the most delicate exercises of governmental authority, and there must necessarily be a strict observance of the substantial provisions of the law.

A further rule by which the sufficiency of an affidavit may be tested is set forth in 1 R. C. L. p. 771, to wit: "The true test of the sufficiency of an affidavit is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false." It is evident that an affidavit which simply states opinions and conclusions does not come within this rule. To the same effect is the case of *People v. Findley*, 132 Cal. 301, 64 P. 472.

In considering the question of the sufficiency of an affidavit entitling one to the benefits of the exemption laws, the court, in *Petrich v. Francis*, 83 Cal. App. 72, 256 P. 444, used the following language: "One who claims the benefit of exemption laws must bring himself within their spirit (25 C. J. 12), or, in other words, he 'must show that he belongs to one of the classes mentioned' in them (*Swanz v. Clark*, 71 Mont. 385, 229 P. 1108). Again, the burden is upon him to show that he is entitled to the exemption. *Murphy v. Harris*, 77 Cal. 194, 19 P. 377. These rules necessarily mean that one who contends for an exemption must establish his right by evidence, by facts. The affidavit of Santich merely follows the language of the statute, and states nothing but conclusions of law. Such an affidavit proves nothing. 1 Cal. Jur. 669, 670."

Other cases might be cited, but the foregoing set forth the rules by which the sufficiency of an affidavit may be determined.

[4] We find nothing in any one of the several acts relating to the creating of the state park system, making the affidavit referred to in section 1251, supra, conclusive evidence of the matters therein set forth, even though such affidavit be considered as setting forth sufficient facts to justify the order of the court extending time of payment and suspending the right of the property owner to the damages awarded, and placing a cloud upon his title for at least one year. Three separate acts were passed by the Legislature in the creation of the state park system: Statutes of 1927, p. 1477, Statutes of 1927, p. 1479, and Statutes of 1927, p. 1480. The first act relates to the creation of a park system, gives power to expend money for the care, protection, and supervision thereof; also authorizes the commission to receive gifts of

money or property to be used in extending the system. The second act authorizes the Department of Natural Resources, through the state park commission, to make surveys and determine what lands are suitable and desirable to be included within the state park system. The last act, known as the "State Park Bonds Act of 1927," sets forth the procedure for the sale of bonds to acquire money for the purchase of lands to be included within the system. This act was approved by a vote of the people on November 6, 1928. The act contemplates that the state shall pay one-half of the cost of acquiring lands of the state park system, and that donations of land or money shall be made sufficient in amount to match the moneys advanced by the state.

The lands involved in this action, the moneys to be expended, and the moneys shown to be on hand by the testimony introduced upon the hearing of the motion to dismiss are so clearly set forth in an opinion filed by the learned judge of the trial court that we incorporate the same herein as a part of the opinion of this court:

"It appears that the state park commission selected as a portion of the state park system two adjacent tracts in Mendocino county. One is known as the Johnson land, the other as the Hargrave land, the two to constitute a unit known as the 'Russian Gulch Project.' The owners of the Johnson land, with the approval of the state authorities, fixed the value of their property at \$40,000, and an agreement was entered into whereby the park commission agreed to buy, and the owners to sell, the Johnson land for \$28,500. The difference of \$11,500 was deemed by the park commission as a donation to that extent. On December 15, 1932, the county of Mendocino, through its board of supervisors, entered into a contract with the state park commission whereby the county obligated itself to contribute \$10,000 to the Russian gulch project. The sum was paid by the county, and \$8,500 thereof was added to \$20,000 realized from the sale of state park bonds, and the total of \$28,500 paid to the owners of the Johnson lands. By this means, there was a compliance with that provision of the State Park Bond Act which requires that in no case shall the park commission purchase any lands unless one-half of the total value involved has been received by the commission as a gift. The gift in this case was construed as a donation of land to the extent of \$11,500 by the owners of the Johnson land, and \$8,500 in cash provided by the board of supervisors of Mendocino county.

The \$1,500 remaining of the \$10,000 provided by the county of Mendocino was placed by the park commission in its contingent fund to be used for 'matching purposes' against a like sum to be provided by the state, to complete the Russian gulch project.

"It is admitted that the state did not pay the award within the 30-day period. The question then arises whether it could have done so. The defendants are entitled to \$3,550. Of this sum, not more than one-half, or \$1,775, could be paid from the state park bond fund of 1927. The balance of \$1,775, to match the money provided by the state, was required to be paid in money or lands derived from other sources, and of this latter sum there was to the credit of this project the sum of \$1,500 on deposit to the credit of the state park contingent fund, which sum had previously been provided by the county. Assuming that the remaining \$275 for matching purposes was provided from some other source, it was incumbent upon the state to provide only the sum of \$1,775 to close the transaction. The testimony of the state controller shows that on the 19th day of July, 1933, there was on hand in the state park bonds fund of 1927 the sum of \$116,567.86, and that this sum remained there intact until August 26, 1933, when \$100 was withdrawn; in other words, at all times between July 19 and August 26, 1933, the actual cash on hand was \$116,567.86. The plaintiff sought to show that this money was not available for payment of the award here, for the reason that the state park commission had allocated this amount to other projects. While it may be conceded that the commission had made contracts involving the expenditure of \$82,013.96 of this money on hand, there yet remained \$34,553.90 in the state park bond fund of 1927 from which the \$1,775 due defendants might have been paid. Mr. Colby attempted to show a commitment by the state park commission that would consume this \$34,553.90. He testified that this sum was intended as a part payment on \$70,000 that the commission had agreed to pay to Walter D. Bliss on the 'Lake Tahoe State Park Project.' It is significant, however, that on the 15th day of September, 1933, the commission requested the sale of bonds to the amount of \$70,000 to cover this particular item. If the commission required \$70,000 to carry out the Bliss contract, and had \$34,553.90 on hand in cash to apply on this payment, why should it still require bonds to the extent of \$70,000 to be sold? The answer must be that the \$34,553.90 was not to be used on the Bliss contract, and, if it was

not so to be used, it was available for other purposes, among them, to pay the Hargrave award."

[5] In addition to the objections urged in the court below, respondents contend that the provisions of section 1251, *supra*, collected herein, give certain litigants special privileges, and is therefore unconstitutional. As what we have set forth herein appears to us determinative of this opinion, following the rule that constitutional questions will not be considered unless necessary to the determination of the cause, we express no opinion on that subject.

The resolution of the state park commission adopted on the 15th day of September, 1933, relative to the condition of the state park fund as of that date, cannot be considered for any purpose as supplementing or adding to an affidavit filed on the 19th day of August, 1933. While the appellant has argued the alleged serious consequences of the decision of the trial court upon the validity of bonds ordered to be sold on or about the 15th day of September, 1933, such questions are not involved herein, and do not call for the expression of any opinion on the part of the court. The validity of the bonds, we may add, however, depends upon the facts as they appeared on the 15th day of September, 1933, at the date of the passage of the resolution just referred to, and not upon the sufficiency or insufficiency of the affidavit filed on behalf of the appellant in the eminent domain action. Nor do we decide that the court would have jurisdiction to go behind that resolution in determining its accuracy. What we do hold herein is that, the right to an extension of time not having been shown, the defendants were entitled to a dismissal.

The judgment is affirmed.



5 Cal.App.2d 668

PEOPLE v. THOMPSON et al.

Civ. 5222.

District Court of Appeal, Third District,
California.

March 29, 1935.

1. Eminent domain ⇨265(3)

\$1,500 award to landowners for fees of attorneys who spent at least 10 days in trial

of cause and motions in connection with condemnation proceeding involving value of several tracts of land, and which was abandoned by state, *held* not excessive (Code Civ. Proc. § 1255a, as amended by St. 1933, p. 790).

2. Appeal and error ⇨984(5)

Trial court's award of attorneys' fees will not be disturbed, unless palpable abuse of discretion is manifest.

3. Attorney and client ⇨140

Trial court, in awarding attorneys' fees, has power to appraise services and determine reasonable value independent of expert testimony.

4. Appeal and error ⇨984(5)

Trial court's determination of value of attorneys' services after full inquiry into pertinent facts constitutes some evidence of value of services.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action in eminent domain by the People against Agnes E. Thompson and others. From an order taxing costs after dismissal of the action, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for the People.

H. L. Preston, J. W. Kingren, and Wayne P. Burke, all of Ukiah, for respondents.

PER CURIAM.

This cause is before us upon an appeal from an order of the trial court taxing costs after dismissal of an eminent domain action between the same parties, for failure of the plaintiff to comply with the provisions of section 1251 of the Code of Civil Procedure.

Section 1255a of the Code of Civil Procedure, as amended May 8, 1933 (Stats. 1933, p. 790), reads as follows:

"*Abandonment of Condemnation Proceedings.* Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary ex-

penses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within thirty (30) days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

Objection is made that the court allowed expert witness fees. This objection, however, appears to have been made by inadvertence, as an examination of the order of the trial court shows that only ordinary fees were allowed. The same inadvertence appears in the objection to certain items apparently covering expenditures made after the trial of the case. A reading of the testimony, however, shows that the date of July 27, 1933, is a clerical error, and should read as of June 27, 1933. The record also shows that the item charged in favor of the witness Hargrave was disallowed.

[1] The main contention of the appellant is as to the allowance of attorney fees. We have gone over the record and found that nine days were consumed in the trial of the main action; that the value of several tracts of land was involved; that the attorneys for the respective parties were in court a number of times after the trial of the main action, in the argument of motions relative to dismissing the proceedings, and also motions to retax costs. It satisfactorily appears from the record that at least an additional day was consumed in these proceedings. Thus the record shows that at least ten days were required for the hearing of the cause and the motions in connection therewith.

The appellant calls our attention to the following cases: *City of Los Angeles v. Agardy*, 1 Cal. (2d) 76, 33 P.(2d) 834; *City of Laguna Beach v. American Legion Post No. 222 of Laguna Beach*, 140 Cal. App. 382, 35 P.(2d) 341; *City of Los Angeles v. Higgins*, 139 Cal. App. 619, 34 P.(2d) 754; *Id.* (Cal.App.) 26 P.(2d) 668; and *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.(2d) 993. These cases, however, we think have no bearing upon the issue presented for our consideration. In the *Abbott* Case the city was enjoined from further proceedings, and therefore there was no abandonment, either express or implied, under provisions of section 1255a, supra. All the other cases cited by the appellant have

reference to the Street Opening Act, or, rather, the act entitled "Acquisition and Improvement Act of 1925, as amended in 1931, Deering's General Laws of 1931, Act 3276a, page 1594." This act, relating to a particular subject, is held to control the general provisions of section 1251, supra, and likewise the provisions of section 1255a, supra; the street act being held inconsistent with the general provisions of the two Code sections just referred to.

Only one question remains to be determined: Was the allowance of \$1,500 attorney fees excessive? The record shows that counsel engaged in the trial of this case are men of experience and long-standing at the bar. For their services in court it would not appear that an allowance of \$100 a day would be excessive. Considerable time must necessarily have been consumed in preparing the cause for trial. The trial court had before it full information as to the conduct of the trial, and necessarily had an opportunity of determining whether the attorneys had or had not given time and thought in preparing for the trial, and whether the cause had been properly presented and called for the exercise of a considerable degree of professional skill.

While we might be under the impression that \$1000 would be an ample fee, the record does not place us in a position to say that the learned judge of the trial court, having much better opportunity to arrive at a just conclusion than an appellate court, has abused his discretion and allowed an excessive fee. It does appear that the witness testified that \$600 would be a reasonable fee for the services performed. As to the experience of this witness the record is silent. All the other witnesses appearing in the cause testified that the attorney's fees were worth the sum approximately allowed by the court. As a matter of fact, the appellant does not contend that the allowance is excessive. In relation to the allowance the appellant presents the following: "We respectfully invite the court to read pages 12 to 20, inclusive, of the reporter's transcript, which contains the cross-examination of the witness on behalf of the State, and we respectfully invite the court's attention particularly to the statement of the court on page 18, lines 6 and 7; also, to the statements of the court and counsel appearing throughout the record in both appeals." All of which we have read.

[2-4] The law, in relation to the fixing of attorney fees, is well stated in the case of *City of Los Angeles v. Los Angeles-Inyo Farms Company*, 134 Cal. App. 268, 25 P.(2d) 224, 227, as follows: "The rule is established

that, in fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion. *Pennie v. Roach*, 94 Cal. 515, 29 P. 956, 30 P. 106; *Watson v. Sutro*, 103 Cal. 169, 37 P. 201; *Freese v. Pennie*, 110 Cal. 467, 42 P. 978; *Estate of Duffill*, 188 Cal. 536, 206 P. 42; *Libby v. Kipp*, 87 Cal. App. 538, 262 P. 68. It is also established that, in making an award for attorney's fees, the court has the unquestioned power to make an appraisal of the services rendered and to arrive at a determination of the reasonable value of such services independent of expert testimony. *Estate of Dorland*, 63 Cal. 281; *Estate of Straus*, 144 Cal. 553, 77 P. 1122; *Zimmer v. Kilborn*, 165 Cal. 523, 132 P. 1026, Ann. Cas. 1914D, 368; *Kirk v. Culley*, 202 Cal. 501, 261 P. 994; *Elconin v. Yalen*, 208 Cal. 546, 282 P. 791; *Moore v. Maryland Casualty Co.*, 100 Cal. App. 658, 280 P. 1008; *Lady v. Ruppe*, 113 Cal. App. 606, 298 P. 859; *Theisen v. Keough*, 115 Cal. App. 353, 1 P.(2d) 1015; *Mills v. Friedman*, 119 Cal. App. 74, 5 P.(2d) 901. It may further properly be observed that the court's determination of the value of the services made after full inquiry into the facts of the case which were pertinent to the matter under consideration constitutes some evidence of the value of such services. *Theisen v. Keough*, supra."

No abuse of discretion having been shown, the order of the trial court is affirmed.



SCARLETT v. ATCHISON, T. & S. F. RY.*

Clv. 9527.

District Court of Appeal, First District,
Division 2, California.

March 29, 1935.

Rehearing Denied April 27, 1935.

Hearing Granted by Supreme Court
May 27, 1935.

1. Master and servant ⇨228(2)

Railroad's liability for injury proximately caused by violation of Federal Safety Appliance Act is absolute, and question of employee's due care is immaterial (Federal Safety Appliance Act [45 USCA § 1 et seq.]).

2. Trial ⇨109

Where counsel for injured brakeman stated that action was brought under Federal Employers' Liability Act and Safety Appliance Act, and subsequently rested action solely on Safety Appliance Act, defenses of contributory negligence and assumption of risk were no longer available for any purpose (Federal Safety Appliance Act 1893, § 8 [45 USCA § 7]; Federal Employers' Liability Act, §§ 3, 4 [45 USCA §§ 53, 54]).

3. Master and servant ⇨286(13)

In action by brakeman who fell while descending ladder of freight car allegedly because of obstruction consisting of brace rod running diagonally across side of car, violation of Federal Safety Appliance Act requiring secure ladders could not be based solely on proximity of rod, where clearance between rod and ladder exceeded minimum specifications of Interstate Commerce Commission, and hence submitting to jury question whether ladder was secure was error (Federal Safety Appliance Act 1910, §§ 2, 3 [45 USCA §§ 11, 12]).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by William W. Scarlett against the Atchison, Topeka & Santa Fé Railway. Judgment for plaintiff, and defendant appeals.

Reversed.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

Werner, Martin & Hildebrand and James F. Hoey, of Martinez (Thomas F. McCue, of Los Angeles, of counsel), for respondent.

SPENCE, Justice.

Plaintiff, a brakeman in the employ of the defendant railroad company, brought this action seeking to recover damages for personal injuries sustained when he fell while descending the side ladder of a freight car. A trial was had before the court sitting with a jury and it resulted in a judgment in favor of plaintiff. Defendant appeals from said judgment.

[1, 2] Plaintiff alleged in his complaint that while descending said ladder he encountered an obstruction and that as a proximate result of said obstruction, he was caused to slip and fall. He further alleged that said obstruction consisted of a brace rod running diagonally across the side of the car beneath the ladder, which brace rod "was

negligently introduced into and maintained in use and service upon said train of said carrier without notice of warning thereof to plaintiff." Defendant denied said allegations in its answer and also set forth appropriate allegations for the purpose of interposing the defenses of contributory negligence and assumption of risk. In the opening statement to the jury, counsel for plaintiff stated that the action was brought under both the Federal Employers' Liability Act (45 USCA, § 51 et seq.) and the Federal Safety Appliance Act (45 USCA § 1 et seq.). During the trial defendant introduced testimony showing that thousands of cars of the type in question had been used by defendant since 1929 and that plaintiff had worked upon similar cars on numerous occasions. Further testimony was being offered to show that plaintiff was entirely familiar with the construction of said cars when counsel for plaintiff questioned the materiality of such testimony. A lengthy discussion followed in which counsel for plaintiff abandoned any claim of negligence under the Employers' Liability Act and stated, "I am basing the case squarely and flatly under the provisions of the Safety Appliance Act." This discussion clarified the issues, as liability for an injury proximately caused by a violation of the Safety Appliance Act is an absolute liability and the question of due care therefore became immaterial. *St. Louis, Iron Mountain & S. R. Co. v. Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061; *St. Louis-Southwestern R. Co. of Texas v. United States* (C. C. A.) 29 F.(2d) 568; *United States v. Pere Marquette R. Co.* (D. C.) 211 F. 220; *Roberts Federal Liabilities of Carriers*, 2d Ed., vol. 2, p. 1518. Furthermore, the defenses of contributory negligence (45 USCA § 53) and assumption of risk (45 USCA §§ 7 and 54) were no longer available to defendant for any purpose. Thereafter the trial proceeded upon the theory that the action was based solely upon the claimed violation of the Safety Appliance Act (title 45 of USCA, § 11), and the jury was so instructed.

[3] Said section 11 requires that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards." At the time said section was adopted in 1910, the Interstate Commerce Commission was empowered after hearings to "designate the number, dimensions, location and manner of application of the appliances" provided for in said section and the statute provided that "thereafter said number, location, dimensions, and manner of

application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act," unless changed by the commission after a full hearing. *United States Stats. at Large*, 36 Stat. 298, c. 160, § 3. These provisions are still in effect. 45 USCA § 12. Pursuant to the Statute of 1910, the Interstate Commerce Commission held hearings and thereafter made its order of March 13, 1911, which order is set forth in *Roberts Federal Liability of Carriers*, second edition, volume 2, pages 2010 et seq. The specifications regarding ladders were fully prescribed in said order and we find the following with respect to clearance, "Minimum clearance of treads, two (2), preferably two and one-half (2½) inches."

The uncontradicted evidence shows that the ladder in question was constructed in all respects in conformity with the specifications prescribed in the order of the commission. In so far as clearance was concerned, the measurement from the inside of the treads to the diagonal brace rod was at all points in excess of 2½ inches. Plaintiff nevertheless insisted that the question of whether defendant violated the provisions of said section 11, or in other words the question of whether the ladder was "secure" or was rendered insecure by reason of the proximity of the diagonal brace rod, was a question of fact for the jury regardless of the admitted fact of compliance with the specifications for clearance set by the commission. The trial court adopted this view. The jury was instructed in part that "the word secure means, among other things, safe, not exposed to danger, relief from apprehension of or exposure to danger, to make safe," and that the question of whether the ladder was secure or insecure rested entirely with the jury. The jury was evidently confused and returned for further instructions during their deliberations. Their questions were directed at the effect of the compliance with the specifications of the commission regarding clearance. The trial court then stated, "The law provides that a secure ladder must be provided. There is no law that covers everything connected with a safe ladder." Then, after referring to the specification for clearance in the order of the commission, the court said, "but there is nothing in the law or nothing in the Interstate Commerce Act [49 USCA § 1 et seq.] that states that a ladder with a two and one-half inch clearance is safe. * * * The Interstate Commerce Commission provides that rungs shall be so far apart and also that there

must be a clearance back of the rungs of two inches, but there is nothing in that law that specifies that a rung that has that clearance is a safe ladder. What is a safe ladder is for you to determine from all the evidence in this case." In other words, the jury was instructed in effect that the specifications of the Interstate Commerce Commission regarding clearance could be ignored and that the jury could fix its own standard with respect to clearance in determining whether or not the ladder was "secure" within the meaning of the section.

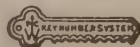
Appellant contends that the evidence was insufficient to sustain the verdict and also contends that the trial court erred in giving and refusing certain instructions. These contentions are closely related and all involve the question of whether a violation of said section 11 requiring "secure ladders" may be predicated solely upon the proximity of a diagonal brace rod beneath the ladder when said ladder and rod are so constructed as to leave the full clearance required by the orders of the Interstate Commerce Commission. In our opinion, it cannot and the contentions of appellant must be sustained. This view finds support in numerous authorities. *Atlantic Coast Line R. Co. v. Napier* (D. C.) 2 F.(2d) 891; see, also, *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *Lancaster & Wright v. Allen*, 110 Tex. 213, 217 S. W. 1032; *Ford v. New York, N. H. & H. R. Ry. Co.* (C. C. A.) 54 F.(2d) 342; *Erie R. Co. v. Lindquist*, (C. C. A.) 27 F.(2d) 98; *Mahutga v. Minneapolis, St. P. & S. S. M. R. Co.*, 182 Minn. 362, 234 N. W. 474, 476; *Pursglove v. Monongahela R. Co.*, 285 Pa. 27, 131 A. 477; *Chicago, R. I. & P. Ry. Co. v. Benson*, 352 Ill. 195, 185 N. E. 244; *Lehigh & N. E. R. Co. v. Smale* (C. C. A.) 19 F.(2d) 67. Respondent cites and relies mainly upon *Davis v. Reynolds* (C. C. A.) 280 F. 363; *Baltimore & O. R. Co. v. Metzler*, 82 Ind. App. 246, 143 N. E. 707, and *Western & A. R. R. v. Meister*, 37 Ga. App. 570, 140 S. E. 905, but these authorities are all distinguishable. Here there was an alleged violation of the Safety Appliance Act rather than of the so-called Boiler Inspection Act (45 USCA § 22 et seq.), which latter act is broader in its scope and differs in its provisions from the Safety Appliance Act. *Roberts Federal Liabilities of Carriers*, 2d Ed., p. 1246. Furthermore, the only alleged violation of said Safety Appliance Act was in the failure to allow a greater clearance between the ladder and the diagonal brace rod be-

neath it. Pursuant to the authority vested in it by the Safety Appliance Act, the Interstate Commerce Commission had definitely specified, among other things, the amount of clearance required and said act provided that the specifications prescribed by the commission should be the "standards of equipment" on all cars subject to the provisions of the act. As the uncontradicted evidence showed a full compliance with the standards prescribed by the commission for clearance, there was no evidence to show a violation of the act with respect to clearance, and the jury should not have been permitted to disregard the standards prescribed by the commission and set up a standard of its own. As was said in *Mahutga v. Minneapolis, St. P. & S. M. R. Co.*, supra, "A jury cannot be permitted to substitute its judgment in lieu of the judgment of the Commission upon whom the law places the responsibility for such determination."

In view of the conclusions which we have reached, we deem it unnecessary to discuss in detail the disputed instructions given and refused.

The judgment is reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



5 Cal.App.2d 554

BERGER v. LEVY.

Civ. 9068.

District Court of Appeal, First District,
Division 1, California.

March 28, 1935.

As Amended on Denial of Rehearing

April 27, 1935.

1. Husband and wife ⚭324

Gist of action for alienation of affections is the taking away of spouse and alienation of his or her affections.

2. Husband and wife ⚭324

In action for alienation of affections, it is sufficient if defendant's conduct led to a separation of the spouses and was intentional and wrongful; it being no defense that such conduct was not sole cause of the separ-

ation and loss of affection, provided that it was the procuring or controlling cause thereof.

3. Husband and wife ⇨324

Action for alienation of affections does not lie where spouse voluntarily gives his or her affection to another, the latter doing nothing wrongfully to win it.

4. New trial ⇨85

To entitle one who fails to appear at trial to relief from judgment, he must establish that absence was without fault or negligence on his part, that he has been injured by reason of his absence, that different result would probably be reached if new trial were had, which may be shown by statement of evidence which would be produced by him in event of new trial.

5. New trial ⇨85

Denial of defendant's motion for new trial in action for alienation of affections of married man held error, where case for plaintiff was not strong, defendant's absence was advised by counsel who assured her that action could be defeated without trouble, date of trial was advanced and trial was had without notice to defendant, and affidavit was filed supporting defendant's claim that she was innocent.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Fannie Berger against Jeanne S. Levy. From a judgment for plaintiff and from an order denying defendant's motion to vacate the judgment, defendant appeals.

Order denying defendant's motion to set aside the judgment reversed, and cause remanded for a new trial.

Walter McGovern, of San Francisco, for appellant.

Elmer E. Robinson, of San Francisco, H. Boyarsky, of Oakland, and William A. Lahanier, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Fannie Berger, brought this action for damages against the defendant, Jeanne Levy, for the alleged alienation of the affections of plaintiff's husband, Emil Berger; and a jury returned a verdict in plaintiff's favor for \$15,000.

Defendant was not present at the trial. She was in Arizona at the time, but was represented by counsel. Soon after the verdict was rendered she returned to California, se-

cured the services of other counsel, and presented two motions, one for a new trial and the other to set aside the judgment upon the grounds of fraud, mistake, surprise, inadvertence, and excusable neglect. In support of said motions she filed a lengthy affidavit wherein she charged that Berger and his wife had conspired to institute the action and to bring about the trial thereof during her absence from the state, and in this connection she averred, among other things, that the attorney who represented her at the trial had been employed for her by Berger; that upon filing her answer said attorney assured her the case would never be brought to trial, that he would obtain a dismissal thereof, and later, under circumstances hereinafter stated, advised her to leave the state and to remain away as long as possible; that being thus assured the case would not be tried she followed such advice and went to Arizona where her relatives lived; and that after remaining there about six weeks she received word that the case had been tried and a verdict rendered against her. The motion for a new trial was denied conditionally upon the acceptance by plaintiff of a reduction in the amount of damages from \$15,000 to \$2,500; and she accepted the reduced amount. Thereupon the motion to set aside the judgment was denied, and defendant took two appeals, one from the judgment and the other from the order denying the motion to vacate the judgment. The grounds urged for the reversal are insufficiency of the evidence to support the verdict, and error in denying the motion to vacate the judgment.

[1-3] The gist of a cause of action of this kind is the enticing or taking away of the husband or the wife and the alienation of his or her affections. *Humphrey v. Pope*, 122 Cal. 253, 54 P. 847. And it has been held that the word "entice" means to lure, induce, tempt, incite, or persuade a person to do a thing. It is sufficient if it be shown that the conduct of a defendant led to a separation of the spouses and was intentional and wrongful; and it is no defense that such conduct was not the sole cause of the separation and loss of affection, proof that it was the procuring or controlling cause being all that it required. *Rogers v. Haines*, 104 Cal. App. 191, 285 P. 412. However, as declared in the leading case of *Scott v. O'Brien*, 129 Ky. 1, 110 S. W. 260, 262, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419, it is well settled that there is no ground for action where a spouse voluntarily gives his or her affection to another, the latter doing nothing wrongfully to

win such affection. That is to say, in order to establish liability it must be shown that the defendant is the enticer, and mere proof of abandonment, or that the husband or wife may be maintaining an improper relation with another, is not sufficient. In this regard the court in that case goes on to say: "In 15 Am. and Eng. Ency. of Law, p. 895, the rule is thus stated: 'In order to sustain an action for the alienation of the husband's affections it must appear, in addition to the fact of alienation or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff to show such interference.' Again, on page 866, it is said: 'But to maintain this action it must be established that the husband was induced to abandon the wife by some active interference on the part of the defendant.' In 3 Elliott on Evidence, § 1643, it is said: 'To entitle the plaintiff to recover in an action for alienating affections, the burden of proof is upon the plaintiff, and the plaintiff must show that there was a direct interference upon the part of the defendant that not only was there infatuation of the husband or wife for the defendant, but that the defendant by wrongful act was the cause of it.' In the case of Waldron v. Waldron (C. C.) 45 F. 315, the court, in an elaborate discussion of the question, said: '* * * If the husband alienated his own affections from his wife, or if alienated by the plaintiff's own conduct, or both, without the interference of defendant, or if they were alienated by any other cause known or unknown, over which defendant had no control or exercised no intentional direction or influence, then the plaintiff, howsoever unfortunate or wronged, cannot recover damages from the defendant.'" See, also, 13 R. C. L. 1464, and 30 C. J. 1123.

In the present case the evidence established that plaintiff's husband took his departure from the family dwelling in February, 1932, which was about four months prior to the filing of the complaint herein, and that at the time of trial, on November 2, 1932, he was still living separate and apart from her; furthermore, that for about a year prior to such separation and apparently up to the time of the commencement of this action defendant, a personal acquaintance of the Berger family of some two years standing, had been the recipient of Berger's attentions, some of which, at the beginning, were of a clandestine nature. But the record contains no af-

firmative evidence that defendant ever expressly suggested, encouraged, or persuaded Berger to leave his wife; and as will hereinafter be seen, the circumstances from which the jury drew its conclusion that she had done so, appear to be more persuasive of the belief that Berger's action in moving out of the family dwelling was not influenced by any active interference on defendant's part, but was due entirely to his own voluntary act brought about solely by matrimonial differences which had been going on between Berger and his wife years before they ever met defendant. Consequently, when the evidence is tested by the legal rules above set forth, it becomes apparent that plaintiff did not present, as her counsel contend, a strong case; and while we cannot say that the state of the evidence is such as would justify us in holding as matter of law that the jury's conclusion is wholly unsupported, the fact remains that on account of defendant's absence from the trial, such conclusion was reached after hearing only one side of the case. Therefore, in view of the apparent weakness of plaintiff's case, a serious question is presented as to whether the uncontroverted facts set forth in defendant's affidavit as to the circumstances under which she claims the cause was brought to trial during her absence did not entitle her, as a matter of law, to the relief sought by her motion to set aside the judgment; and a fair consideration of this latter question would seem to require a review of the main features of the evidence.

It appears therefrom that the Bergers were married in Austria in 1899, and are the parents of twin daughters and a son, whose ages at the time of trial were 31 and 29 years, respectively. They came to America about the year 1905, and after residing in New York for a while moved to Pittsburgh, where in 1911 Berger left his family and went to Canada, then to Seattle, and eventually in 1913 moved to Los Angeles. There is a dispute as to his reasons for having gone away. However, after arriving in Los Angeles, his wife and children, at his instance, rejoined him, and the following year, 1914, they moved to Oakland, where they continued to reside up to the time of the trial of this action. During his residence in Oakland, Berger engaged in various business enterprises, and up to 1929 was quite prosperous. Besides acquiring several pieces of valuable property, he operated a furniture store for some time with his son, and later purchased and conducted a general market. But in 1929, he began to suffer serious business reverses and gradually lost everything except the market and

the family home; and in October, 1931, he made an assignment to his creditors of the market, but was allowed to conduct the same until June, 1932, when he was ousted. That same month, June, 1932, Mrs. Berger filed this action for damages against Miss Levy. As stated, Berger was not living at the family home at that time, nor had he been living there since the preceding February, although he continued to eat most of his meals with his family up to the time he was ousted from the market in June, 1932. At the time he quit the family dwelling it was occupied by his wife, the three children and a son-in-law to whom his daughter Rose had been recently married in New York. So far as the record shows, no divorce proceedings have ever been instituted by the Bergers, but soon after bringing the present action Mrs. Berger sued Berger for separate maintenance.

Miss Levy came originally from Arizona, where her near relatives continued to reside. She was reputed to be the wealthy owner of copper mining interests in that state; but in her affidavit she denied that such was the fact. She met Berger's family early in 1930, and afterwards they became very friendly. She lived in an apartment house in San Francisco and the Bergers often visited her there. She also visited them frequently in Oakland, and occasionally spent the night or the week-end at their home. This social relationship ended, however, in March 1931; and in February 1932, about the time Berger took his departure from the family dwelling, Miss Levy moved to Oakland, where she continued to live up to September, 1932, when as stated she went to Arizona.

There is a sharp conflict in the evidence as to whether the Bergers ever lived harmoniously after arriving in this country; also as to whether, for several years prior to the time Berger moved out of the family dwelling, he and his wife had any affection at all for each other. In this regard Mrs. Berger testified that up to the time they became acquainted with Miss Levy, Berger was a dutiful husband and father; that they lived happily and were reciprocally affectionate; and her testimony was supported generally by the children. But on cross-examination it was shown that for many years there had been frequent matrimonial disturbances, some of a violent nature, and that for approximately four years prior to their separation in February, 1932, Berger slept on a lounge or couch in another room. On the other hand, Berger, who was called as a witness on behalf of defendant, described Mrs. Berger as quarrelsome, faultfinding, and ex-

tremely jealous, and stated that on account of her incompatible and contentious disposition their married life had been a most unpleasant one; that she wrangled with him continuously over financial and business matters, and quarreled with him incessantly over unfounded charges of paying undue attention to other women. In this connection he went on to relate, among other things, that while they were living in New York she threatened, in a jealous rage, to strike a young woman friend over the head with a chair; and that after they moved to Pittsburgh he was actually driven from home by the constant quarreling on the part of his wife over a woman with whom she falsely accused him of being too friendly. Continuing, he stated that after living apart for a couple of years he concluded that on account of the children, a reconciliation was desirable, and for that reason alone he provided the transportation for his family to rejoin him in Los Angeles; but that soon after they moved to Oakland his wife resumed her quarrelsome and jealous attitude and continually charged him unjustly with paying undue attentions to other women; that ultimately, about four years prior to their final separation, her constant paroxysms brought about complete estrangement between them and a definite termination of their marital relations, at which time he changed his sleeping quarters to another room; that in February, 1932, he could stand her wrangling no longer, so he moved out.

In support of plaintiff's claim that Miss Levy alienated her husband's affections, Mrs. Berger and her children testified that soon after Berger became acquainted with Miss Levy his attitude toward them began to change; that he often absented himself from the family home during the day and at night without explaining his whereabouts; and that eventually they discovered he was spending much of his time with Miss Levy. In this respect the evidence shows that he called on Miss Levy a number of times at her apartment in San Francisco; that on a few occasions, usually when Miss Levy's landlady was present, he dined there and the three went automobile riding; that at one time Berger and Miss Levy were seen in company with a woman friend leaving a theater, and at another time they were seen sitting alone in a miniature golf course. Testimony was given also by the son to the effect that Miss Levy frequently visited his father during the day time at his furniture store in Oakland under the pretense of helping him carry on the business; and that on several occasions

he saw them with their heads close together talking in undertones; that when he approached, Miss Levy pretended she was adjusting his father's collar or necktie; and that at the end of the day his father would drive her to their home or to the station. Other evidence was introduced showing that about a month before Berger quit the family dwelling Mrs. Berger found in his pocket-book a lock of hair which resembled Miss Levy's hair; that about the same time she found among his private papers a letter written by her husband to Miss Levy, at Arizona, telling her, among other things, "to take good care" of herself; also a few Christmas and birthday cards which Mrs. Berger claimed were sent to her husband by Miss Levy; also a silhouette of a woman which she asserted was a likeness of Miss Levy. Furthermore, Miss Anne Berger testified that in May, 1931, which was about two months after the breach of the social relations between the Berger family and Miss Levy, she called on Miss Levy at her apartment in San Francisco and said to her: "You have been seeing my father without letting the family know anything about it and you are gradually undermining, you are gradually changing him, turning him away from his family, and I never thought that could have happened"; and that the only reply made by Miss Levy was, "I neither admit nor deny it." About nine months later, in February, 1932, Miss Levy moved to Oakland; and evidence was introduced showing that Berger frequently visited her there.

Only two witnesses were produced in behalf of defendant. One was a young woman employed in the Berger market who claimed to have heard Mrs. Berger say that Berger left home because of the existence of an unfriendly feeling between him and his married daughter. The other witness was Berger, who related the entire story of his turbulent married life. In this connection he stated in part that as a result of the constant quarreling there had been a total lack of affection between himself and his wife for several years; and he declared most positively that never at any time had Miss Levy suggested that he abandon his family, nor in any manner encouraged or persuaded him to do so; that he did not leave on her account at all but was actually driven from home by his wife; that her querulous disposition made it impossible for him to live with her any longer. Counsel for plaintiff did not see fit to interrogate Berger at all on cross-examination, nor did they offer any testimony in rebuttal.

The main uncontroverted facts appearing in defendant's affidavit which she filed in support of her motion to set aside the judgment were the following: She averred that on June 29, 1932, Berger called at her apartment in Oakland and told her his wife intended to sue her for a large sum of money for alienating his affections unless she compromised and settled with his wife; that she replied she had not been guilty of any wrongdoing, as he well knew, and consequently she would not pay any money whatever; that on the contrary would go directly to his wife and demand an explanation, whereupon Berger dissuaded her from doing so. Continuing, she averred that the next day, June 30, 1932, the complaint was filed and she was served with summons, immediately following which and on the same day Berger called again, saying he knew she had been served with the papers; and that taking possession of the papers he told her he would secure the services of an attorney, which he did; that subsequently she held two short conferences with said attorney, one on July 9, 1932, at which time she verified her answer; that at both conferences said attorney assured her that "there was nothing to said action and that it was without merit and that he would succeed in having the same dismissed without the necessity of going to trial"; that on July 11, 1932, twelve days after the action was instituted, without demurring to the complaint, he filed the answer. Continuing, defendant averred that on September 15, 1932, she again visited said attorney's office, this time to complain about "certain mysterious visits, calls and threats" to which she was being subjected; and that said attorney advised that "she should leave the jurisdiction" of the court and "remain away therefrom for as long a time as it would be convenient for her so to do"; that on September 29, 1932, in pursuance of such advice, she went to Arizona; that upon her return she ascertained that on July 12, 1932, the cause was set for trial for a later date and that during her absence, on stipulation of her attorney, the trial date was advanced. She also averred that at no time and especially when said attorney advised her to leave the state was she informed by him, nor did she know, that the cause had been set for trial; furthermore, she averred that after her departure she received no message nor notice of any kind until November 8, 1932, at which time she learned of the rendition of the verdict; and that thereupon she returned to California at once. With respect to the merits of the controversy defendant averred, among other things, that she

never sought, gained, nor possessed Berger's affections, nor in any way attempted to persuade or encourage him to leave his wife; that both Mrs. Berger and her husband repeatedly told her there had been no affection between them for years; that both sought to discuss with her their marital troubles but that she refused to listen to them; that Berger persisted in calling on her occasionally, against her will, and she told him his visits were not welcome; that the ostensible object thereof seemed to be to obtain money from her with which to extricate himself from his financial difficulties; that consequently his visits became annoying and she asked him to discontinue them; that sometimes she would try to avoid him and at other times refused to see him at all. Furthermore, defendant denied ever having had any such conversation with Miss Berger as related by her, or ever having sent Berger any written communications whatever or having given him any kind of a picture or silhouette. The affidavit then goes on to set forth the evidence defendant claims she could and would produce if given a new trial, including the names of the witnesses and the nature of the testimony they and she would give, all of which appears to be pertinent and relevant to the issues.

Counter affidavits were filed by plaintiff's attorneys in controversion of any intimation of collusion between them and Berger or defendant's attorney; and it may be stated in passing that there is nothing whatever in the record to justify any such intimation. Counter affidavits were also filed by plaintiff and others relating to the merits of the case; and it would appear from some of them that the "mysterious visits and calls" of which defendant complained to her attorney were made by a process server, seeking to serve defendant with a subpoena to appear and give her deposition. However, no counter affidavits were filed by either Berger or said attorney; and consequently so far as the record shows there was no refutation whatever of

the sworn statements made by defendant as to the circumstances under which she claims she was advised and induced to leave the state, nor as to the failure to notify her of the impending trial of the action. Therefore the statements so made by her stood wholly uncontradicted.

[4, 5] The general rule governing a situation of this kind, as it is stated in *McGuire v. Drew*, 83 Cal. 225, 23 P. 312, is that in order to entitle one who has failed to appear at the trial to relief on that ground, he must establish that his absence was without fault or negligence on his part; also, that he has been injured by a trial in his absence, and that a different result would probably be reached if a new trial were had; and that this may be done by showing that he could establish an entirely different case favorable to himself in the event a new trial is granted. See, also, *Hayne on New Trial and Appeal*, § 76, p. 378. As will be seen, the uncontroverted facts stated in defendant's affidavit seem to meet all of the foregoing legal requirements. It is our conclusion, therefore, that under the circumstances therein stated, the denial of defendant's application to fully present her side of the case to a jury amounted to a miscarriage of justice. *Melde v. Reynolds*, 129 Cal. 308, 309, 61 P. 932; *Sluman v. Dolan*, 24 S. D. 32, 123 N. W. 72; *Warren v. Frank Gardner, etc., Co.*, 96 Miss. 284, 51 So. 129; *Anderson v. Graham*, 87 Okl. 278, 210 P. 281; *Bentley v. Ben Williamson Hardware Co.*, 177 Ky. 799, 198 S. W. 232; *Hinman v. C. H. Hamilton Paper Co.*, 53 Wis. 169, 10 N. W. 160.

For the reasons stated the order denying defendant's motion to set aside the judgment is reversed, and the trial court is directed to grant the same upon the condition that defendant pay to plaintiff the expenses incurred by plaintiff at the former trial. *Melde v. Reynolds*, 129 Cal. 308, 61 P. 932. Defendant will recover her costs of appeal.

We concur: TYLER, P. J.; CASHIN, J.

3 Cal.2d 214

**ALLEN et al. v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
S. F. 15279.

Supreme Court of California.
April 18, 1935.

1. United States ⇐3

Where contract of employment was made, work was performed, and injury was received at Fort Miley, a military reservation of the United States, in California, the California Industrial Accident Commission was without jurisdiction of proceeding for compensation (St. 1917, p. 831, as amended).

2. Evidence ⇐23(1)

Supreme Court judicially knows that Fort Miley, in California, has, since January 23, 1893, been a military reservation under the exclusive jurisdiction of the United States (Code Civ. Proc. § 1875, subd. 3; Pol. Code, §§ 33, 34; St. 1891, p. 262; St. 1897, p. 51; Const. U. S. art. 1, § 8, cl. 17).

In Bank.

Petition by William J. Allen, employer, and the Columbia Casualty Company, insurance carrier, to review an award of compensation made to Jack Duley, claimant, by the Industrial Accident Commission in a proceeding under the Workmen's Compensation Act.

Findings and award annulled.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

PRESTON, Justice.

Petitioners (an employer and his insurance carrier) seek the annulment of findings and temporary partial disability award made by respondent commission in favor of respondent Jack Duley, who sustained a fracture of the left heel bone while performing work connected with erection under the Veterans' Administration of the United States of the Veterans' Hospital on premises at Fort Miley, a military reservation situate within the territorial boundaries of the city and county of San Francisco. Petitioners contend that the California Workmen's Compensation Act (Stats. 1917, p. 831, and amendments thereto) is not applicable, and that respondent commission was without jurisdiction in the matter because said territory where the contract of hire was consummated, work performed,

and injury received, was under the exclusive jurisdiction of the federal government. See *Standard Oil Co. v. People of State of California*, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775; *Murray v. Joe Gerrick & Co.*, 172 Wash. 365, 20 P.(2d) 591; *Murray v. Joe Gerrick & Co.*, 291 U. S. 315, 54 S. Ct. 432, 78 L. Ed. 821, 92 A. L. R. 1259; *People v. Mouse*, 203 Cal. 782, 265 P. 944.

[1, 2] Respondents make no effort to refute this contention, but they assert that in the proceedings before the commission petitioners failed to sustain the burden of establishing it as affirmative defense. Petitioners set up the defense by their answer. On the hearing the testimony of the employee and other undisputed evidence showed that the contract was consummated, the work performed, and injury received at Fort Miley, as aforesaid. The commission found this to be the fact, but nevertheless assumed jurisdiction and made said findings and award in favor of respondent employee. Petitioners thereupon sought a rehearing for the purpose of producing in evidence a certified copy of the decree of condemnation by which the premises known as Fort Miley passed into the hands of the United States. The commission refused to grant the rehearing.

Its position is entirely erroneous. Section 1875, subdivision 3 of the Code of Civil Procedure, provides that: "Courts take judicial notice of * * * public and private official acts of the legislative, executive and judicial departments of this state and of the United States, and the laws of the several states * * * and the interpretation thereof by the highest courts of appellate jurisdiction of such states. * * * In all these cases the court may resort for its aid to appropriate books or documents of reference." See, also, *Bell v. Southern Pac. Co.*, 189 Cal. 421, 425, 208 P. 970, and *Southern Pac. Land Co. v. Meserve*, 186 Cal. 157, 193 P. 1055. Thus the following official records, to which petitioners call attention, establish as a matter of judicial knowledge that Fort Miley has, since January 23, 1893, been a military reservation under the exclusive jurisdiction of the United States: Political Code, §§ 33 and 34; United States Constitution, art. 1, § 8, cl. 17; St. 1891, c. 181, p. 262; St. 1897, c. 56, p. 51; final decree and order of condemnation of January 23, 1893, of United States Circuit Court, in action entitled "United States of America, Plaintiff, v. City and County of San Francisco, a municipal corporation, Defendant," No. 11484, condemning for fortification purposes the premises now known as Fort

Miley, recorded in the office of the county recorder of the city and county of San Francisco, state of California, Record of Deeds Book, vol. 1548, p. 100; General Order of the War Department No. 77, issued at Washington April 17, 1906, published 1907 in "General Orders and Circulars of the War Department 1906," establishing the territory described in the above-mentioned condemnation decree as "comprising the military reservation of Fort Miley, California"; Document 496 of the War Department, published in 1916 at page 31 of "United States Military Reservations, National Cemeteries and Military Parks," confirming description and location of "Fort Miley" as a military reservation and subpost of the Presidio.

For the reasons above set forth, the findings and award of the Industrial Accident Commission must be, and they are hereby, annulled.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



3 Cal.2d 110

CALLAHAN v. MARTIN et ux.
L. A. 12569.

Supreme Court of California.
April 2, 1935.

Rehearing Denied May 2, 1935.

1. Mines and minerals ⇨55(4)

Assignment by owner in fee, transferring undivided interest in oil rights in his land, is assignment of interest in real property in nature of incorporeal hereditament and enforceable against subsequent grantee of the fee in general estate, and recordation of such assignment imparts constructive notice to such grantee.

2. Mines and minerals ⇨55(4)

Landowner's assignment of 3 per cent. landowner's royalty, "being 3 per cent. of all oil, gas and other hydrocarbon substances, * * * to have and to hold unto [assignees] or survivor of them, their heirs and assigns forever," held intended to transfer perpetual interest in oil and other hydrocarbon substances to be produced, and not limited to oil produced during continuance of outstanding lease.

3. Mines and minerals ⇨73

Operating lessee under oil and gas lease for term of years, or for term of years and so long as oil shall be produced in paying quantities, has interest or estate in real property in nature of profit à prendre, which is an incorporeal hereditament.

4. Landlord and tenant ⇨70

Property ⇨4

Rights or estate which owner in fee or for life has in land are real property, but right which owner of leasehold interest has in real property is not real property or real estate, but chattel real, which is personalty (Civ. Code, § 14, subd. 2, and § 765).

5. Landlord and tenant ⇨70

Lessee's leasehold interest, though not real property or real estate, is nevertheless an estate in land (Civ. Code, § 14, subd. 2, and § 761).

6. Property ⇨4

Rights in and to land embraced within definition of incorporeal hereditament constitute limited interest or estate in land, and, where such interest is to endure in perpetuity or for life, it is a freehold interest and real property or real estate, but, where it is for years, although an interest in land or in real estate, it is not real estate itself, but a chattel real (Civ. Code, § 14, subd. 2).

7. Easements ⇨24

Servitudes in gross are assignable unless expressly or by necessary implication made personal to particular individual (Civ. Code, §§ 802, 1044).

8. Easements ⇨24

At common law, profit à prendre, if granted in gross, was capable of being transferred in gross (Civ. Code, §§ 802, 1044).

9. Property ⇨4

Incorporeal hereditaments in gross are a species of estate in real property (Civ. Code, § 14, subd. 2, and § 802).

10. Property ⇨4

Code sections defining real property and appurtenances held not to limit incorporeal hereditaments to those appurtenant to a dominant tenement (Civ. Code, § 14, subd. 2, and §§ 658, 662, 802, 1044).

11. Mines and minerals ⇨73

Rights of oil and gas lessee constitute profit à prendre in gross, and such profit à prendre vests in lessee an incorporeal hereditament, a present estate or interest in land, which is a chattel real if it is to endure for years.

12. Mines and minerals ⇨73

Oil and gas lessee, if not granted exclusive possession of surface by the lease, has

nevertheless right to such possession as is necessary and convenient for exercise of his interest.

13. Mines and minerals ↪73

Oil and gas lessee has vested estate in the land prior to production of oil, even though lease contains provisions for forfeiture on failure to discover oil or for breach of covenants of lease, and though rights granted are in consideration of rent and royalty to accrue rather than on cash consideration paid in advance.

14. Mines and minerals ↪79(1)

Royalty return which oil and gas lessee renders to lessor is rent or so closely analogous thereto as to partake of incidents thereof.

15. Mines and minerals ↪74

Where, under landowner's assignment of oil rights, the assignee's rights are not limited to duration of particular lease, but are in perpetuity, assignee has right to participate in entering into new leases for production of oil on the premises, and future leases cannot be terminated without assignee's consent.

16. Mines and minerals ↪74

Landowner's assignee in perpetuity of a royalty interest becomes in effect tenant in common with assignor, who retains partial interest in the oil rights, and with other assignees in the right to drill for and produce oil, and this implies right of entry of assignees for production of oil equally with lessor owner, even though the assignment is silent as to right of entry in assignee (Civ. Code, § 3522).

17. Mines and minerals ↪74

Landowner's assignee of oil rights takes subject to existing leases of which he has actual or constructive notice.

18. Mines and minerals ↪74

Interest of landowner's assignees of undivided interest in oil not limited to duration of existing lease held real property, and recordation of assignment charged landowner's subsequent grantee of fee in the general estate with constructive notice of the assignment, and deed to such grantee could not impair assignees' rights (Civ. Code, § 14, subd. 2, and § 802).

In Bank.

Appeal from Superior Court, Los Angeles County; James L. Allen, Judge.

Action by C. B. Callahan against Frank Martin and wife. From an adverse judgment, defendants appeal.

Reversed.

Prior opinion, 24 P.(2d) 866.

O. E. McDowell, W. M. Greathouse, and Harry F. Sewell, all of Los Angeles, for appellants.

Pease, Dolley & Elson, Robert M. Pease, Roy P. Dolley, and Pease & Dolley, all of Los Angeles, for respondent.

PER CURIAM.

Plaintiff, C. B. Callahan, as the owner in fee of real property in the county of Los Angeles, brought this action to quiet his title to said real property and "to oil, gas and other hydro-carbon substances and/or minerals in place within said land and to be produced, extracted and saved on or from said land." Defendants Frank Martin and Stella Meyer Martin, his wife, claim an interest in said oil and other substances by virtue of an assignment to them of 3 per cent. of all oil, gas, and other hydrocarbon substances produced on said property, which assignment was executed by Jose Gonzales, through whom plaintiff derails title to the fee by mesne conveyances. The trial court entered judgment for Callahan. The appeal presents the question whether the assignment to defendants Martin made by Gonzales while he was the owner in fee of the land vested in said defendants oil rights which survived the conveyance of the land by Gonzales.

The facts may be stated briefly: On July 28, 1922, Jose Gonzales, a minor, through his guardian, executed an oil and gas lease covering said property, reserving to himself a one-sixth landowner's royalty in the oil and other substances to be produced, the oil royalty to be paid in money or in kind at the lessor's option. The lessees also agreed to pay a cash rental of \$60 a month, to continue until the royalty agreed to be paid should equal or exceed that sum. The lease was for a term of 20 years, and so long thereafter as oil should be produced in paying quantities, unless sooner terminated or forfeited. It contained provisions for forfeiture for failure to perform the covenants and conditions of the lease.

On July 31, 1923, while said lease was in full force and effect, Gonzales and wife executed the instrument which forms the basis of defendants' claim herein. It is as follows:

**"Conveyance and Assignment of
Royalty Interest**

"Know all men by these presents: That Jose Gonzales and Eulalia Gonzales, his wife, of Downey, California, hereinafter des-

ignated as the sellers, for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration to them in hand paid by Frank Martin and Stella Meyer Martin, husband and wife, of Whittier, California, hereinafter designated as the buyers:

"Do hereby grant, bargain, sell, convey, transfer, assign and set over unto said Frank Martin and Stella Meyer Martin, husband and wife, as joint tenants, three per cent. (3%) landowner's royalty, being three per cent. (3%) of all oil, gas and other hydrocarbon substances and/or minerals produced, extracted and saved on the following described real property located in the County of Los Angeles, State of California, to-wit: [Description of property]

"To have and to hold unto the said buyers or the survivor of them, their heirs and assigns forever.

"In Witness Whereof, the said sellers have hereunto signed their names this 31st day of July, 1928.

"Jose V. Gonzales

"Eulalia L. Gonzales."

Thereafter, on May 29, 1929, Gonzales and wife executed a deed conveying the fee in said real property, "subject to conditions, restrictions, reservations, easements, rights and rights of way of record," to John F. Tracey, and Tracey, by deed dated June 6, 1929, conveyed to C. B. Callahan, plaintiff herein. This conveyance was made subject to "conditions, restrictions, reservations, rights, rights of way and easements of record." The holder of the lease executed a quitclaim deed, dated May 28, 1929, to Gonzales and wife, with the object of terminating said lease. Callahan subsequently entered into a new lease after the conveyance to him from Tracey. All instruments, including the assignment to defendants Martin by Gonzales, were recorded within a few days after execution. A well was drilled on the property in 1922, and continued in production until about June 10, 1929. It does not appear from the record whether oil has been produced under the new lease executed by Callahan.

[1] We are of the view that an assignment made by an owner in fee transferring an undivided interest in oil rights in his land is an assignment of an interest in real property, and enforceable against a grantee of the fee in the general estate. It follows that recordation of such an assignment of oil rights imparts constructive notice to a subsequent grantee of the fee in the general estate. In the case herein Callahan procured a guaranty of title, which described title as

vested in him, but listed the assignment to the Martins as an encumbrance. It was stipulated at the trial that this guaranty "was received by Mr. Callahan at the time of the delivery of the deed by Tracey [Callahan's grantor] to Callahan." Since the Tracey-Callahan deed is dated June 6, 1929, and recorded June 24, 1929, and the guaranty is dated June 27, 1929, it is to be inferred that the guaranty of title was not delivered to Callahan until after the recordation of the deed to him. While it is probable that he had actual notice of the assignment to the Martins, prior to recordation of the deed to him, in the absence of any evidence on the point except this stipulation, we prefer to rest our conclusion on the premise that recordation of said assignment charged him with constructive notice thereof.

[2] The situation presented in the instant case is a usual one in the development of oil lands. At the time of the landowner's assignment of a 3 per cent. royalty interest to the Martins, the land was subject to a lease for the production of oil and gas, under which the operating lessees were entitled to retain five-sixths of all oil and other hydrocarbon substances produced, rendering to the lessor-owner one-sixth, as a return for the privileges granted by the lease. It was not contemplated that the rights assigned to the Martins should in any way infringe upon the rights of the operating and producing lessee. The percentage assigned to the Martins was less than the percentage returnable to the landowner as his royalty, and was deductible from the landowner's share. To the lessee was given the exclusive right to prospect and drill for oil and gas for a period of 20 years, and for so long thereafter as oil and other hydrocarbon substances should be produced in paying quantities, with the right to such possession of the surface as was necessary and incidental to its oil operations. The persons to whom the landowner transfers varying percentages in oil to be produced on his land by royalty instruments are not equipped ordinarily to operate oil wells, but are investors, who desire to share in the profits from the development and sale of oil. The assignment of a royalty interest to the Martins herein was not limited to oil produced during the continuance of the lease, or during a fixed period of years, but was designed to transfer to them a perpetual interest in oil and other hydrocarbon substances to be produced from the land. It expressly provides that the assignment shall run to the "buyers, or the survivor of them, their heirs and assigns forever." Thus, the case

involves the rights of an assignee of oil royalty under an assignment unlimited as to duration, not the rights of an assignee under an assignment limited to royalty to be realized from a designated lease.

The question to be determined in the instant case is as to the nature of the rights of the purchaser of the oil royalty interest. At the time of the transfer of the royalty interest to the Martins, on July 31, 1928, the lease was in full force and effect. Thereafter the lessees executed to the lessor, Gonzales, and to his wife, a quitclaim deed, dated May 28, 1929, with the object of terminating the lease, and the well on the property ceased production on June 10, 1929. Callahan did not become the owner of the fee in the land until some time after June 6, 1929, probably after June 10, when the well ceased production. The Martins did not claim in the court below that the termination of the lease without their concurrence was ineffective, or pray that it be reinstated, but rather seem to acquiesce in the acts of the lessor and lessees as an effectual termination. For the purposes of the instant case, we accept the termination of said lease as an established fact.

The nature of the interest of an assignee to whom an owner of land transfers a percentage interest in oil rights has been the subject of consideration in several recent cases in this state, to be noticed hereinafter, but so far has not been precisely defined. It is the contention of respondent Callahan herein that such a transfer is merely the personal contract of the owner of the land, at most a contract for the sale of oil brought to the surface and reduced to possession as personal property, and that it creates in the assignee no rights in oil produced after his assignor has transferred the fee in the land. The theory that assignees of percentage interests in oil rights have no enforceable rights in oil produced after a transfer by the assignor of the fee in the land is widely repudiated. The difficulty experienced in defining with exactitude the nature of the assignee's rights is due in part to the fact that the oil industry is of very recent development, while in this country, by statute and judicial precedent, our classification of property as realty or personalty is based on common-law definitions which crystallized in a time when oil interests were not the subject of judicial cognizance.

Some jurisdictions adhere to the theory that the owner of land has an estate in oil and gas beneath the surface in like manner as he has an estate in the surface; that oil

and gas in place beneath the surface of land constitute a part of the land, and as such are real property, may be granted separate and apart from the surface, and when so granted vest in the assignee an estate in definite corporeal real property. This theory cannot be better enlarged upon than by the following quotation from *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, 719, 720, L. R. A. 1917F, 989:

"It is no longer doubted that oil and gas within the ground are minerals. They have peculiar attributes not common to other minerals because of their fugitive nature or vagrant habit—the disposition to wander or percolate, and the possibility of their escape from beneath one part of the surface of the earth to another. Nevertheless, they are to be classed as minerals. [Citing authorities.] In place, they lie within the strata of the earth, and necessarily are a part of the realty. Being a part of the realty while in place, it would seem to logically follow that, whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results. It is generally conceded that, for the purpose of ownership and conveyance of solid minerals, the earth may be divided horizontally as well as vertically, and that title to the surface may rest in one person and title to the strata beneath the surface containing such minerals in another. * * *

"If they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty. * * * Their conveyance while in place, if the instrument be given any effect, is consequently the conveyance of an interest in the realty." See, also, *Stephens v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566, note, 585; *Leonard v. Prater* (Tex. Com. App.) 36 S.W.(2d) 216, 86 A. L. R. 499, note, 506.

Under this theory, the possibility of the escape of oil and gas beneath the surface of the assignor's land at the time of the conveyance of an interest in oil and gas in place, as by being drawn off through wells on other lands, is recognized, and gives rise to statements that the owner of the surface, or his assignee of oil rights in the event of a severance of surface and oil rights, has a defeasible fee in the minerals, an estate subject to being defeated through the escape of oil and gas to other lands. But, as a development of a logical theory appropriate to the facts, the oil and gas in place doctrine, which in terms describes a grant of an inter-

est in oil rights which is unlimited as to duration as a present transfer of a defeasible fee in definite corporeal real property, seems not to take into account the circumstance that the oil actually brought to the surface, and to which the assignee's rights attach, may be, not only the oil and gas in place beneath the surface of the assignor's land at the time of the assignment, but also oil drawn off from beneath the surface of other lands. There is a further difficulty in applying the oil and gas in place theory, which implies a present transfer of definite corporeal real property, when the operating oil lease is not of unlimited duration, or for so long as oil shall be produced in paying quantities, but for a fixed period of years which may not exhaust the oil, or when the assignment of landowner's royalty is to extend only to oil produced during a fixed period of years.

By reason of these anomalies, as the law relating to oil and gas has developed during recent years, and the relationships arising from dealings in this type of property have been analyzed more closely by the courts, the oil in place doctrine has been rejected by a large number of jurisdictions, and other theories developed, which give due recognition to the fugacious, vagrant nature of oil and other hydrocarbon substances, yet in their logical application protect oil interests as estates in real property. There are intimations of approval of the oil and gas in place doctrine in some of the decisions in this state. *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 144, 99 P. 483, 20 L. R. A. (N. S.) 211; *Chandler v. Hart*, 161 Cal. 405, 414, 119 P. 516, Ann. Cas. 1913B, 1094; *Black v. Solano Co.*, 114 Cal. App. 170, 174, 299 P. 843; *Stone v. City of Los Angeles*, 114 Cal. App. 192, 299 P. 838. But other cases unequivocally declare that the owner of land does not have an absolute title to oil and gas in place as corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land. *People v. Associated Oil Co.*, 211 Cal. 93, 101, 294 P. 717; *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 741, 24 P.(2d) 971, 88 A. L. R. 1271; *Bandini Petroleum Co. v. Superior Court*, 110 Cal. App. 123, 293 P. 899; see, also, *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A. L. R. 403, 412; *McCoy v. Arkansas National Gas Co.*, 175 La. 487, 143 So. 383, 85 A. L. R. 1147; *Rich v. Doneghey*, 71 Okl. 204, 177 P. 86, 3 A. L. R. 353, with note.

[3] Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit à prendre, which is an incorporeal hereditament, and that the assignee of a royalty interest in oil rights under an assignment by the landowner also has an interest or estate in real property in the nature of an incorporeal hereditament.

[4, 5] "Real property" is defined by section 14, subd. 2, Civil Code, as "coextensive with lands, tenements, and hereditaments," to which Blackstone gives the appellation "things real." Cooley's Blackstone, vol. 1 (4th Ed.), p. 443. At this point it is appropriate to note that the word "property" is commonly used in two different senses: First, it is applied to those external things which are the objects of rights or estates, to those things which, in the language of Blackstone, are objects of dominion or property. Cooley's Blackstone, supra, p. 443. It is also applied to the rights or estates which a man may acquire in and to things. Cooley's Blackstone, supra, p. 433, including footnote 2. Thus land, as the object of rights, is described as a thing real, or as real property. The rights or estate which the owner in fee or for life has in land are also described as real property, but those rights which the owner of a leasehold interest has in and to the land or real property, as the object of rights, are not real property, or real estate, but a chattel real, which is personalty. Section 765, Civ. Code; *Jefferis v. Easton, Eldridge & Co.*, 113 Cal. 345, 352, 45 P. 680; *Summerville v. Stockton Mill Co.*, 142 Cal. 529, 537, 540, 76 P. 243; *First National Bank v. Brashear*, 200 Cal. 389, 253 P. 143; *Prairie Oil & Gas Co. v. Jordan*, 151 Okl. 147, 3 P.(2d) 170, 79 A. L. R. 492; *First National Bank v. Dunlap*, 122 Okl. 288, 254 P. 729, 52 A. L. R. 126, 129, with note, 135; 22 Cal. Jur. 416. Although not real property or real estate, a leasehold is nevertheless an estate in land, an estate in real property. Section 761, Civ. Code; *Chandler v. Hart*, 161 Cal. 405, 413, 119 P. 516, Ann. Cas. 1913B, 1094; *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656; *Harvey v. Weisbaum*, 159 Cal. 265, 267, 113 P. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115; *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 686, 102 P. 932, 24 L. R. A. (N. S.) 1066; *In re Estate of White*, 53 Cal. 19; *Guy v. Brennen*, 60 Cal. App. 452, 213 P. 265; Cooley's Blackstone, vol. 1, supra, p. 386. This duality of

meaning should be borne in mind in determining the nature of oil leases and royalty assignments.

The common law included, in addition to lands and tenements, in the category of things real, hereditaments, corporeal and incorporeal, and section 14, subd. 2, Civil Code, noted above, preserves this classification. A hereditament, as defined by Blackstone, included, not only lands and tenements, but whatsoever passed to the heirs at law, rather than to personal representatives, "be it corporeal or incorporeal." Cooley's Blackstone, *supra*, p. 444. Blackstone lists ten sorts of incorporeal hereditaments: advowsons, tithes, commons, ways, offices dignities, franchises, corodies or pensions, annuities, and rents. Not all are rights in or pertaining to land. The annuity, for instance, is "chargeable only upon the person of the grantor," and "yet a man may have a real estate in it, though his security is merely personal." Cooley's Blackstone, *supra*, p. 467. Of the ancient incorporeal hereditaments listed by Blackstone, several either are not recognized at all in this country, or, if they do not involve rights in or to land, are not classed as things real. But a number of the common-law incorporeal hereditaments which involve rights connected with or pertaining to land persist, and are recognized generally as a species of interest in land, or estate in real property. Appeal of North Beach & M. R. Co., 32 Cal. 499, 506, 510, 511; Smith v. Cooley, 65 Cal. 46, 2 P. 880; Patchett v. Pac. Coast Ry. Co., 100 Cal. 505, 35 P. 73; Corea v. Higuera, 153 Cal. 451, 95 P. 882, 17 L. R. A. (N. S.) 1018; Painter v. Pasadena L. & W. Co., 91 Cal. 74, 81, 84, 27 P. 539; Parsons v. Clarke (C. C. A.) 24 F.(2d) 338; O'Sullivan v. Griffith, 153 Cal. 502, 505, 95 P. 873, 96 P. 323; Zlozower v. Lindenbaum, 100 Cal. App. 766, 281 P. 102; Hoyt v. Hart, 149 Cal. 722, 730, 87 P. 569; Eastman v. Piper, 68 Cal. App. 554, 229 P. 1002; 2 Tiffany, Landlord and Tenant, pp. 1111, 1112; 9 Cal. Jur. 944.

The incorporeal hereditament of common is defined by Blackstone as "being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like." Cooley's Blackstone, *supra*, p. 455. These are the rights which are described as profits à prendre, and they may be several as well as in common. See, discussion, 2 Tiffany, Real Property, 1391.

[6] Jurists writing since Blackstone's time have remarked that his inclusion of incorporeal hereditaments, together with lands and

tenements, as "things," or objects in which dominion or property may be had, is somewhat misleading. See 1 Tiffany, Real Property (2d Ed.) p. 9, note 27, citing Austin, Jurisprudence (3d Ed.) 371, 804; Digby, History Real Property (4th Ed.) 304, note; Hohfeld, 23 Yale Law Journal, p. 23; Salmond, Jurisprudence (4th Ed.) 220. Where the incorporeal hereditament relates or pertains to land, it is, rather, a designation of a certain class of rights in and to land, just as an estate in fee simple absolute is the designation applied to the rights and interests of the person who has the fullest and most absolute estate in lands known to the law. That rights in and to land, though they are embraced within the definition of an incorporeal hereditament, constitute a limited interest or estate in land, is generally recognized. (See cases cited second paragraph above.) Where this limited interest is to endure in perpetuity or for life, it is a freehold interest, and real property or real estate, as well as an estate in real property. But, where it is for years, although an interest in land or in real estate, it is not real estate, but a chattel real, in like manner as a lease for years. Thus in the early case of Smith v. Cooley, 65 Cal. 46, 2 P. 880, 881, this court said, in consideration of a grant of mining rights: "This particular estate or incorporeal hereditament is what is known in law as a servitude 'in gross,' or a personal servitude, imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents, or from quarrying and digging it for ores, or from harvesting its fruits, crops, and vintages, etc. Sections 802-806, Civil Code. As an incorporeal hereditament, it is subject to the general rules which govern the enjoyment of real property, and to the laws of descent, devolution, and transfer by act of law, according to the freehold or chattel interest acquired in it.
* * *

[7-10] As noted above, the definition of "real property" given in section 14, subd. 2, Civil Code, corresponds to Blackstone's definition of "things real"—lands, tenements, and hereditaments. Section 801, Civil Code, lists as "land burdens, or servitudes upon land," which "may be attached to other land as incidents or appurtenances," and which "are then called easements," many of the common-law incorporeal hereditaments, including the "right of taking water, wood, minerals, and other things." Subdivision 5.

The land to which the easement is attached is called the "dominant tenement." Section 802, Civil Code, lists land burdens or servitudes upon land in gross, which "may be granted and held, though not attached to land," and includes the common law incorporeal hereditaments of "taking water, wood, minerals, or other things" (subdivision 6), and "the right of taking rents and tolls" (subdivision 4). There seems to have been some question at common law as to the assignability of servitudes in gross, other than profits à prendre. *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 P. 539. But under our Code, section 1044, Civil Code, such servitudes are assignable unless they are expressly or by necessary implication made personal to a particular individual. *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 P. 1024. And at common law a profit à prendre, if granted in gross, was capable of being transferred in gross. *Painter v. Pasadena L. & W. Co.*, supra; 2 *Tiffany, Real Property*, p. 1392. See *Cooley's Blackstone*, vol. 1, p. 456, common in gross. Incorporeal hereditaments in gross have been recognized as a species of estate in real property in many decisions in this state, of which we cite a few: *Appeal of North Beach & M. R. Co.*, 32 Cal. 499, 506, 510, 511; *Stockton Gas, etc., Co. v. San Joaquin County*, 148 Cal. 313, 83 P. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511; *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; *Smith v. Cooley*, 65 Cal. 46, 2 P. 880; *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 P. 539; *Arkley v. Union Sugar Co.*, 147 Cal. 195, 81 P. 509; *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 P. 73; *O'Sullivan v. Griffith*, 153 Cal. 502, 505, 95 P. 873, 96 P. 323. In view of the decisions and the provisions of section 14, subd. 2, §§ 802, 1044, Civil Code, it cannot be held that the provisions of sections 658 and 662, Civil Code, limit incorporeal hereditaments in this state to those only which are appurtenant to a dominant tenement. Section 658 lists land as a species of real property, but it does not attempt to enumerate the various estates which may exist in land, of which an incorporeal hereditament in gross is one.

[11, 12] Under the usual oil and gas lease, the owner-lessor transfers to his lessee his right to drill for and produce oil and other substances. The rights of the lessee present a clear case of a profit à prendre in gross, a right to remove a part of the substance of the land. If the oil and gas lessee is not granted exclusive possession of the surface by the

terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which, in fact, may preclude any other surface possession. This profit à prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years. *Smith v. Cooley*, 65 Cal. 46, 2 P. 880; *Jones v. Pier*, 124 Cal. App. 444, 449, 12 P.(2d) 646; *Beam v. Dugan*, 132 Cal. App. 546; *Merrill v. California Petroleum Corp.*, 105 Cal. App. 737, 288 P. 721; *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656; *Jameson v. Chanslor-Canfield Oil Co.*, 176 Cal. 1, 167 P. 369; *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 P. 73; *Stone v. City of Los Angeles*, 114 Cal. App. 192, 299 P. 838; *Bartholomae Oil Corp. v. Delaney*, 112 Cal. App. 314, 296 P. 390; *Ewert v. Robinson (C. C. A.)* 289 F. 740, 35 A. L. R. 219, note p. 234; *Rich v. Donaghey*, 71 Okl. 204, 177 P. 86, 3 A. L. R. 352, note 378. See, also, note, 59 A. L. R. 701.

[13] That the lessee has a vested estate in the land prior to production of oil, and although the lease contains provisions for forfeiture upon failure to discover oil, or for breach of covenants of the lease, and although the rights granted are in consideration of rent and royalty to accrue, rather than upon a cash consideration paid in advance, is established by the above-cited cases. See note, 3 A. L. R. 378, as to effect of surrender clauses. Under an ordinary lease of surface rights, with provision for rentals to accrue, a leasehold estate vests in the lessee, although the lease contains provision for forfeiture upon conditions subsequent. In *Brookshire Oil Co. v. Casmalia, etc., Co.*, 156 Cal. 211, 103 P. 927, it was stated that, prior to discovery of gas and oil, the rights of the lessee are inchoate and no estate vests in him, and this decision has been cited in several cases. However, this qualification was not recognized in a number of the cases cited in the preceding paragraph, and in *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656, 658, it was expressly repudiated, as follows:

"Appellants contend that prior to the discovery and production of oil the lease carried only a naked and exclusive privilege to enter upon the premises for that purpose, that is to say, the 'lease' was a mere option to enter the

demised premises for the purpose of exploring for oil and is, not the lease of an interest in property, but a license. Respondents argue that, although the rule in other jurisdictions is that a lease of oil land is a mere license, in California the interest of the lessee under an oil lease is an estate for years and a present interest and estate in land. *Jameison v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 167 P. 369; *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094.

"These authorities support this contention.

* * *

[14] The royalty return which the lessee renders to his lessor for this estate in the land is rent, or so closely analogous to rent as to partake of the incidents thereof. In the lease in the instant case, executed by Gonzales through his guardian, the lessor's oil royalty is referred to as "rent or royalty." In discussing the nature of landowner's royalties, the Supreme Court of the United States said in *United States v. Noble*, 237 U. S. 74, 35 S. Ct. 532, 535, 59 L. Ed. 844:

"The rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. * * *

"It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land."

That the right to receive future rents and oil royalties is an incorporeal hereditament, an interest in land, is recognized in the following cases: *Schmid v. Baum's Home of Flowers*, 162 Tenn. 439, 37 S.W.(2d) 105, 75 A. L. R. 261, note 270; *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491, 122 N. E. 575; *McMenamy Invest. & Real Estate Co. v. Dawley*, 183 Mo. App. 1, 165 S. W. 829; *Arrington v. United Royalty Co.*, 188 Ark. 270, 65 S.W. (2d) 36, 90 A. L. R. 765; *State v. Royal Mineral Ass'n*, 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918A, 145, with note 148; *Roberson v. Pioneer Gas Co.*, 173 La. 313, 314, 137 So. 46, 82 A. L. R. 1264, 1268; *McIntire v. Bond*, 227 Ky. 607, 13 S.W.(2d) 772, 64 A. L. R. 630. In *Schmid v. Baum's Home of Flowers*, supra, the court had under consideration the ques-

tion whether an assignment of rents, in that case a money rental upon a building lease, rather than an oil lease, was subject to recordation. The court held that such assignments were subject to the registration laws, except that, as a lease for a period of 3 years or less was not required to be recorded, a like exemption should be implied as to assignments of rent for a similar period. In several recent decisions in this state oil royalties have been treated as rents. *Beam v. Dugan*, 132 Cal. App. 546, 23 P.(2d) 58; *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, 6 P.(2d) 71, 80 A. L. R. 453, with note, 461; *Adams v. Petroleum Midway Co.*, 205 Cal. 221, 270 P. 668; *Clark v. Richfield Oil Co.*, 127 Cal. App. 495, 16 P.(2d) 162.

[15-17] Thus, the recognition of oil royalties as rents affords a basis for sustaining an assignment of oil royalty by a landowner as a transfer of an interest in real property. But, where an assignment by the landowner of an interest in his oil rights is not limited to oil to be produced under a particular lease, but is in perpetuity, as is the assignment to the Martins in the instant case, with the intent that the interest shall survive a forfeiture or other termination of the lease, there is more than a transfer of rent or royalty to be rendered under a lease in effect at the time of the assignment and under future leases. In *Jones v. Pier*, 124 Cal. App. 444, 12 P.(2d) 646, in which a petition for hearing in this court was denied, the appellate court held that, under an assignment of oil royalty limited to the duration of a particular lease, the operating lease cannot be terminated by agreement between the lessors and operating lessee without the consent of the assignee of an oil interest. This decision was recognized with approval in *Metzler & Co. of California v. Stevenson*, 217 Cal. 236, 18 P.(2d) 330, and in *Beam v. Dugan*, 132 Cal. App. 546, 23 P.(2d) 58, in which this court denied a petition for hearing.

In *Beam v. Dugan*, supra, it was held that the rights of the assignee of oil royalty to share in oil produced extend not only to the lease in effect at the time the assignment is made, but to all future leases where the assignment of oil rights is unlimited in duration. In *Jones v. Pier*, supra, it was held that, where the assignee's rights are limited to a particular lease, said lease cannot be terminated without the assignee's consent. Where, under the assignment of oil rights, the assignee's rights are not limited to a particular lease, but are in perpetuity, under the

rule of *Beam v. Dugan*, supra, that the assignee's rights extend to oil produced under all leases, it must be held that such future leases cannot be terminated without the assignee's consent. It must follow, if such assignee must be a party to any lawful termination of leases, that he must have a right to participate in entering into new leases for production of oil upon the premises. We are of the view that an assignee of a royalty interest becomes in effect a tenant in common with his assignor who retains an interest in the oil rights, and with other assignees of percentage interests, in the right which the assignor had, by virtue of his ownership of the fee in the land, to drill for and produce oil. A several right of the owner becomes a right exercisable by him jointly with others. We are not here holding that the lease which Callahan entered into after the conveyance to him, and in which the Martins presumably did not participate, is invalid as to them. All the circumstances connected with said lease are not before us. For all that here appears, the Martins acquiesce in said lease and claim only oil rights as to 3 per cent. of oil produced thereunder.

What we have said here implies a right of entry for the production of oil in assignees of oil rights equally with the lessor-owner who retains a partial interest in oil to be produced. Of course, we are not to be understood as here holding that an assignee of oil rights may exercise a right of entry while a valid operating lease is in effect which confers an exclusive right to enter, drill for, and produce oil on the lessee thereunder. The assignee of oil rights takes subject to existing leases of which he has notice, actual or constructive. In this analysis, the assignee of an oil royalty not limited to the duration of a particular lease has a right in the nature of a profit à prendre in the land, and this right constitutes an interest in said land an estate in real property. Of course, it is not to be contemplated from the circumstance that tenants in common in oil rights have coequal rights of entry, that a large number of investors holding assignments of small percentages in oil rights will wish, each for himself, to undertake the production of oil. It is not necessary for us here to determine in detail the rights inter se of those who as tenants in common are jointly interested in oil rights in land. The question is the subject of two recent annotations in *American Law Reports*, in which decisions are cited which recognize that a tenancy in common may exist

in oil rights independently of surface rights, even though the oil and gas in place theory is rejected. 40 A. L. R. 1400, note to *Prairie Oil & Gas Co. v. Allen* (C. C. A.) 2 F.(2d) 566, 40 A. L. R. 1389; 91 A. L. R. 205, note to *Earp v. Mid-Continent Petroleum Corp.*, 167 Okl. 86, 27 P.(2d) 855, 91 A. L. R. 188. If numerous holders of oil rights in a single parcel of land are unable to agree upon an operating lessee or upon the terms of an oil lease, we are inclined to think that the powers of a court of equity may be invoked to formulate a just and reasonable plan for the development and production of oil upon the land, and to settle the controversy in accordance therewith. But this can be determined as the question may arise in future litigation. The rules of law should be sufficiently adaptable to reach a desirable result in this developing field of the law.

What we have said here applies, although the assignment of the undivided interest in oil rights is silent, as in the instant case, as to any right of entry in the assignee. The right exists by virtue of the unqualified grant to the assignee of an interest in oil to be produced from the land, in like manner as certain rights follow without express enumeration from an ordinary deed absolute of real property. One who grants a thing is presumed to grant also whatever is essential to its use. Section 3522, Civ. Code; *Smith v. Cooley*, 65 Cal. 46, 2 P. 880; *Cave v. Crafts*, 53 Cal. 135, 140; *Sulloway v. Sulloway*, 160 Cal. 508, 513, 117 P. 522; *Davison v. Reynolds*, 150 Ga. 182, 103 S. E. 248. The right of entry is an incident to the grant of an estate in the mineral rights.

In support of their contention that a right of entry cannot be implied under such circumstances as we have outlined above, respondent relies earnestly on *Morgan v. McGee*, 117 Okl. 212, 245 P. 888. In that case the owner of land granted to another all oil and other minerals beneath the land. It was held that this assignment conferred no rights against the subsequent grantee of the fee, as a right of entry could not be implied. The court made a distinction between the situation where the owner of land conveys to another, reserving ownership of the oil and other minerals in himself, in which case a right of entry is implied [*Newbern v. Gould*, 162 Okl. 82, 19 P.(2d) 157], and the case where he assigns the oil and minerals to another, retaining ownership of the general estate in the land, in which case the right of entry must be expressed. We are of the view that

this distinction is not supported by reason, and that the basis of the court's holding that a right of entry is implied upon a reservation by the landowner of oil and minerals to himself—that equity will not permit a right to fail for want of a remedy to enforce it—applies with equal force to a grant of such mineral rights. The decision of the Oklahoma court is probably in conflict with its decision in *McKernon v. Josey Oil Co.*, 106 Okl. 100, 233 P. 451, decided the preceding year, and we have found no subsequent Oklahoma case where *Morgan v. McGee* has been relied on to defeat an assignee of mineral rights. Such a rule would be at variance with the principle, supported by *Metzler & Co. of California v. Stevenson*, supra; *Jones v. Pier*, supra, and *Beam v. Dugan*, supra, that the holders of oil royalty interest have a right to participate in the termination of existing leases, and the principle which follows therefrom, that they have coequal rights as to executing new leases. These rules imply coequal rights of entry. The holders of oil interests under a landowner's assignments have rights of profit à prendre, which are estates in real property, and are properly described as real property, or real estate, where, as in the instant case, they are to endure in perpetuity.

It is unnecessary here to determine the effect of our decision in the instant case on the nature of royalty interests created by an operating lessee, rather than by the landowner lessor, as in the instant case. This question was involved in such cases as *Western Oil, etc., Co. v. Venago Oil Corp.*, 218 Cal. 733, 24 P.(2d) 971, 88 A. L. R. 1271; *Black v. Solano Co.*, 114 Cal. App. 170, 299 P. 843; *Merrill v. California Petroleum Corp.*, 105 Cal. App. 737, 288 P. 721. In these cases the doctrine of potential possession of personality—the oil severed from the land and brought to the surface—was applied. This doctrine has since been abolished by the adoption of section 5 of the Uniform Sales Act, section 1725, Civil Code.

[18] The assignments of oil royalty to the defendants Martin herein, by plaintiff Callahan's predecessor in ownership of the general estate in the land, vested in the Martins an estate in real property described in plaintiff's complaint, and the recordation of the assignment charged plaintiff with constructive notice thereof.

The judgment is reversed.

3 Cal.2d 128

STANDARD OIL CO. OF CALIFORNIA v.
JOHN P. MILLS ORGANIZATION
et al.

L. A. 13885.

Supreme Court of California.

April 2, 1935.

1. Mines and minerals ⇨55(4)

Landowner's assignment of interest in his oil rights creates in assignee an interest or estate in real property which may be asserted against grantee of the fee in general estate in the land.

2. Mines and minerals ⇨55(1)

Interest in oil rights may be transferred separate and apart from general estate in the land.

3. Mines and minerals ⇨54(2)

Under deed granting general estate in the land, grantee generally succeeds to all oil rights in land as incident to the conveyance, except as such rights have previously been assigned by instruments of which such grantee had actual or constructive notice or which are reserved by the deed.

4. Mines and minerals ⇨74

Where block of land subject to single oil and gas lease was subdivided into 83 lots which were conveyed to different owners, each lot owner was, during continuance of the lease, entitled, as to each lot owned by him, to $\frac{1}{83}$ of the landowner's $\frac{1}{8}$ oil royalty, or $\frac{1}{498}$ part of oil produced anywhere on the block, though several of the deeds omitted reference to oil rights, and though oil was brought to surface on lot the deed to which did not refer to oil rights.

5. Mines and minerals ⇨74

Where landowner of block, subject to oil and gas lease, divided block into 83 lots, and conveyed first lot together with a $\frac{1}{498}$ part of all oil and gas produced on the block, owner thereby granted to purchaser a $\frac{1}{498}$ royalty interest in oil rights on each lot in block, and by necessary implication reserved and excepted all oil to be produced on the lot conveyed except a $\frac{1}{498}$ part thereof; $\frac{82}{498}$ being reserved to be transferred with other lots.

6. Mines and minerals ⇨74

Where landowner of block subject to oil and gas lease divided block into 83 lots and granted to purchaser of each lot, except 6 lots, a $\frac{1}{498}$ part of all oil and gas produced on the block, and grantees of lots as to which oil clause was inadvertently omitted joined with other lot owners in alleging in pleadings and contending during trial, of a quiet title

action that transaction should be construed as vesting in each lot owner a $\frac{1}{498}$ part of oil produced anywhere on block, such action was tantamount to written reformation by agreement between the lot owners.

7. Mines and minerals — 74

Where subdivider of block subject to oil lease intended, in subdividing block into 83 lots, to attach to grant of each lot a $\frac{1}{498}$ interest in oil produced on whole block, and through inadvertence omitted the oil clause from deeds conveying 6 lots, but grantees holding deeds without oil clause had in a prior action joined with other lot owners in alleging that transaction vested in each a $\frac{1}{498}$ part of oil produced anywhere on block, and the subdivider, in present action, consented to such construction, decree declaring that each lot owner had $\frac{1}{498}$ royalty interest in oil produced from entire block in perpetuity held not error.

8. Judgment — 203

In case of two conflicting judgments, the later in time controls.

9. Judgment — 743(2)

Judgment not determining oil rights of lot owners, but establishing that lease covering entire block, as to which there had been attempted cancellation without consent of lot owners, was in force, held not res judicata as to oil rights of lot owners inter se involved in subsequent interpleader action.

10. Judgment — 634

Former adjudication will not operate as estoppel as to issues in later action, unless there is identity of parties or their privies and identity of issues.

11. Judgment — 704

Parties to judgment are not bound by it in subsequent proceeding or controversy between them unless they were adverse parties in original action.

12. Stipulations — 18(2)

In interpleader action involving oil rights as between lot owners in block, stipulation that the parties in a prior quiet title action as to one lot only were also the parties in present action or their successors in interest held not intended or construable as extending binding force of prior judgment to persons who from the record appeared not to have been parties thereto either by themselves or by their predecessors.

13. Judgment — 704

In interpleader action involving oil rights, as between cross-complainants and other lot owners in block, in oil produced from entire block, judgment in a prior action quieting title to a single lot in favor of its

owners held not binding in favor of cross-complainant in present action who owned different lots, where cross-complainant and cross-defendants in present action were co-operating parties in former action, who, as answering defendants or interveners therein, joined in urging claim that each lot owner was entitled to participate in oil produced anywhere on block by virtue of oil clause in deed from common owner.

In Bank.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Interpleader action by the Standard Oil Company of California against the John P. Mills Organization, Inc., and others, in which C. Douglass Smith and wife filed a cross-complaint against Constance R. Wright and others. From an adverse judgment, cross-complainants appeal.

Affirmed.

Prior opinion, 27 P.(2d) 650.

C. Douglass Smith, of Long Beach, for appellants.

F. G. Smith and Bradner & Weil, all of Los Angeles, Todd, Pawson, Watkins & Anderson, of Long Beach, and W. I. Gilbert and Lawler & Degnan, all of Los Angeles, for respondent.

PER CURIAM.

The Standard Oil Company of California commenced this action by filing a complaint in interpleader. Said company purchased oil produced on block V, Signal Hill, Los Angeles county, from lessees operating wells on said block under a lease providing for a 16% per cent. or $\frac{1}{6}$ landowner's royalty. Under the complaint interpleader, the Standard Oil Company deposited in court \$71,980.28, the landowner's $\frac{1}{6}$ share of the purchase price due from it, and prayed that the court determine conflicting claims thereto. Other companies deposited in court a total of \$18,451.61, which likewise represented $\frac{1}{6}$ of the price due for oil purchased from operating lessees on said block V.

In 1923 John P. Mills Organization, Inc., was the owner of block V, subject to said oil and gas lease, which provided for a 16% per cent., or $\frac{1}{6}$, landowner's royalty. In that year it subdivided the block into 83 lots, all of which were sold under a plan of subdivision whereby there was to be conveyed to each purchaser of a lot in the block $\frac{1}{83}$ of said $\frac{1}{6}$ landowner's royalty, or a $\frac{1}{498}$ part of all oil and gas produced, saved, and sold on said

block V. On the theory that the oil royalties sold were securities, the Mills Organization procured a permit from the corporation department of the state of California to sell said lots together with a $\frac{1}{498}$ part of oil to be produced from the block with each lot sold. The Mills Organization stated in its application for a permit that the 83 lots with oil rights were to be sold at prices to average \$1,500 per lot, and on this basis the permit authorized sale of the property at an aggregate price of \$124,500.

A provision transferring to each purchaser of a lot " $\frac{1}{498}$ th part of all oil and gas produced, saved and sold on said Block V" was included in all deeds except four, which covered six lots, Nos. 37, 57, 61, 60, 67, and 68. Appellants C. Douglass Smith and Ellen Smith, husband and wife, through mesne conveyances, are the owners of lots 60, 67, and 68, and also of 11 other lots, and of an undivided one-half interest in a further lot. The respondents severally are the owners of other lots in block V. The parties stipulated that all wells on block V were on the property of appellants Smith, except for a well on lot 77, which is not involved in the instant action. The sums deposited in court represent amounts due for oil produced from lots 68 and 83, owned by appellants Smith. By virtue of their ownership of the lots from which the oil was produced, they contend that they are entitled to the full amount deposited in court, to the exclusion of the owners of other lots in the block. By appropriate pleadings the parties submitted to the court the question of the oil rights of respondents in the lands owned by appellants Smith, upon which depends their rights in the fund on deposit in court. By the judgment appealed from the court below decreed that the $\frac{1}{6}$ landowner's royalty from oil produced, or to be produced, on any lot in block V, should be distributed to all lot owners in the block in the proportion of $\frac{1}{83}$ of $\frac{1}{6}$, or $\frac{1}{498}$ of the total production, for each lot owned.

The appellants Smith claim the right to all oil produced, and to be produced, not only from lots 60, 67, and 68, which were sold by the Mills Organization to predecessors in interest of the Smiths by deeds omitting the oil clause, but also from lot 83 and other lots now owned by them, which were transferred by the Mills Organization to appellants' predecessors in interest by deeds containing the oil clause. The trial court herein found that the Smiths purchased their lots with full notice of the scheme of subdivision and the plan that all lot owners should share in oil produced

anywhere on the block, and in the light of the record could have reached no other reasonable conclusion. Appellants were not original grantees of the Mills Organization as to any lots in block V, and did not become owners of any lots in said block until after all 83 lots had been sold by the Mills Organization.

[1-3] The basic proposition asserted by appellants is that assignments by a landowner of royalty interests cannot create any rights which are enforceable against a subsequent grantee of the general estate in the land. This question is determined adversely to appellants in *Callahan v. Martin*, 3 Cal.2d 110, 43 P.(2d) 788, this day decided. We there hold that an assignment by a landowner of an interest in his oil rights creates in his assignee an interest or estate in real property which may be asserted against a grantee of the fee in the general estate in the land. It follows from our analysis in *Callahan v. Martin*, that the owner of land may convey all or a percentage of his oil rights in described land, retaining the residue of the general estate in the land, or that he may grant surface rights, retaining in himself all or a percentage interest in oil rights in the land; that is, interests in oil rights may be transferred separate and apart from the general estate in the land. But, under a deed granting a general estate in the land, the grantee generally succeeds to all oil rights in the land as an incident to the conveyance, except as such rights have previously been assigned by instruments of which such grantee had actual or constructive notice, or are reserved by the deed.

[4] Where a parcel of land subject to a single oil and gas lease is subdivided by deeds which contain no reference to oil rights, there is a conflict of authority in the few cases where the question has arisen as to whether the landowner's royalty on oil thereafter produced goes entirely to the owner of the section on which the oil has been brought to the surface, or is to be apportioned among the several lot owners. The question also arises where land is partitioned among heirs upon the death of the landowner lessor. The problem is the subject of three annotations in *American Law Reports*. *Pittsburgh & West Virginia Gas Co. v. Ankrom*, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157, note 1162; *Musgrave v. Musgrave*, 86 W. Va. 119, 103 S. E. 302, 16 A. L. R. 564, note 588; *McIntire v. Bond*, 227 Ky. 607, 13 S.W.(2d) 772, 774, 64 A. L. R. 630, note 634.

We are of the view that the decisions holding for the rule of apportionment best ac-

cord with the principles laid down in *Callahan v. Martin*, supra, this day decided, and in other decisions of the courts of this state, as to the nature of the interest of the landowner, his lessee, and assignees of oil royalty. Therefore, in the instant case, during the continuance of the oil lease to which block V was subject at the time of its subdivision by the Mills Organization, even in the absence of any provisions in regard to oil rights in the deeds to the 83 lots of approximately equal size, each lot owner would be entitled to $\frac{1}{63}$ of $\frac{1}{6}$ landowner's royalty, or $\frac{1}{498}$ part thereof for each lot owned. The sum of more than \$90,000 deposited in court in the actions herein was produced under the lease in effect at the time of subdivision by the Mills Organization, and was apportionable in the ratio of $\frac{1}{498}$ part for each lot owned, as decreed by the court below. But the court did not limit its decree to oil produced while the lease continued, but, in response to the prayer of the respondents, undertook to determine their oil rights in this ratio for all time. The omission of the oil clause in deeds to 6 of the lots may affect the rights of the owners of these lots, as will hereafter appear.

The most recent of the American Law Reports notes, cited above, is appended to the case of *McIntire v. Bond*, 227 Ky. 607, 13 S. W.(2d) 772, 774, 64 A. L. R. 630, which case clearly states the reason for the rule of apportionment. In that case oil royalty is regarded as rent, an incorporeal hereditament, issuing from the profits of land and payable by the lessee in consideration of the privileges and estate vested in him under the lease. This is in accord with the principles we have this day stated in *Callahan v. Martin*. It has sometimes been said that compensation paid for privileges comprising an incorporeal hereditament cannot be classed as rent. But this view has been criticized (Cooley's Blackstone, vol. 1, p. 446, note; Thompson on Real Property, vol. 1, p. 319), and has been quite generally rejected by the courts, including the Supreme Court of the United States (*United States v. Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. Ed. 844). The view that rent or royalty is not to be apportioned in the situation under consideration rests largely on the theory that the royalty is a payment for oil removed, due the owner of the parcel from which it is taken. The Supreme Court of West Virginia, in *Campbell v. Lynch*, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070, at first adopted the rule of apportionment, but its later decisions in *Pittsburgh & West Virginia Gas Co. v. Ankrom*, supra, and *Musgrave v. Musgrave*, supra, are generally regarded as overruling

Campbell v. Lynch. The strong dissenting opinion of Poffenbarger, J., in *Musgrave v. Musgrave* is quoted by the court in *McIntire v. Bond*, supra, as follows:

"The error in the assumption necessary to these decisions [assumption that rent or royalty is a return for the right to take oil from the land whence the oil is taken] is so well pointed out in the dissenting opinion of Judge Poffenbarger in the *Musgrave* Case that we quote from it: 'Manifestly it is that, but it is just as clearly something more than that. Besides paying for the oil taken out, it holds the lease on all of the land and oil included within its boundaries. It maintains the lessee's right to carry his operations to every part of the tract and precludes operation or mining on any part of it by the owner and everybody else except assignees of the lessee. How then can it be said to be only pay for the oil taken out? A full and true definition of anything must accord fully with its nature and characteristics. "A definition is a description of a thing by its properties or a conception by its attributes." Webster. As a royalty does more in fact and in law than pay for the oil taken out, a description of it, calling it pay for oil taken out, is true as far as it goes, but it stops short of revelation or narration of its complete nature and character. Any intelligent layman on the street knows it does more than that and no lawyer can maintain his client's case in any court, upon the proposition that the royalty only pays for the oil taken out.'" To the same point, see, *Wettengel v. Gormley*, 160 Pa. 559, 28 A. 934, 40 Am. St. Rep. 733; *Keystone Gas Co. v. Allen*, 227 Ky. 801, 14 S.W.(2d) 155.

The owners of separate parcels into which the fee in the land has been subdivided have no right to drill upon their lots while the lease continues, and cannot require the lessee to drill offset wells on their lands, since the burden the lessee assumes by the lease cannot be enlarged. The oil brought to the surface upon one of the several parcels into which the property has been subdivided may in fact be drawn from beneath the surface of the other parcels.

The author of the annotation in 64 A. L. R. 634, to illustrate his point that the rule denying apportionment is most unjust and inequitable, cites *Galt v. Metscher*, 103 Okl. 271, 229 P. 522. In that case the lessee, in an effort to protect the holders of the two parcels of land into which a tract had been divided, attempted to locate a well partly on one parcel, partly on the other, but through mistake placed it entirely on one parcel. Nevertheless, the court felt compelled to apply the rule in that

jurisdiction denying apportionment. The commentator further states (64 A. L. R. at page 639): "It cannot fairly be said to have been the intent of the parties that, if the lessee happened to locate the well upon the tract purchased, the owner of the tract would thereby be enabled to obtain a royalty not only on the oil and gas actually in the land within his boundaries, but also on that in the adjoining lands subject to the same lease. It was not the intent of the parties that either of them should be placed in a position where they would be helpless to protect their right to a royalty upon oil produced from their land, should the lessee, either through the exercise of his best judgment, or through caprice, perform the terms of his contract by drilling wells upon the adjoining tract, especially where the grantee paid a sum of money for the land explainable only upon the theory of the expected profits from operations under the lease."

We conclude that, while the lease on block V at the time of the subdivision thereof by the Mills Organization continues in effect, each lot owner in said block is entitled to $\frac{1}{498}$ part of oil produced anywhere on the block for each lot owned, regardless of the omission of the oil clause in several of the deeds. We now pass to consider the effect of the omission of the oil clause in several of the deeds as to the rights of the parties in the event of a termination of the lease.

[5-7] When the Mills Organization conveyed the first of the 83 lots in block V, together with a " $\frac{1}{498}$ th part of all oil and gas produced, saved and sold on said Block V," it granted to the purchaser a $\frac{1}{498}$ royalty interest in the oil rights on each and every other lot in the block, and by necessary implication reserved and excepted all oil to be produced on the lot conveyed except a $\frac{1}{498}$ part thereof, $\frac{82}{498}$ being reserved to be transferred with other lots. As the Mills Organization sold other lots, this process of grant, reservation, and exception of oil rights continued. All except a few of the lots were sold by the Mills Organization in 1923. The four deeds to the 6 lots inadvertently omitting the oil clause were, except for a deed executed on December 3, 1926, covering lots 52 and 53, the last deeds to be executed by the Mills Organization. Said deeds were dated, respectively, December 9, 1924, May 7, 1926, July 9, 1927, and July 25, 1927.

Of the 6 lots sold without the oil clause, appellants Smith, as noted above, now own lots 60, 67, and 68. The present owners of the other 3 lots, 37, 57, and 61, and also the owners of lots 52 and 53, join with the other

respondents in praying that it be adjudged that each lot owner in the block is entitled to $\frac{1}{498}$ part of the oil produced anywhere on the block for each lot owned, and appellants Smith are the only owners to claim the full $\frac{83}{498}$ or $\frac{1}{6}$ of oil produced on lots owned by them. Appellants Smith deraign title to lots 67 and 68 through one Mitchell, who received a deed from the Mills Organization omitting the oil clause of date July 9, 1927. At the time of the conveyance to Mitchell of lots 67 and 68, and also lot 57, by said deed, all 83 lots, with the exception of these 3 and lot 60, had passed from the Mills Organization. Of the 79 lots sold, all except 2, lots 37 and 61, had been transferred by deeds containing the oil clause, which were duly recorded; that is, 77 lots had been transferred by deeds containing the oil clause. Therefore the most that the Mills Organization could have transferred to Mitchell by express provision in the deed to him for lots 57, 67, and 68 was $\frac{77}{498}$ of the oil to be produced from each of said lots, and this, therefore, is the greatest percentage that could vest in him, and through him in appellants Smith, by reason of the omission of the oil clause in said deed of July 9, 1927. (We are here dealing with the $\frac{83}{498}$, or $\frac{1}{6}$ interest, not with rights of appellants in the $\frac{5}{6}$ working interest which would be released upon the termination of the existing lease.) The same analysis applies to the grant of lot 60, on July 25, 1927, to Polk and Lilly. This lot, also, is now owned by appellants Smith.

The result would be, if appellants Smith are entitled to a $\frac{1}{498}$ interest as to lots 60, 67, and 68, the respondent owners of lots 37, 57, and 61, the other 3 lots transferred without the oil clause, have no oil rights in appellants' lots 60, 67, and 68, and appellants have no rights in respondents' lots 37, 57, and 61. The owners of the 77 lots transferred by deeds with the oil clause have rights in lots 60, 67, and 68, and also 37, 57, and 61, by virtue of the express provision in their deeds. However, there are circumstances which prevent appellants Smith from denying the rights of the owners of lots 37, 57, and 61 in oil produced on their lots 60, 67, and 68. The omission of the oil clause was inadvertent and contrary to the understanding of the parties that a perpetual $\frac{1}{498}$ interest in oil produced anywhere on the block passed with each lot. The holders of said deeds could have brought actions for reformation. The record herein shows that the owners of lots 60, 67, and 68 joined with other lot owners in block V in opposing the claims of one Toms

and wife, owners of lot 77, who claimed all oil produced therefrom, in a prior action, C-1159, in the superior court of Los Angeles county. We shall have more to say of this action in discussing appellants' claim of res judicata. In said prior action the owners of lots 60, 67, and 68 joined with the owners of other lots, including lots transferred without the oil clause, in alleging in their pleadings and contending during the trial that the transaction should be construed as vesting in each lot owner $\frac{1}{498}$ part of oil produced anywhere on the block. As to the owners of lots 60, 67, and 68, this was tantamount to a written reformation by agreement between them and other lot owners. Similar allegations were contained in pleadings in another action, 240, 990 in the superior court of Los Angeles, and Mitchell also accepted payments of $\frac{1}{498}$ part for each lot owned by him on account of oil produced on an early well on block V. The respondent owners of lots 37, 57, and 61 have not appealed from the judgment, which gives the Smiths, as to lots 67, 68, and 60, rights in lots 37, 57, and 61 to the extent of $\frac{1}{498}$ for each of said lots 60, 67, and 68.

As to the rights of the owners of the 6 lots which were transferred without the oil clause to share in oil produced on the 77 lots conveyed with said clause, the effect of the inadvertent omission was to give said owners of the 6 lots no rights in oil produced on any lot other than the particular lot conveyed, and to leave in the Mills Organization $\frac{9}{498}$ of the oil produced on each of said 77 lots. Such $\frac{9}{498}$ part of oil in each of said 77 lots would not pass to the respective grantees of the fee in each of said lots, since such grantees by the terms of their deeds were limited to only $\frac{1}{498}$ for each lot, including the lot granted in fee. The effect of the judgment herein is to vest in the owners of each of said 6 lots a $\frac{1}{498}$ interest in oil produced on each of the other 77 lots (or really 76 lots, since it was agreed that lot No. 77, which had been the subject of a prior action, C-1159, to be hereafter noticed, was not involved in the action herein). The Mills Organization, in which remained the $\frac{9}{498}$ undisposed interest as to each of the other 77 (or 76) lots, was a party to the action herein, and by the form of its pleadings consented to said six lot owners sharing in oil produced on the other 76 lots, in the proportion of $\frac{1}{498}$ interest for each lot. The Mills Organization has not appealed from the judgment herein. It has thus, in effect, in a large measure corrected its inadvertent failure, through omis-

sion of the oil clause, to give said 6 lot owners rights in the other 77 lots.

[8, 9] The only point remaining to be considered is the effect of the judgment in two prior actions involving block V. Appellants Smith contend that the decree in action C-1159 in the superior court of Los Angeles is res judicata of issues in the instant case, and compels entry of a judgment in their favor. Respondents rely on a judgment in former action 240, 990 in the same court. The judgment in this action antedated the judgment in action C-1159. In case of two conflicting judgments the later in time controls. 15 Cal. Jur. 104, and cases there cited. Furthermore, said judgment did not determine the oil rights of the various lot owners who participated therein, but established that the lease covering block V, as to which there had been an attempted cancellation, without the consent of the lot owners, was in full force and effect.

[10, 11] Nor can we accept appellants' argument that the judgment in action C-1159 compels judgment herein in their favor. In said action Ernest G. Toms and wife and Leonard E. Rowe, owners of lot 77, block V, brought suit to quiet title to lot 77 against the claims of other lot owners in said block to participate in oil produced and to be produced on lot 77. The court held that the owners of other lots in said block who appeared as answering defendants or as interveners had no interest or estate in lot 77 or oil to be produced therefrom. As indicated by the pleadings and decree and a stipulation filed in said action, it involved the question of the rights of various lot owners in said block V in oil produced on other lots by virtue of the subdivision of said block by the Mills Organization and the inclusion in the deeds to grantees of a transfer of " $\frac{1}{498}$ part of all oil and gas produced, saved and sold on said Block V." However, it is fundamental as to the doctrine of res judicata that, before the former adjudication may operate as an estoppel as to issues in the later action, there must be an identity of parties, as well as an identity of issues. The subsequent action must be between the parties or their privies. 2 Freeman on Judgments, on p. 1414; 1 Freeman on Judgments, p. 887; 15 Cal. Jur. 181, and cases cited in these two texts. It is also a general principle in the field of res judicata that parties to a judgment are not bound by it in a subsequent proceeding or controversy between them, unless they were adverse parties in the original

action. 1 Freeman on Judgments, p. 918; 15 Cal. Jur. 186.

[12] In the case herein, after the taking of evidence had concluded, it was stipulated between appellant C. Douglass Smith, representing himself in propria persona and his wife, on the one side, and Cecil H. Phillips, for respondent lot owners, "that the parties in the Toms' action [C-1159] were also the parties in this action or their successors in interest." Even without this stipulation, the identity of certain of the parties in the instant action with the parties in C-1159 is established by comparing the parties in the two actions, as their names appear in the records before us. It also appears from examining said records that in the instant action the owners of all 83 lots, except three—77, 9, and 74—appeared by counsel. In action C-1159 owners of only 50 lots appeared as answering defendants or interveners. The action was dismissed as to four defendants in action C-1159, all of whom are parties in the instant action. Thus it appears that as to a considerable number of lot owners they either were not made parties to action C-1159 or said action was dismissed as to them. The Phillips' stipulation, in the light of the circumstances which caused it to be made, was not intended and should not be construed to extend the binding force of the prior judgment to persons who appear from the record not to have been parties thereto, themselves or by their predecessors.

[13] As to those lot owners who were parties to the prior action, the judgment is not binding on them in the instant case in favor of appellants Smith because in said prior action the predecessors in interest of appellants Smith and the owners of said lots were not adverse parties, but co-operating parties, who as answering defendants or interveners joined in urging the claim that each owner of a lot in block V was entitled to participate in oil produced anywhere on block V by virtue of the oil clause in the deeds from the Mills Organization. In action C-1159 the adversary parties were plaintiffs Toms and Rowe on the one side and the defendant and intervening lot owners on the other. The rule that parties to a judgment are not bound by it in a subsequent proceeding or controversy between them unless they were adverse parties in the original action is embodied in section 1910, Code of Civil Procedure. 1 Freeman on Judgments, p. 918; 34 C. J. 1040; 15 R. C. L. 1013; 15 Cal. Jur. 186; Black, Judgments (2d Ed.) § 599; Big-

elow, Estoppel (6th Ed.) p. 113; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Hubermann v. National Surety Co., 37 Cal. App. 569, 174 P. 79; Hentig v. Johnson, 8 Cal. App. 221, 96 P. 390; Robson v. Superior Court, 171 Cal. 588, 154 P. 8; In re Estate of Heydenfeldt, 127 Cal. 456, 59 P. 839. Smith is the successor in interest of lot owners who either were not parties to action C-1159, or of lot owners who as parties to said former action joined with lot owners who are respondents in the instant action, or their predecessor in interest, in urging the claim that each lot owner shared in the proportion of $\frac{1}{498}$ part of oil for each lot owned. The former judgment is not binding on them to the point that they have no oil rights in lots now owned by the Smiths.

The judgment is affirmed.



3 Cal.2d 217

MITCHELL, Insurance Com'r, v. TAYLOR,
Clerk of Supreme Court.
S. F. 15191.

Supreme Court of California.
April 18, 1935.

Appeal and error — 374 (4)

State insurance commissioner in charge of insolvent insurance company's business is not mere private trustee or receiver, but "state officer" exempt from payment of fees for filing transcript on appeal from judgment against him (Gen. Laws 1931, Act 3739, § 2; Pol. Code, § 4295).

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

CURTIS and PRESTON, JJ., dissenting.

In Bank.

Proceeding by E. Forrest Mitchell, as Insurance Commissioner of the State of California, liquidator of the Union Automobile and Casualty Company, for a writ of mandate to compel B. Grant Taylor, Clerk of the Supreme Court, to file a transcript on appeal without payment of fees.

Peremptory writ granted.

Frank L. Guerena, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for respondent.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, *amici curiæ*.

LANGDON, Justice.

This is a petition for a writ of mandate to compel respondent, clerk of this court, to file a transcript on appeal without payment of fees.

Petitioner is the Insurance Commissioner of the state of California. In accordance with statute (Deering's Gen. Laws, 1931, Act 3739) he was by order of the superior court of Los Angeles county appointed liquidator of the Union Automobile & Casualty Company, an insolvent insurance corporation. As such liquidator he paid certain state taxes under protest and sued to recover them. Judgment was rendered against him, and he took the appeal in which, as above stated, he seeks to avoid the statutory fee for filing the transcript. It appears that in most of the counties of this state, under the advice of district attorneys and a ruling of the Attorney General, the commissioner is not charged for official service; but that in at least one county the payment of fees is required. This proceeding is brought to secure a positive ruling on the question, and thus to establish a uniform practice throughout the state.

The claimed exemption rests upon the provisions of section 4295 of the Political Code, that "the state * * * or any public officer * * * acting in his * * * official capacity on behalf of the state * * * shall not be required to pay or deposit any fee for the filing of any document or paper, or for the performance of any official service. * * *" This section has never been construed by our appellate courts. It is, of course, conceded that petitioner is a "public officer * * * acting in his * * * official capacity." In the only case in this state which bears closely upon the question at issue, *Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 P. 913, the court had under consideration section 1058 of the Code of Civil Procedure, dispensing with an appeal bond where the state or "any state officer, in his official capacity or on behalf of the state" was the appellant. It was held that the superintendent of banks came within the language of this provision. *Amici curiæ* appearing for respondent herein seek to distinguish this case on the ground that the section of the Code of Civil Procedure which the court

construed was in the disjunctive, whereas the statute now before us is in the conjunctive. They assert that to obtain its benefits a public officer must show not only (1) that he is acting in his official capacity, but (2) that he is acting "on behalf of the state." They contend that the Insurance Commissioner, in taking charge of the business of an insolvent company, acts as the trustee of a private trust, on behalf of the private persons who are the ultimate owners of the trust property.

We are unable to agree with this contention, which ignores the basic purpose of the law under which the office of insurance commissioner was created. That law provides that when there is insolvency or such situation as would make the further transaction of business by the insurer hazardous to its policyholders, its creditors, or to the public, the commissioner, with the aid of the Attorney General, shall institute a proceeding in the superior court placing him in possession of the company's property and seeking such other order as the interest of the policyholders, creditors, and public may require. Deering's Gen. Laws, 1931, Act 3739, § 2. Other provisions give him wide powers to carry out these purposes. There can be no doubt that the statute was enacted under the police power for a purpose connected with the public interest; that the Legislature has declared the liquidation of insolvent insurance companies a matter in which the state has an interest; and that consequently it has made provision for a state officer to protect and advance that interest. The Insurance Commissioner is not a mere private trustee, or receiver wholly dependent on the appointing court for his powers. He is a state officer, performing duties enjoined upon him by statute, and in their performance he acts on behalf of the state. Decisions from other jurisdictions fully support this characterization of the duties of such an officer. See *State ex rel. Missouri State Life Ins. Co. v. Hall*, 330 Mo. 1107, 52 S.W.(2d) 174; *People ex rel. Palmer v. Niehaus*, 356 Ill. 104, 190 N. E. 349; *O'Neil v. Welch* (C. C. A.) 245 F. 261. In *Mitchell v. Lay* (C. C. A.) 48 F.(2d) 79, 84, the court refers to the official character of the duties of the Insurance Commissioner under our statute. The same view has been expressed in this state with reference to the similar position of building and loan commissioner. *Richardson v. Superior Court*, 138 Cal. App. 389, 32 P.(2d) 405.

It follows that petitioner is entitled to the exemption provided in section 4295 of the

Political Code. Let a peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

We dissent: CURTIS, J.; PRESTON, J.



3 Cal.2d 1
MATSON NAV. CO. et al. v. STATE BOARD
OF EQUALIZATION OF CALIFORNIA
et al.

S. F. 15137.

Supreme Court of California.

March 27, 1935.

Rehearing Denied April 25, 1935.

1. Taxation ☞165

Section of Bank and Corporation Franchise Tax Act levying tax upon corporations doing business within state of classes referred to in provision of Constitution authorizing franchise tax *held* not to include foreign corporations doing business in state but engaged solely in interstate commerce, since corporations referred to in constitutional provision authorizing franchise tax were those subject to be taxed pursuant to another provision of constitution, under which, prior to adoption of Franchise Tax Act, corporations of class in question were held not taxable (St. 1929, p. 20, § 4; Const. art. 13, § 14 (d), and § 16, subd. 2 (a).

2. Taxation ☞117, 165

Section of Bank and Corporation Franchise Tax Act levying tax upon corporations doing business within state of classes referred to in provision of Constitution authorizing franchise tax *held* to impose upon such corporations franchise tax therein provided, regardless of whether corporation is foreign or domestic and whether engaged in interstate or foreign commerce, so long as corporation is doing some intrastate business as well (St. 1929, p. 20, § 4, and § 5, as amended; St. 1931, p. 2226, § 10; Const. art. 13, § 14 (d), and § 16, subd. 2 (a).

3. Taxation ☞117, 165, 376(1)

Section of Bank and Corporation Franchise Act levying tax upon corporations doing business within state of classes referred

to in provision of Constitution authorizing franchise tax *held* to impose on foreign and domestic corporations of classes mentioned, when they are engaged in both intrastate and interstate commerce, for privilege of engaging in intrastate commerce, franchise tax measured by net income, and to include income from interstate or foreign commerce in measuring tax (St. 1929, p. 20, § 4, and § 5 as amended; St. 1931, p. 2226, § 10; Const. art. 13, § 14 (d), and § 16, subd. 2 (a).

4. Taxation ☞376(1)

"Derived from business done within this state," as used in section of Bank and Corporation Franchise Tax Act providing that, if entire business of bank or corporation is not done within state, tax shall be measured by that portion thereof which is derived from business done within this state, *held* to include, as measure of tax, income from interstate or foreign commerce which is reasonably attributable to business done within state and not to limit measure to income from business solely done in intrastate commerce (St. 1929, p. 20, § 4, and § 5 as amended; St. 1931, p. 2226, § 10; Const. art. 13, § 14 (d), and § 16, subd. 2 (a).

5. Commerce ☞72

Any tax that is a direct burden on interstate commerce is unconstitutional.

6. Commerce ☞69(1)

Foreign corporation coming into state and doing some intrastate business as well as interstate business originating in state cannot be taxed for privilege of engaging in interstate commerce, but it may be taxed for privilege of engaging in intrastate commerce, and in fixing tax state may require corporation to pay tax measured by its net income attributable to business done in state regardless of whether income is derived from intrastate or from interstate or foreign commerce.

7. Taxation ☞117

State, having power to impose franchise tax measured by income from business done within state derived from interstate or intrastate commerce upon foreign corporations doing some intrastate business, has at least equal power as to domestic corporations.

8. Constitutional law ☞229(1), 283

Taxation ☞40(5)

Statute imposing franchise tax, measured by net income, upon certain classes of corporations doing business within state, *held* not unconstitutional, as respects domestic corporations, as a tax upon interstate and foreign commerce or a violation of equal protection, due process, and uniformity clauses because it imposed tax upon domestic corporations measured in part by income derived

from that proportion of their net income which was derived from business done in interstate or foreign commerce originating in state (St. 1929, p. 20, § 4, and § 5 as amended; St. 1931, p. 2226, § 10; St. 1933, p. 703, § 30; Const. art. 1, § 11; art. 12, § 15; art. 13, § 14 (d), and § 16, subd. 2 (a).

9. Taxation ☞121

State has power to tax entire net income of domestic corporation from whatever source derived, with certain possible exceptions, including its total income from interstate commerce, whether originating in state or not.

10. Commerce ☞69(1)

Tax upon corporation for privilege of exercising its corporate franchises within state, although measured in part by net income from interstate or foreign commerce originating in state, *held* not to compel corporation to pay for privilege in order to engage in interstate or foreign commerce (St. 1929, p. 20, § 4).

In Bank.

Proceeding by the Matson Navigation Company and others against the State Board of Equalization of the State of California and others, brought under Bank and Corporation Franchise Tax Act, § 30 (St. 1933, p. 703), to review an order of the Board of Equalization approving an assessment levied against petitioners by the Franchise Tax Commission.

Order affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., H. H. Linney, Deputy Atty. Gen., and Dixwell L. Pierce, and Frank M. Keesling, both of Sacramento, for respondents.

PER CURIAM.

Petitioners bring this proceeding under section 30 of the Bank and Corporation Franchise Tax Act (Stats. of 1929, pp. 19, 31), as such section was amended in 1933 (Stats. of 1933, pp. 692, 703). This is apparently the first case to reach this court under the procedure therein provided. That section, as amended, provides that any corporate taxpayer dissatisfied with the assessment levied against it by the franchise tax commissioner, and after having unsuccessfully appealed to the state board of equalization, within 60 days of the decision of that board, may apply to this court for a writ of certiorari or re-

view, for the purpose of testing the lawfulness of the order of the board; that in such proceeding the cause is to be heard on the record of the board as certified by it; that no new or additional evidence may be taken in this court; that the findings and conclusions of the board are final on all questions of fact; that this court is limited in its review to determining whether the board has regularly pursued its authority, including the determination as to whether the state or federal constitution has been violated; that upon the hearing this court shall enter judgment either affirming or setting aside the order or decision of the board.

The facts giving rise to the present controversy are as follows:

Petitioners are domestic corporations engaged in both intrastate and interstate or foreign commerce. The Matson Navigation Company, in addition to certain purely intrastate activities, is engaged in the business of transporting passengers and freight between ports on the Pacific Coast, including California ports, and ports in Hawaii. The Oceanic Steamship Company, in addition to certain purely intrastate activities, is engaged in the business of transporting passengers and freight between ports on the Pacific Coast, including California ports, and ports in Hawaii, the South Seas, Australia, and New Zealand. The Matson Terminals, Inc., is interested in this proceeding only in so far as it is a party to a consolidated return. No portion of the tax here under attack is apportionable to this company. All of the transportation activities of the two other petitioners are interstate or foreign.

The tax here under attack is that imposed for the year 1931, measured by the net income of these companies, as provided in the act, for the preceding year. These companies, in filing their return for 1931, omitted from their net income all portions thereof derived from interstate or foreign commerce. They paid a tax of \$12,845.30, computed by applying to their net income, derived solely from intrastate commerce, the statutory rate. In 1930, petitioners made a net income of \$2,526,148.22 from their interstate or foreign commerce, a considerable portion of which originated in California. This was entirely omitted from their 1931 return. The franchise tax commission, after notice and a hearing, imposed an additional tax of \$19,637.71, which is the tax involved in this proceeding. The commissioner computed the additional assessment by

allocating 22.2 per cent. of the total net income derived from interstate and foreign commerce to California, that percentage correctly representing the proportion of the net income derived from business originating in this state. In arriving at this result, the commissioner allocated to income from business done in this state that portion of petitioners' income from its transportation business done within and without the state which the amount of the business originating in this state bore to the total business done.

Petitioners concede that the percentage adopted by the commissioner correctly represents that portion of their net income from interstate or foreign commerce derived from the transportation of passengers and freight originating in California. In a comprehensive opinion, the State Board of Equalization sustained the commissioner, holding that the state has the power to impose a franchise tax upon domestic corporations measured in part by income derived from that proportion of their net income derived from business done in interstate or foreign commerce originating in this state, and that the tax act here involved provides for such a tax.

Petitioners contend that the Franchise Tax Act, properly construed, does not include in its tax base income derived from interstate or foreign commerce. In the event the act be construed to include such income, then petitioners contend that the additional assessment is unconstitutional and void in that it imposes a tax on interstate and foreign commerce contrary to the commerce clause of the Federal Constitution; that it deprives petitioners of the equal protection of the laws and deprives them of their property without due process; that the assessment is also void for lack of uniformity in violation of section 11 of article 1 of the State Constitution; and that it also violates section 15 of article 12 of the State Constitution, in that it permits foreign corporations similar to petitioners to engage in business in this state on more favorable terms than domestic corporations. All of these contentions are without merit, as will hereinafter appear.

The first major contention of petitioners is that the Franchise Tax Act does not expressly include net income from interstate or foreign commerce and that the act cannot and should not be interpreted as imposing a tax measured by income derived from such business, even though such a tax is within the power of the state to impose. The problem thus presented is solely one of interpretation, turning solely upon the provisions of the act.

[1-3] The act does not specifically provide that income from business done in interstate or foreign commerce originating in this state shall be included in the measure of the tax. Such specific provision is not necessary, however, if the language employed is broad enough to and actually does include such income, and if such income is not otherwise excluded. It is our opinion that the provisions of the act include in the measure of the tax all income, however earned, unless such income is specifically excluded, and that since there is no provision specifically excluding the type of income here involved, it is necessarily included.

Section 4 of the act (St. 1929, p. 20, § 4), as it read in 1931, provides: "Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2 (a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income * * * at the rate of four per centum. * * *" Under this section, considered alone, every corporation of the type classified that does business in this state would be required to pay a tax measured by its *entire* net income, regardless of source, but it is important to note that the tax is imposed only on those corporations referred to in subdivision 2 (a), of section 16, article 13, of the Constitution. That section, as it read prior to the 1933 amendments, refers to those corporations doing business in this state which are subject to be taxed pursuant to subdivision (d) of section 14 of article 13 of the Constitution. Prior to the adoption of the Corporation Franchise Tax Act here involved, it was held that foreign corporations engaged *solely* in interstate commerce were not subject to the tax imposed by section 14 (d). *People v. Alaska Pacific Steamship Company*, 182 Cal. 202, 187 P. 742. Thus the classification found in section 4 of the act here involved, as above quoted, necessarily excludes from the tax foreign corporations doing business in this state but engaged solely in interstate commerce. This is quite important, because if section 4 should be interpreted to include such corporations, the act, as to such corporations, would be unconstitutional. The United States Supreme Court has consistently held that a state may not impose a franchise tax, whether measured by net income or otherwise, upon foreign corporations doing business within the state, if the foreign corporations' business

is exclusively interstate in character. *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219; *Anglo-Chilean Nitrate Sales Co. v. Alabama*, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710.

However, although section 4, by its classification, excludes from its provisions foreign corporations doing business in this state and engaged solely in interstate commerce, it includes within its terms foreign corporations engaged in both interstate and intrastate commerce, as well as domestic corporations also so engaged. If section 4 were the only provision of the act on the subject, such corporations would be required to pay a franchise tax for the privilege of engaging in intrastate business in this state, measured by their entire net income, however acquired. However, the act contains other provisions which limit the operation of section 4, above quoted.

Section 5 of the act (St. 1929, p. 20, § 5, as amended by St. 1931, pp. 64, 2225), as it read in 1931, defines the terms "doing business" as "any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state * * *." Section 10 of the act (St. 1929, p. 24, § 10, as amended by St. 1931, p. 2226), as it read in 1931, provides: "If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state." The section then provides for various formulae whereby the portion of the net income attributable to business done within this state may be determined, and expressly provides that whatever formula is used it must be "fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation." The formula adopted by the commissioner in the present case is well calculated to accomplish the purpose provided in the portion of section 10 last quoted.

We think that by section 4 of the act as limited by sections 5 and 10, as above quoted, the act was intended to and by its terms does impose on the corporations of the type mentioned, for the privilege of exercising their

corporate franchises within this state, the tax therein provided, whether such corporation is a foreign or domestic corporation, and whether engaged in interstate or foreign commerce or not, so long as such corporation is doing some intrastate business as well. We are likewise of the opinion that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act.

[4] Petitioners' contention that the words "derived from business done within this state," found in section 10, must be construed to mean business solely done in intrastate commerce, is untenable. When standing alone, such words may be capable of the interpretation contended for (*Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 S. Ct. 250, 39 L. Ed. 1035), but when read with the rest of section 10 and with sections 4 and 5, they cannot be so interpreted without doing violence to the language used and without imposing limitations not therein contained. Section 10, in the interests of avoiding double taxation, does limit section 4 to the extent of excluding from the measure of the tax income from business done entirely outside the state, but reasonably and properly construed, there is nothing in the section which even by implication excludes from the measure of the tax imposed for the privilege of exercising the corporate franchise to do intrastate business, income from interstate or foreign commerce which is reasonably attributable to business done within this state.

[5] The above interpretation of the act brings us to the next major question presented, viz.: Is the tax here involved, as interpreted above, in violation of the commerce clause and the equal protection and due process clauses of the Federal Constitution? The contentions made by petitioners on this point are not new. They have been made in many cases and have been completely answered by several decisions of the United States Supreme Court. It is well settled that any tax that is a direct burden on interstate commerce is unconstitutional. Thus, as already stated, a franchise tax measured by net income cannot be imposed on a foreign corporation engaged solely in interstate commerce

(Alpha Portland Cement Co. v. Massachusetts, supra), because such tax attempts to directly burden such commerce. Likewise, a *gross receipts tax* on a foreign corporation engaged in both interstate and intrastate commerce is unconstitutional as a direct burden on interstate commerce. United States Glue Company v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748. On the other hand, it has been held that a tax upon net income of a foreign or domestic corporation engaged in both interstate and intrastate commerce, where the tax is imposed upon all income earned within the state, including income derived from transactions in interstate or foreign commerce, does not amount to burdening interstate or foreign commerce, and is valid. United States Glue Company v. Oak Creek, supra; Peck & Co. v. Lowe, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049. In the Glue Company Case, supra, the court pointed out that a tax that affects only indirectly the profits or returns from interstate commerce is valid, and that the franchise of a corporation is property which can be taxed, and then stated (247 U. S. 321, 328, 38 S. Ct. 499, 501, 62 L. Ed. 1135, Ann. Cas. 1918E, 748): "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Con-

stitution because they happen to be engaged in commerce among the states."

[6] Petitioners concede that a state, under the above authorities, can impose a net income tax and impose the tax on income from interstate commerce, but contend that the principles applicable to a state's power to impose franchise taxes measured by net income are entirely different from the principles applicable to a state's power to impose taxes upon net income. There are some differences between the two situations, it is true, but such differences do not affect the situation here presented. When a foreign corporation comes into this state and does some intrastate business, as well as interstate business originating here, it cannot be taxed for the privilege of engaging in interstate commerce, but it may be taxed for the privilege of engaging in intrastate commerce. In fixing that tax, the state may require the corporation to pay for that privilege a tax measured by its net income attributable to business done in this state, regardless of whether the income is derived from intrastate business or from business done in interstate or foreign commerce. The cases of Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165, and Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282, squarely support this conclusion. The following language from the Underwood Case, supra, 254 U. S. 113, page 120, 41 S. Ct. 45, 46, 65 L. Ed. 165, is pertinent: "A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the state. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695, 15 S. Ct. 268 [360], 39 L. Ed. 311. This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 40 S. Ct. 221, 64 L. Ed. 445; compare Peck & Co. v. Lowe, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

[7] Since, under the Federal Constitution, the state may impose a franchise tax, measured by income from business done within the

state derived from interstate or intrastate commerce, upon foreign corporations doing some intrastate business, it likewise has at least equal powers as to domestic corporations.

[8,9] The above analysis completely disposes of petitioners' arguments on the constitutional point under discussion and also fully disposes of petitioners' argument that under the act foreign corporations similar to petitioners (foreign corporations doing some intrastate and some interstate business) are permitted to transact business here on more favorable terms than petitioners. As we have seen, the act makes no distinction, but treats both classes alike. In this connection, it is worthy of mention that the state, so far as domestic corporations such as petitioners are concerned, has seen fit to impose a tax more limited in extent than it could have levied. Unquestionably the state has the power to tax the *entire* net income of a domestic corporation, from whatever source derived (with certain possible exceptions not here involved, see *Lynch v. People*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191), including its total income from interstate commerce, whether originating in this state or not. *Lawrence v. State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374; *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931. See, also, *Schwab v. Richardson*, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183. California, however, in the interest of imposing on domestic corporations engaged in both interstate and intrastate commerce the same tax that is imposed on foreign corporations similarly situated, has limited the tax to that portion of the income derived from interstate commerce attributable to business done in this state. In view of this, petitioners have no just cause for complaint.

[10] We do not find it necessary to discuss the many other points raised by petitioners, nor the many cases cited by them. The above analysis is a complete answer to all of their contentions. We emphasize the fact that the act here involved imposes a tax on a corporation "for the privilege of exercising its corporate franchises within this state." Such a tax, under the authorities already cited, although measured in part by net income from interstate or foreign commerce originating here, does not compel a company to pay for the privilege in order to engage in interstate or foreign commerce.

The order of the respondent board is affirmed.

BOLDEMANN CHOCOLATE CO. v. PRICE
et al.
S. F. 15307.

Supreme Court of California.

April 19, 1935.

Appeal and error §460(1)

Where policy, which judgment required defendants to surrender, had been introduced in evidence and was in clerk's possession, and, after judgment, order was made directing delivery of policy to plaintiff upon filing of photostatic copy thereof, but defendants appealed before clerk delivered policy, defendants *held* entitled to supersedeas (Code Civ. Proc. §§ 943, 946).

In Bank.

Action by the Boldemann Chocolate Company against Eva Price and another. From a judgment for plaintiff, defendants appeal. On appellants' application for writ of supersedeas.

Application granted.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner Bank of California Nat. Ass'n.

Halsey & Leo, of San Francisco, for petitioner Eva Price.

Philip Barnett, of San Francisco, for respondent.

CURTIS, Justice.

Petition for writ of supersedeas. The action was brought to quiet title of plaintiff to a certain policy of insurance in the possession of the Bank of California National Association, and for the possession of said policy. Judgment was rendered in favor of the plaintiff as prayed for, and the defendants have appealed from said judgment. The policy had been introduced in evidence in the case, and at the date of the judgment was in the custody of the clerk of the court. After judgment the court made its order directing the clerk to release said policy to the plaintiff upon the deposit by the plaintiff of a photostatic copy thereof. Before the order was complied with, and while said policy of insurance was in the custody of the clerk of the court as aforesaid, the defendants filed their notice of appeal and subsequently filed their petition herein praying for a writ of supersedeas directed to said court restraining it from proceeding with the execution of said judgment and of said order for the delivery of said

policy of insurance to the plaintiff, and that all proceedings upon said judgment and order be stayed until the final determination of said appeal. Upon the filing of said petition the court issued an order to show cause why said writ should not issue, and ordered proceedings in said matter stayed until the final determination of this proceeding. As a result of said last-named order, said policy of insurance is now in the custody of the clerk of said court.

Section 943 of the Code of Civil Procedure provides, in part, that: "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

While it is alleged that petitioners, the defendants and appellants in this action, offered to give the undertaking required by said section, this allegation is denied by the respondent and in proof of the denial the affidavits of the trial judge and the attorney of respondent have been filed supporting the denial of the respondent. We deem this matter not determinative of any material issue here, as section 946 of the Code of Civil Procedure provides that: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter [which includes section 943], it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein."

It will thus be seen that on appeal from the judgment directing the delivery of a document like, for instance, an insurance policy, all the appellant is required to do in order to secure a stay of execution is to serve and file his notice of appeal and deliver said document into the custody of such officer as the court may appoint. In such a case, no undertaking is required. The undertaking is only required when the document is not delivered to the custody of the officer. In the present case, the insurance policy was at the date of the judgment in the custody of the clerk of the court, having been received in evidence during the trial. While the clerk was not designated by the court as the proper officer

in whose custody the document was to be placed, he was the officer usually designated by courts for that purpose, and we do not deem the omission of the court to make such designation fatal to petitioners' application for said writ. Petitioners have done all in their power and all that is required of them by law in order to entitle them to a stay of execution.

While mention has been made herein of the order of the court directing the clerk to release said policy of insurance to respondent upon the deposit of a photostatic copy thereof, said order is merely ancillary to the judgment. The judgment itself expressly provided that said policy of insurance should be surrendered to plaintiff. If the judgment is stayed the policy of insurance will remain in the custody of the clerk of the court and the subsequent order of the court to release it to the plaintiff upon the filing of a photostatic copy thereof passes out of the case.

In our opinion, the petitioners have complied with all the provisions of the sections of the Code of Civil Procedure relating to an appeal from the judgment rendered in said action, entitling them to a stay of said judgment.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.



3 Cal.2d 264

UNION SAFE DEPOSIT BANK v. CITY
OF MENLO PARK et al. *

S. F. 15237.

Supreme Court of California.

April 19, 1935.

Rehearing Denied May 16, 1935.

1. Mandamus ☞115

Where city purchased property of defaulting landowners at delinquent assessment sale, city officers would be required by writ of mandate to levy tax to pay amount due on improvement bonds (St. 1915, p. 1441).

2. Mandamus ☞16(1)

Duty of city to levy tax to pay principal and interest due on improvement bonds being a continuing obligation, proceeding for writ

of mandate to compel tax levy *held* not moot (St. 1915, p. 1441).

In Bank.

Petition by the Union Safe Deposit Bank against the City of Menlo Park and others for a writ of mandate directing respondent officers of city to levy tax to pay amount due and unpaid on improvement bonds.

Writ of mandate issued.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

James T. O'Keefe, Jr., City Atty., of Menlo Park, for respondents.

CURTIS, Justice.

[1, 2] Petitioner is the owner and holder of several bonds issued pursuant to the Improvement Bond Act of 1915 (Stats. 1915, p. 1441). Petitioner, after alleging in its verified petition the necessary facts as to the issuance of said bonds, the default of the property owners in the payment of the assessments levied for the purpose of paying the principal and interest on said bonds, and the sale of the property in the several districts against which said bonds were made a lien, the several amounts due and unpaid on the bonds held by petitioner, and the refusal of the respondents, as officers of said city, to take the necessary legal steps provided by said act to levy a tax to pay the amount due and unpaid on said bonds, prays for a writ of mandate to issue out of this court directed to respondents compelling them as officers of said city to perform their duty as enjoined upon them by said Improvement Act. The respondents have appeared herein and filed an answer to said petition in which they admit the material allegations of the petition. The answer contains denials of certain legal conclusions in the petition, and of other matters contained in the petition not material to any issue involved herein. The admitted facts in this case bring it squarely within the principles of law enunciated by this court in the case of *American Co. v. City of Lakeport*, 220 Cal. 548, 32 P.(2d) 622. We are, therefore, of the opinion that a mandatory duty rests upon the respondents to levy and collect a tax to meet said delinquent assessments, such tax, however, being limited to 10 cents on each \$100 of assessable property as provided in section 16a of said act (as amended in 1921, Stats. 1921, pp. 224, 230), and that said levy be made and said tax levied on or before the time fixed by law for the next general tax levy for municipal and coun-

ty purposes. As the duty to levy and collect said tax to pay the principal and interest on said bonds is a continuing obligation, the question involved herein has not become moot. *American Securities Co. v. Forward*, 220 Cal. 566, 572, 32 P.(2d) 343.

It is hereby ordered that a writ of mandate issue directed to respondents commanding them to levy and collect said tax in the amount and at the time stated herein.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.



6 Cal.App.2d 193

JONES v. MEEK, Director of Public Works,
et al.
Civ. 9760.

District Court of Appeal, Second District,
Division 2, California.

April 15, 1935.

Officers ~~6~~76

Senior clerk under civil service in state department of motor vehicles who had been dismissed *held* not entitled to reinstatement where lessening in amount of work had required reduction in number of employees, clerk was least efficient person so employed, and temporary work during period of increased activity had been offered to and refused by clerk.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Petition by William M. Jones against Burt B. Meek, Director of Public Works of the Department of Public Works of the State of California, and others, for writ of mandate. From a judgment denying the writ, the petitioner appeals.

Affirmed.

William M. Jones, of Los Angeles, in pro. per.

U. S. Webb, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and John A. McGilvray, of Sacramento, Atty. for Department of Motor Vehicles, for respondents.

SCOTT, Justice pro tem.

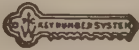
Petitioner appeals from a judgment of the trial court denying a writ of mandate which petitioner sought to secure to compel respondents to reinstate him as a "cashier" or senior clerk under civil service in the state department of motor vehicles.

The trial court found on evidence which is ample and persuasive that petitioner was laid off from the job he had been filling because a lessening in the amount of work had required a reduction in the number of employees; that respondents had not abused their discretion in selecting petitioner for such release, because under the court's finding the latter was held to be the least efficient person so employed, and that temporary work during a period of increased activity in the department was offered to petitioner and by him refused.

We are aware of no authority which requires a department of the state government to retain such an employee, whether under civil service or not, under such circumstances.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 751

MacDONALD v. NEUNER.
Civ. 9702.

District Court of Appeal, Second District,
Division 2, California.
April 4, 1935.

1. Elections ⇨126(6)

Although, under certain circumstances, "primary election" may be included in term "election," "election" does not always include "primary election," and, as regards expenditures for campaign purposes, "primary election" and ensuing "election" are separate proceedings (Gen. Laws 1931, Acts 2256, 2262).

[Ed. Note.—For other definitions of "Elect; Elected; Election" and "Primary Election," see Words & Phrases.]

2. Elections ⇨126(6)

Statute limiting campaign expenditures of candidate in public elections held not to limit campaign expenditures in primary election for office of mayor of Los Angeles so as to restrict primary campaign expenditures to 20 per cent. of salary of office of mayor (Gen. Laws 1931, Acts 2256, 2262).

3. Elections ⇨126(6)

In action by labor commissioner as assignee to recover for services rendered by persons in primary election campaign, determin-

ation of assignors' financial ability to employ counsel held not a condition precedent to bringing of action by commissioner (Gen. Laws 1931, Act 2256, and Act 4089, § 7).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Frank C. MacDonald, as chief of Division of Labor Statistics and Law Enforcement, Department of Industrial Relations, against Martin C. Neuner. From a judgment for plaintiff, defendant appeals.

Affirmed.

Clifford Thoms, Leonard Wilson, and Robert P. Dockeray, all of Los Angeles, for appellant.

Chas. F. Lowy and Leo L. Schaumer, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal from a judgment in an action to recover for services rendered.

Appellant was an unsuccessful candidate for the office of mayor of the city of Los Angeles at the primary election held May 2, 1933, and during his campaign had employed campaign workers whose claims for services were unpaid and who assigned to respondent their demands, found by the court to amount to a total of \$4,229.89. Other claims were included in the action, but were not substantiated and were dismissed. It is claimed that Act 2262, Deering's General Laws, 1931, applied to said primary election, and that since, as such candidate, appellant was limited in his campaign expenditures to \$2,000, a sum equal to 20 per cent. of \$10,000, the annual salary of the mayor of Los Angeles at the time, and since he had incurred expenses in excess of this amount, he was not liable therefor.

[1] Act 2262 makes no mention of what are commonly termed primary elections, and refers and applies only to public elections. Does the act apply to primary election expenditures? Primary elections merely take the place of previous methods of nominating candidates for public office. The effect of the primary election here involved was not to "elect" any person to the office of mayor, but merely to nominate persons who should be candidates at the ensuing election when the mayor would actually be chosen and elected. The Primary Election Law, Act 2256, Deering's General Laws, defines a primary election as a "primary nominating election," and

separately defines the word "election" as "a general state, county, city or city and county election as distinguished from a primary election, recall election, or special election." Section 1. The act further discloses the difference by referring to the successful candidates at a primary election as being "nominated." We can assume that the Legislature had these distinctions in mind when it some years later passed Act 2262. It might also be noted that expenses of candidates at a primary election are specially provided for in the Primary Election Law, and no limitation is made therein as to the amount which may be incurred or paid. While it is true that under some circumstances a primary election may be included within the term "election" (*Spier v. Baker*, 120 Cal. 370, 52 P. 659, 41 L. R. A. 196; *Marsh v. Hanley et al.*, *Supervisors*, 111 Cal. 368, 43 P. 975; *Britton v. Board of Commissioners*, 129 Cal. 337, 61 P. 1115, 51 L. R. A. 115), it does not follow that the word "election" always includes a primary election. The primary election and the ensuing election are separate proceedings, involving separate expenditures for campaign purposes. The suggestion that a primary election might become an election where one candidate secures a majority of all votes cast has no application to the case at bar, as appellant herein failed to secure such a majority.

[2] It is appellant's contention in effect that the total expenditures for both primary election and the ensuing election must be kept within the limits laid down by Act 2262. Under such an interpretation, unsuccessful opponents at a primary election would be within the law if they had expended up to the maximum amount allowed, but a successful candidate who had expended a like amount would be precluded from incurring or paying anything for campaign expenses between the primary and the election itself. Or, putting it another way, the amount which a candidate could spend between the primary and the election would depend upon the amount spent up to the primary. We believe that the Legislature in passing Act 2262 intended to limit campaign expenditures as to amounts only during the campaign following the primary, leaving the limitation of the expenses

for the primary election to the limitations provided in the Primary Law.

The case of *Mathewson v. Bean*, 114 Cal. App. 519, 300 P. 56, cited by appellant, is not in point, as the expenses there involved were incurred at an election and not at a primary election. The cited cases from other jurisdictions are not persuasive here.

The point just decided also disposes of the point that respondent's assignors had not complied with the provisions of section 4 of Act 2262.

[3] Appellant's final contention is that respondent failed to show at the trial that his assignors were financially unable to employ counsel. This point is based upon Act 4089, *Deering's General Laws*, which in defining the duties of the labor commissioner provides that he is to prosecute actions for wages and other demands "of persons who, in the judgment of the commissioner or his said representative, are financially unable to employ counsel." Section 7. The trial court made no finding on this subject, but evidence was introduced at the trial that the labor commissioner had made an investigation and had determined that such assignors were financially unable to employ counsel, and an allegation to that effect is contained in the complaint. The claim that the evidence of the commissioner's investigation and determination was hearsay is not supported by the record. The evidence is presented by a bill of exceptions, which recites that evidence to this effect was introduced but fails to show that proof was by hearsay evidence or that any objection thereto was made. Counsel cites no authority for his position that a finding of the court was necessary as to such investigation and the financial inability of respondent's assignors. Act 4089 lays down the duties of the labor commissioner but does not make it a part of the cause of action nor a condition precedent to the bringing of the action that lack of financial ability to employ counsel be first determined. A finding to that effect was not at all necessary to an adjudication of the merits of the action.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

5 Cal.App.2d 673

HANNIN et al. v. FISHER et al.

Civ. 8762.

District Court of Appeal, Second District,
Division 1, California.

March 29, 1935.

1. Sales ⇨454

Distinction between a "contract of sale" and a "contract of conditional sale" is that in contract of conditional sale title to the thing sold is reserved in vendor, while in contract of sale title passes to the vendee.

[Ed. Note.—For other definitions of "Conditional Sale" and "Contract of Sale," see Words & Phrases.]

2. Sales ⇨454

Whether a sale is conditional or absolute is one of intention as disclosed by the whole contract.

3. Chattel mortgages ⇨1, 138(1)

Provision in contract for sale and installation of plumbing in apartment building that, in addition to other remedies, materialman might in case of default remove materials installed *held*, in effect, a chattel mortgage and valid as between parties thereto, but invalid as between materialman and prior mortgagee.

4. Fixtures ⇨18(3)

Complete gas, water, and waste vent systems installed in apartment building *held* "fixtures" which materialman could not remove on owner's default, notwithstanding contract that he might do so, where there existed a prior mortgage on the premises.

5. Principal and agent ⇨197

Judgment against both principal and agent on contract purporting to be executed by agent on behalf of principal *held* error, where there was no evidence that agency did not exist, or that principal could not be held because agent had abused his authority.

6. Appeal and error ⇨110

No appeal lies from order denying motion for new trial (Code Civ. Proc. § 963).

7. Appeal and error ⇨635(2)

Appeal from order denying motion to set aside and vacate judgment and enter different judgment must be dismissed, where no such order appears in the record.

ment for plaintiff from an order denying motion for new trial, and from order denying motion to set aside and vacate judgment and enter a different judgment, defendants appeal.

Judgment reversed, and cause remanded for new trial, and appeals from order denying motion for new trial and from order denying motion to set aside and vacate judgment and enter a different judgment dismissed.

Bicksler, Parke & Catlin, W. G. Danielson, and Lawrence M. Cahill, all of Los Angeles, for appellants.

C. A. Stice, of Los Angeles, for respondents.

ROTH, Justice pro tem.

On October 19, 1927, a mortgage in which appellant Western Loan & Building Company (hereinafter referred to as loan company) was mortgagee, and appellant Frederick Fisher, mortgagor, was recorded in the official records of Los Angeles county, to secure the payment of \$60,000, a construction loan for the erection of an apartment house on the premises described in the mortgage.

On December 1, 1927, H. S. Jones & Co., plumbing contractors (plaintiffs' assignors), entered into a written contract with appellant Stratford Holding Company whereby it "agrees to furnish all labor and rough and finish materials necessary to install, in accordance with the specifications herein set forth, the plumbing system." The contract on its reverse side provided: "It is understood and agreed that in the event of the failure to pay any installment or installments on the contract price herein provided for, when due, then the Plumbing Contractor, at his option, which option shall continue during all the time of such default, may remove from the premises any materials or fixtures that shall or may have been installed therein by him or delivered by him to the premises, and may apply the value of such materials or fixtures so removed on account of any indebtedness due him on the contract. The option herein provided for shall be in addition to any and all other remedies the Plumbing Contractor may have to enforce his contract, either in law or equity." Pursuant thereto, the labor, rough and finish materials were rendered and furnished as provided for, and payments to a total of \$3,880 were to be made as the work progressed. Of this amount \$1,320 was paid, leaving unpaid a balance of \$2,560. It cannot be ascertained from the record whether Stratford Holding Company

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by M. P. Hannin and another against Frederick Fisher and others. From a judg-

succeeded to Fisher's title to the property covered by the mortgage, nor can it be ascertained why, if this was not the fact, the contract was made with Stratford Holding Company.

On April 24, 1928, respondents brought this possessory action demanding the return of "All Soil Pipes, Lead Drain Pipes, Traps, L's and Sanitary tees, vent pipes and other fittings, water piping, and fittings, gas pipings and fittings, heat vents and all other materials pertaining to rough plumbing of the building"; and, in the event delivery could not be made, damages for the said articles and for withholding the same. The claim for possession is predicated on the theory that the contract, under which the materials were furnished, was one of conditional sale, and the trial court so held.

The first question to determine is whether the trial court is correct in its judgment that the contract was one of conditional sale.

[1] It will be conceded that the decisive distinction between a contract of sale and a contract of conditional sale is that in the latter, title to the thing sold is reserved in the vendor, while in the former, title passes to the vendee. *McConnell v. Redd*, 86 Cal. App. 785, 789, 261 P. 506; *Sheeley v. Holmes Music Co.*, 189 App. Div. 756, 179 N. Y. S. 202.

[2] It is thoroughly settled that the question whether a sale is conditional or absolute is one of intention as disclosed by the whole contract. *Perkins v. Mettler*, 126 Cal. 100, 105, 58 P. 384; *Greene v. Carmichael*, 24 Cal. App. 27, 30, 140 P. 45.

In the case of *Palmer v. Howard*, 72 Cal. 293, 13 P. 858, 860, 1 Am. St. Rep. 60, the court was called upon to construe an instrument which contained within its four corners language much more detailed and persuasive than does the one at bar. The court held the contract to be a mortgage, saying, among other things: "In the present case it seems to us that the intention must be taken to have been to transfer the ownership of the property, reserving a security for the price and nothing more. The possession was delivered. The promise to pay was absolute. *Hart v. Barney & Co.* [C. C.] 7 F. [543] 553. If *Palmer & Rey*, on reselling the property, had sued the *St. Clairs* for the difference between the agreed price and what the property brought on the resale, we see no defense the latter could have made. Moreover, *Palmer & Rey* were bound to resell the property if they repossessed themselves of it. They could not have kept it as an owner; and not only

so, but they were bound to resell for the benefit of the *St. Clairs*. The provision is that, if they retake, they shall sell 'to the best advantage, rendering to said borrower all surplus, if any, after paying the price agreed upon, and the expenses of removal and sale.' This is not a feature of an executory contract of sale. It is the chief characteristic of a mortgage, and is the very sum and substance of proceedings for foreclosure."

While it is true that later cases have held that the mere fact that a contract gives the right to a vendor to retake and sell for the credit of the vendee is not the decisive indication whether a contract is one of conditional sale or one of absolute sale, all the cases so deciding are with reference to situations in which title was reserved by the vendor, and in which the parties have provided for remedies other than and in addition to the remedy herein discussed. In the instant case, the sole ground upon which respondent predicates its claim that the contract is one of conditional sale, is the very remedy which the court in *Palmer v. Howard* proclaims as a primary distinguishing feature of a chattel mortgage from a conditional sale. Any other remedies which the vendor in the instant case might have would arise, not from a situation in which it has reserved title, but from one in which title has passed.

[3] Under the laws of this state, an instrument, such as the one at bar, could create nothing more than a chattel mortgage, valid as between the parties. *Palmer v. Howard*, supra. Lacking the formal requisites of a chattel mortgage as does the alleged conditional sales contract in this case, it would not be binding upon any third parties, and it becomes unimportant whether the rights of appellant loan company in relation to those of respondents be considered from the perspective of a prior or a subsequent incumbrancer. *Dauch v. Ginsburg*, 214 Cal. 540, 544, 545, 6 P.(2d) 952. The chattel mortgage is not binding upon the loan company in either event. Furthermore, it is well settled that the rule giving to a conditional vendor rights superior to a prior incumbrancer is subject to the "well-recognized exception * * * that it has no application where a severance of the fixtures will substantially injure or diminish the security of the prior incumbrancer." *Dauch v. Ginsburg*, supra, 214 Cal. page 545, 6 P.(2d) 952, 954.

In the instant case, the evidence shows that the plumbing was affixed by various methods, some by means of metal tape nailed to the studding; some was held in place by bridges

that were screwed to the joists; some was cemented into place; some was buried underground; and some was buried right in the brick walls. It is not questioned that the plumbing was adapted to the use of the apartment house and that it constituted the complete gas, water, and waste vent systems for the entire apartment house, and was a part of the fire protection equipment thereof, and that it was intended that the plumbing was to remain installed so long as the apartment house was to be used. It was to become and was in fact an essential and integral part of the building.

Giving the clause excerpted from the plumbing contract the construction most favorable to respondents, it may be said that the parties to the contract agreed that the articles in question should retain their character of personalty irrespective of the manner of affixation. Since under such construction the contract creates a chattel mortgage good as between the parties, then as between the parties it is immaterial whether the plumbing in question became affixed to the land or actually retained its character as personalty. This rule is clearly stated in *Dauch v. Ginsburg*, 214 Cal. 540, 544, 6 P.(2d) 952, 954, where it is said: "The rule is well settled in this, as well as in other jurisdictions, that an agreement by the owner of land in favor of the owner of an article, to the effect that the article shall retain its personal character or be removable as personalty, even though affixed to the land, is valid and effective against the owner of the realty, and precludes him from contending that the article has become part of the realty by virtue of the fact that it has become affixed thereto."

[4] As between respondents and loan company, the facts demonstrate that the articles in question were fixtures, and any finding of the trial court holding otherwise is not supported by the evidence. *Broadway Improvement & Investment Co. v. Tumansky* (Cal. Sup.) 41 P.(2d) 553. The facts in the instant case and in *Dauch v. Ginsburg*, *supra*, are identical except that in the instant case the building was incomplete at the time demand was made and the articles in question could have been removed with less damage to the freehold than would have been the situation in the *Dauch* Case.

As between respondents and Stratford Holding Company or Fisher, respondents had a right to the possession of the articles in

question irrespective of the real or personal status of the articles, because the contract for their installation provided, in effect, that such articles should retain their personal character.

[5] The difficulty, however, is that respondents had judgment against all three. Respondents are not in any event entitled to judgment against the loan company, and they cannot be entitled to judgment against both Stratford Holding Company and Fisher, because both the principal and the agent cannot be held. The contract in question was signed Stratford Holding Company, "Owner," by Frederick Fisher, and the word "Agent" appeared immediately after the signature of Fisher. If, for any reason, the principal could not be held because of abuse of authority or because there was in fact no agency, then Fisher would be a proper party defendant, and a judgment, assuming the proof of sufficient facts to warrant one, would be proper against Fisher. But the very statement of such an hypothesis excludes the possibility of a judgment against Stratford Holding Company. So, if Fisher acted properly as agent and facts warranting a judgment against Stratford Holding Company are proved, then a judgment would be proper against Stratford Holding Company, but certainly not as against Fisher. *Ewing v. Hayward*, 50 Cal. App. 708, 717, 718, 195 P. 970. In short, while it may be proper for respondents to sue both Stratford Holding Company and Fisher, it is necessary for respondents to elect at some time prior to judgment as to whom they are going to take judgment against. This was not done, and it is clear from what has been said that judgment cannot run against both. The trial court held that both Fisher and Stratford Holding Company were principals, but there is no evidence justifying such a finding. The execution clause of the contract indicates that Stratford Holding Company was principal and Fisher the agent.

[6, 7] The judgment must be, and it is, reversed, as to all three defendants, and the cause remanded for a new trial. The appeal from the order denying the motion for a new trial is dismissed (section 963 Code Civ. Proc.); and the appeal from order denying the motion to set aside and vacate the judgment and enter a different judgment (since the record is devoid of any such order) is dismissed.

We concur: CONREY, P. J.; YORK, J.

6 Cal.App.2d 29

ZOBELEIN CO. v. CITY OF LOS ANGELES.
Civ. 9643.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1935.

Hearing Denied by Supreme Court
June 3, 1935.

1. Eminent domain ⇨2(6)

Landowner held entitled to recover compensation from city for construction of pedestrian subway tunnel from point in front of land to park and stadium on opposite side of intersecting street as against contention that work was done in exercise of city's police power.

2. Appeal and error ⇨1013

Amount of award of compensation to landowner for city's construction of pedestrian subway tunnel from point in front of his land was fact question for trial court.

Appeal from Superior Court, Los Angeles County; Walter L. Mann, Judge pro tem.

Action by the Zobelein Company, a corporation, against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, all of Los Angeles, for appellant.

E. H. Delorey, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

[1, 2] Plaintiff owned a tract of land fronting on Flower, Thirty-Eighth and Hope streets in the city of Los Angeles, at a point where Flower merges with Figueroa street. A pedestrian subway tunnel was built by defendant city from a point in front of plaintiff's land on Flower street across Figueroa street (a 100-foot boulevard) so as to afford safe and readier access to the Exposition Park and Olympic Stadium on the other side. The approach to the subway is an open cut and stairway 18 feet long paralleling the street at a distance of 7 feet, partly surrounded by an iron rail 2 feet and 10 inches high. It is located in the 15-foot strip between the curb and property line at the southwest corner of plaintiff's property. Frontage on that street is zoned for business. This suit was brought to recover damages caused to plaintiff by reason of the said improvement, and

the trial court made an award of \$2,000. Defendant appeals, asserting that the work was done by it in the exercise of its police powers and is not compensable.

The right to compensation under the facts is clear, from the case of *McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.(2d) 139, and the question as to the amount of the award is one of fact for the trial court. Its finding on that subject is well supported by the evidence.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



PACIFIC EMPLOYERS' INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al. *

Civ. 9732.

District Court of Appeal, First District,
Division 2, California.

April 1, 1935.

Hearing Granted by Supreme Court
May 29, 1935.

1. Master and servant ⇨405(1)

Undisputed facts in evidence held to warrant but one reasonable inference that night watchman, killed by fall into elevator shaft at employer's plant, attempted to use elevator on his rounds in disobedience of employer's orders, so as to bar recovery of compensation under Workmen's Compensation Act for his death (St. 1917, p. 831, as amended).

2. Master and servant ⇨380

Injury to employee as result of voluntarily placing himself in dangerous position, contrary to employer's orders and instructions, for his own convenience, is not compensable (St. 1917, p. 831, as amended).

3. Evidence ⇨595

Where direct evidence of fact is wanting, inferences may be drawn from facts proved to supply evidence needed, but inference contrary to facts proved and based on speculation and surmise is not such evidence as will support conclusion (Code Civ. Proc. § 1958).

Proceeding by the Pacific Employers' Insurance Company to review an award of compensation by the Industrial Accident Commission under the Workmen's Compensation

Act (St. 1917, p. 831, as amended) to Maria Chavez for the death of Joseph Chavez, an employee of the Western Wool Manufacturing Company.

Award annulled.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The petitioner seeks a review of an award of compensation to the mother of Joseph Chavez, who died while employed as a watchman by the Western Wool Manufacturing Company.

The evidence relating to the conditions of the place of employment, the terms of employment, and the circumstances leading to the death of the deceased is all uncontradicted. Prior to the employment of deceased, the wool company engaged the American District Telegraph Company to install a fire and watchman's signal service in its plant, and such system was laid out with considerable detail on each of the three floors of the plant with specially designed signal boxes so arranged throughout the plant that the watchman would be required to follow a well-defined course from one box to the next in order. These boxes were of such a type that a specially designed key had to be carried by the watchman and inserted in each box in regular order, otherwise the signal could not be given. To this key was attached a registering device which noted each box punched and prepared the key for insertion in the box next in order. As an additional protection to the plan, this course was so laid out that the watchman would have to use the stairways (of which there were three) instead of the elevator, as this course would take him over the parts of the plant which the employer deemed needed inspection.

When Chavez was employed, he was taken over this course and at that time, and on numerous other occasions, was given definite instructions not to use the elevator. He was also told that the former watchman had been discharged for disobedience of this order. There was but one elevator in the plant and it was used exclusively for carrying freight. It carried a printed sign warning all employees that it should not be used except to carry freight. None of the employees used it in the daytime except for that purpose, and this use was impressed upon the watchman on more than one occasion.

The employees left the plant at 4:30 p. m. The manager and engineer remained until near 5 p. m. when the deceased appeared to assume his duties as watchman. All the witnesses testified that the elevator was at the second floor when the deceased was left alone in the plant on the day of the accident and that the safety gates on all three floors were closed. The deceased was found near the bottom of the elevator shaft in the basement. The elevator was then at the third floor and the safety gate on the first floor had been raised in such a manner that it was jammed and could be closed only with great force.

As to the duties of the watchman, there is no dispute. He was required to commence his rounds at 6 p. m. and to follow the same course once every hour. In case of fire, he was to use one of the fire signals on whatever floor he might be and without regard to the size or probable danger of the fire. He was given no instructions to fight a fire himself. At the time of his death Chavez had been working at the plant off and on for three or four years and had become thoroughly familiar with the physical conditions of the plant, with his duties as watchman, and with the rules applicable to such duties. When he was found in the basement, he was unable to talk and made no statement before he died.

[1] The only reasonable inference that can be drawn from the undisputed facts is that he attempted to use the elevator and fell into the shaft. Circumstances leading directly to this inference are that the whole space about the elevator was clear as day; that the safety gate was made of slats painted white which stood out clearly against the dark background of the elevator shaft; that the deceased had turned in his signals from boxes numbered 1 and 2 (the latter was located on the first floor); and that the register which was attached to his key was set for box number 3, which was located on the third floor. His course called him to take the stairways from the first floor to the third in order to signal from this box. From this evidence, the inference is that he attempted to use the freight elevator to reach the third floor, in disobedience of explicit orders from his employer.

The only answer made by the respondents is that "the most reasonable inference to be drawn from the circumstances" is that, "as it was dark in front of the elevator shaft, decedent mistook said shaft for a door and fell down the shaft." In support of this inference, it is then said that he might have

smelled smoke and was looking for a fire, or that he might have heard an intruder. The chief weakness of this argument is that it is not supported by any evidence. The injury occurred May 15, 1934. The deceased started his rounds at 6 p. m., before sunset, when the space in front of the elevator was flooded with daylight. His schedule called him to punch the third signal before 6:15 p. m. When this signal failed to come in at the telegraph office, an inspector was sent to the plant to investigate. He arrived at 6:34 p. m. It was then still light inside the plant. Without the aid of any artificial light, he went over the watchman's route twice from the first floor to the third and then down to the basement. The only evidence of darkness in the plant came from those witnesses who arrived after 7 o'clock. There was no evidence of any indication of a fire or of an intruder. But, if there had been, the undisputed evidence is that it was deceased's duty to first give the alarm. No such alarm was given.

[2] The case is controlled by the accepted rule that when an employee, for his own convenience, voluntarily places himself in a dangerous position contrary to the orders and instructions of his employer, the injury resulting is not compensable. *San Francisco & S. Railway Co. v. Industrial Accident Commission*, 201 Cal. 597, 600, 258 P. 86; *Moyer v. Packard Motor Car Co.*, 205 Mich. 503, 171 N. W. 403; *Borck v. Simon J. Murphy Co.*, 205 Mich. 472, 171 N. W. 470; *Dulac v. Dumbarton Woolen Mills*, 120 Me. 31, 112 A. 710; *Hibberd v. Hughey*, 110 Neb. 744, 194 N. W. 859; *White City Amusement Co. v. Industrial Commission*, 331 Ill. 541, 163 N. E. 337; *Pacific Fruit Express Co. v. Industrial Commission*, 32 Ariz. 299, 258 P. 253, 55 A. L. R. 975; *Roebbling's Sons Co. v. Industrial Accident Commission*, 36 Cal. App. 10, 16, 171 P. 987. The same rule has been followed by respondents in other cases coming before the commission: *Jones v. State Fund*, 18 I. A. C. 91; *Dove v. I. A. C.*, No. 37647, in which a petition for certiorari was denied by this court in case No. 9397, and by the Supreme Court in S. F. No. 14825.

[3] Our courts have all followed the rule that, where direct evidence is wanting to prove a certain fact, inferences may be drawn from the facts proved to supply the evidence needed. But such an inference can be drawn only from the "facts proved." Code Civ. Proc. § 1958. When an inference is contrary to the facts proved and based upon specula-

tion and surmise, it is not such evidence as will support a conclusion. This is made clear in the opinion of the Supreme Court in denying a hearing in the *Roebbling Case*, 36 Cal. App. at page 16, 171 P. 989. Here the inference that the deceased had not departed from the course of his employment at the time of his injury is contrary to all proved facts and to the only inference that can be "reasonably and fairly made from the testimony."

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.



5 Cal.App.2d 632

**BEAUMOND et al. v. PRUDENTIAL INS.
CO. OF AMERICA.**
Civ. 8753.

District Court of Appeal, Second District,
Division 1, California.
March 29, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

Insurance ☞ 209, 587

Forms furnished by agent and signed by insured requesting insurer in event of insured's death to pay policy benefits to designated beneficiary, while ineffectual to change beneficiary under policies originally made payable to estate, held sufficient as assignments thereof, where policies did not require notice of assignment and forms were to be retained until claim was made (Civ. Code, § 2764).

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Adelaide Beaumont and another against the Prudential Insurance Company of America. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

For prior opinion, see 41 P.(2d) 359.

Herbert F. Bridges, of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiffs appeal from a judgment of nonsuit in an action upon a policy of industrial life insurance.

Egnacio Glory, a Filipino, insured his life under two policies issued by the defendant company payable "to the executors or administrators of the Insured immediately upon receipt of due proof of the prior death of the Insured during the continuance of this policy, unless payment be made under the provisions of the next succeeding paragraph." This latter provision is known as the facility of payment clause.

Some time after the issuance of the policies, Glory took plaintiff Beaumont to the office of the company and told the agent that he wanted to make her the beneficiary of his life insurance. The agent thereupon gave him two blanks which he signed in the presence of the agent and Miss Beaumont. Each of them was in identical form except as to policy number and read as follows:

"I, the undersigned, insured under Policy No. * * * in the above named Company, hereby request and authorize the said Company, in event of my death prior to the death of the person next hereinafter named, to pay the amount of benefit specified in said policy to Adelaide Beaumont, my (state relationship, if any) Friend and the receipt signed by said person, or other sufficient proof of such payment, shall operate in the same manner as the receipt or proof of payment described in said policy.

"It is mutually agreed and understood, however, that nothing herein is to vary in any manner any of the provisions, agreements or conditions contained in said policy and the application therefor, especially the provision in the policy that the Company may make any payment provided for in the policy to any relative by blood or connection by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same, anything herein to the contrary notwithstanding.

"[Signature] Egnacio Glory."

The insured later died as the result of an accident and \$2,000.25 became due on the two policies. Miss Beaumont made claim for the proceeds, which the company refused to recognize, and accordingly paid the amount to the public administrator as the administrator of the estate of the insured. Thereupon, plaintiff Beaumont brought this action, joining her coplaintiff as an assignee of an interest in the sum.

In an opinion filed herein prior to the order granting petition for rehearing, we said that the company's defense is "that under the facility of payment clause it may pay the money to any person who comes within its

provisions, and that having done so, its action is conclusive and bars an action by any other person." In their petition for rehearing, counsel for respondent insisted that we have misunderstood their position. The true position of respondent, they say, is that payment was made, "not by virtue of the facility clause, but by virtue of the direct designation of the insured's administrator as beneficiary, without reservation of any right to change the beneficiary."

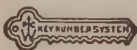
Assuming that the foregoing statement of counsel is correct, and that our statement of their position was due to a misunderstanding, the real question becomes: Who was the payee of the policy at the time of the insured's death? The administrator was the payee, unless Miss Beaumont had been substituted by virtue of the documents signed by Egnacio Glory, and quoted above. We think that the documents were effective as such substitution. This being so, our previous discussion of the "facility of payment clause" becomes, in large part, superfluous.

While the instruments executed by Glory were ineffectual to change the "beneficiary" under the policies, they are sufficient as assignments thereof. In the case of *Lewis v. Reed*, 48 Cal. App. 742, 192 P. 335, 336, the insured under policies of the same character as those sued upon in this action, executed and delivered the following: "For value received, I hereby agree and request that in the event of my death that policies No. 31229112, 31229113, 31285557 issued by Metropolitan Life Insurance Company be paid to Paul P. Lewis." In an action by Lewis against the administrator of the insured's estate, who had collected the insurance money, the court held that this instrument was an effective assignment of the policies. In reaching this conclusion the court observed: "Section 2764, Civil Code, provides that—'A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered.' The section following provides that no notice of transfer is necessary to preserve the validity of a policy upon life or health, unless expressly required thereby. No one of the policies here considered contained any requirement that notice should be given of assignment of it. The question as to whether an insured under a life policy, which was made payable in case of death to his estate, could legally assign his interest, and especially to one not having an insurable interest in his life, has been the subject of some debate. Irrespective of statu-

tory conditions, however, it has latterly become well settled that such an assignment may be made. * * * It would seem that the statute of this state was designedly adopted to set at rest any question as to the assignability of a life insurance policy and also to affirm the right to make such assignment to a person having no insurable interest in the life of the insured." The policies sued on in this action do not require notice of their assignment, and, on the contrary, it is to be noted that the printed forms supplied by the company to Glory include the following: "This form must not be sent to home office, but should be retained by the holder of the policy and presented with the policy when claim is made."

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 186

LUTHER T. MAYO, Inc., v. PUTERMAN & GOLD et al.
Civ. 10003.

District Court of Appeal, Second District,
Division 1, California.

April 15, 1935.

1. Appeal and error ☞931(1)

Where brief did not contain specification of insufficiency of evidence to sustain findings of fact, appellate court would assume that findings contained established facts (Code Civ. Proc. § 953a et seq.; § 953c).

2. Appeal and error ☞846(5)

While contention of appellants, that conditions of contract precedent to right of recovery for breach thereof have not been met, may imply an exception to some finding of fact, in absence of any such finding, sufficiency of evidence to sustain it cannot be tested (Code Civ. Proc. § 953a et seq.; § 953c).

3. Appeal and error ☞766

Judgment for plaintiff for breach of contract would be affirmed where defendants contended that contract was unenforceable because of its palpable uncertainty in material respects, but failed to point to such "material respects," and brief did not contain copy of complaint or any statement of substance thereof, except quotation from one

paragraph of complaint, and so far as appeared from record, complaint stated cause of action (Code Civ. Proc. § 953 et seq.; § 953c).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Luther T. Mayo, Inc., against Puterman & Gold, a copartnership, and others. From a judgment, defendants appeal and plaintiff moves to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Abe Richman and Sidney J. Unickel, both of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

CONREY, Presiding Judge.

Proceeding under the provisions of rule V, subdivision 3, and rule VIII, respondent moves to dismiss the appeal of defendants, or affirm judgment.

[1, 2] This motion has been presented promptly after the filing of appellants' opening brief. The judgment is a judgment for damages resulting from an alleged breach of contract. The record on appeal is the clerk's transcript, together with the typewritten transcript presented in lieu of a bill of exceptions, as permitted by section 953a et seq. of the Code of Civil Procedure. As there is not any specification in the brief, of insufficiency of the evidence to sustain the findings of fact, we must assume that the findings contain the established facts. And as the findings are not set forth, or even mentioned, in the brief, we are not called upon to give them further attention. The transcript, prepared in accordance with section 953c, Code of Civil Procedure, need not be printed, but the parties "must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." While the contention of appellants, that the conditions of the contract precedent to the right of recovery for breach thereof have not been met, may imply an exception to some finding of fact, yet in the absence of any such finding, the sufficiency of the evidence to sustain it cannot be tested. Moreover, the contention above mentioned is not even supported by any presentation of the evidence relating thereto.

[3] The remaining points presented by appellants are that no enforceable contract was entered into between the parties, in this, that

the alleged contract was at best an offer to enter into a lease and ultimately into a construction contract; that the contract is without mutuality and therefore is not enforceable; and that the contract is unenforceable because of its palpable uncertainty in material respects. There is, however, no suggestion pointing to those "material respects," or indicating what they are. These contentions are, in effect, that by reason of these faults in the contract, the complaint failed to state a cause of action. The contract is not in the brief, but there is a statement purporting to give the substance of the document. There is no apparent reason why such contract might not be performed, or why an action may not be maintained for breach thereof. There is not found in the brief any copy of the complaint, or any statement of the substance thereof, except that on page 4 of the brief there is a quotation from one paragraph of the complaint. So far as appears, the complaint stated a good cause of action.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.



5 Cal.App.2d 679

MEYER & HOLLER v. RAMONA VILLAGE
et al.*
Civ. 8788.

District Court of Appeal, Second District,
Division 1, California.
March 29, 1935.

As Amended on Denial of Rehearing
April 27, 1935.

Hearing Denied by Supreme Court
May 27, 1935.

1. Corporations ⇨519(3)

Evidence sustained finding that term "preliminary plans and estimates," as used in contract providing that, should abandonment of work occur before architects had been authorized to proceed with preparation of working drawings, corporation should pay architects one and one-half times amount expended by them in preparing preliminary plans and estimates, meant preliminary plans developed to such a point as to enable architects to make detailed estimate of cost of proposed building.

2. Corporations ⇨243(1)

In action by architects for services rendered corporation, that no stock had ever

been issued to persons who were sued as stockholders of corporation held not to prevent liability attaching to them as stockholders if they had paid for stock and had right to receive it on demand.

3. Corporations ⇨243(1)

In action by architects against stockholders of corporation for services rendered corporation, wherein stockholders sought to escape liability by denying ownership of, and right to receive, stock, by-laws of corporation held, in view of recitals in minutes of meeting of directors, amended in accordance with requirement of permit issued by Commissioner of Corporations authorizing issuance of stock to defendant stockholders.

4. Corporations ⇨243(10)

Corporation's stockholders could not escape liability to architects who had rendered services to corporation by denying ownership of stock on ground that instrument assigning lease to corporation, as consideration for issuance of stock, was invalid because of non-joinder of wives of stockholders, since stockholders had duty to know that transfer required wives' signatures and to have obtained them, or, as directors of corporation, not to have accepted assignment (St. 1917, p. 673, as amended).

5. Corporations ⇨243(10)

Corporate Securities Act is protective measure, but it is not designed for protection of those who violate it, and one who participates in violation of act and thereby acquires corporate stock cannot establish void character of his stock by proving unlawful act (St. 1917, p. 673, as amended).

6. Corporations ⇨246

In action by architects against stockholders of corporation for services rendered corporation, stockholders, having acted jointly in contracts with corporation whereby they assigned lease to corporation in exchange for stock, were entitled to certificate in their joint names, hence liability was imposed on each stockholder on basis of ownership of the whole, and was presumed to be joint and not several (Civ. Code, § 1431).

7. Corporations ⇨246

In action by architects against stockholders of corporation for services rendered corporation, where stockholders' ownership of stock was joint, liability of each stockholder was in amount equal to entire ownership and not in equal shares, since statute applicable to joint obligations in general, and not joint interests in property, controlled (Civ. Code, §§ 683, 1431).

8. Corporations ⇨217

In action by architects against stockholders of corporation for services rendered cor-

poration, stockholders held not released from stockholders' liability by repeal of constitutional provision imposing such liability, in view of provision of Civil Code saving existing causes of action from operation of repealing and amending statutes (Civ. Code, §§ 280, 322, 322a; Const. art. 12, § 3, repealed in 1930).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Meyer & Holler against Ramona Village and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Scott McReynolds, of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Defendants appeal from a judgment rendered against Ramona Village, a corporation, and against defendants Callahan and Boos, as stockholders thereof, in an action to recover compensation for architectural services.

[1] Plaintiff's employment was under a written contract in the form of a proposal made to and accepted by defendant corporation. The provisions of the contract upon which the judgment was founded and which are material on this appeal are as follows: "We will prepare preliminary plans for said building and submit them to you for your approval and upon your approval thereof we will proceed with the plans to a point where we shall be enabled to estimate the cost of the work and will submit to you a guaranteed maximum price for which we will construct the building. The guaranteed maximum price is to be based on the estimated net cost, including labor, materials, drafting, engineering, estimating and blue printing costs of producing the building from said plans plus a compensation of fifteen per cent. (15%). * * * Should the erection of the building for any reason be postponed or abandoned before you have authorized us in writing to proceed with the preparation of working drawings in order to prepare for actual construction of the building you are to pay to us at the time of such postponement or abandonment one and one-half (1½) times the actual amount expended by us in connection with the preparation of your preliminary plans and estimates to reimburse us in full for the cost of same without any percentage charge as a fee for our

services. Should postponement or abandonment occur after such authorization, or should you at any time desire to sever relations with us, you are to pay us one and one-half (1½) times the actual amount expended by us in connection with the preparation of the preliminary plans, working drawings and estimates, and in addition a sum equal to three per cent. (3%) of our guaranteed maximum price as a fee for our services."

The erection of the building was abandoned, and plaintiff never was instructed to prepare working drawings in order to prepare for actual construction. Plaintiff brought this action to recover upon the basis of one and one-half times the amount expended by it in the work it had done in preparing preliminary plans and estimates up to the time of abandonment. It was not denied that plaintiff did prepare preliminary plans for the building, and that the same were approved by defendant corporation. The position taken by defendants at the time of trial was that these plans were the only ones they were bound to pay for, while it was contended by plaintiff that the work done was necessary to enable it to estimate the cost of the work and submit a guaranteed maximum price for which it would contract to construct the building. This question of fact was resolved in favor of plaintiff, the court finding "that plaintiff did no more work or expend more money than was reasonably necessary to carry said preliminary plans to a point where said estimate could be made and said guaranteed maximum price submitted. The court further finds, in this connection, that by the term 'preliminary plans and estimates' as said term was used in the written agreement, Plaintiff's Exhibit 1, the parties to said agreement referred and intended to refer to the preliminary plans carried and developed to such a point as to enable plaintiff to make an actual, detailed estimate of the cost of said proposed building and to submit a bid or guaranteed maximum price for the construction thereof."

These findings find support in the testimony of numerous qualified architects to the effect that, while the plans were as much as 60 per cent. completed, they were not sufficient to constitute working drawings and did not go beyond the point necessary to determine the cost with sufficient accuracy to justify a bid for the construction. While there was testimony the other way which created a conflict, the findings of the court are not only supported by the evidence, but strongly so. We do not see how the court

could have reached a contrary construction of the agreement, for in order to do so it would have been necessary to find that plaintiff undertook to make a binding offer to construct the building for a stated price, based upon the preliminary plans, from which neither of the parties could know with certainty what manner of construction would be employed. Had such been the intention, the contract would not have provided for additional work to be done on the plans, after their approval, before an estimate of cost would be made. A point is made of the fact that the complaint sought recovery only for work done on preliminary plans and estimates, whereas plaintiff was allowed to recover for the cost of preparing working drawings, but this argument is based upon the same erroneous construction of the contract and is answered by the findings we have referred to, which are conclusive on the point.

[2] The court found that defendants Boos and Callahan were the joint owners of 4,000 out of 4,009 shares of subscribed and outstanding stock of the corporation, and gave judgment against them jointly for that proportion of the amount of plaintiff's claim. These defendants advance several reasons why they should not have been held to that or any other liability. One argument is that they were not stockholders at all at the time the debt was created, because, as they claim, no stock was ever issued to them and they never became entitled to receive any. While it is true that no certificate was issued, that fact is immaterial if, as we think was the case, they had paid for the stock and had a right to receive it on demand. These defendants held a lease upon certain real property upon which it was proposed to construct the building in question, and they also owned the stage rights of a certain book. These they offered in writing to transfer to the corporation, which they had caused to be organized, in return for 2,000 shares of preferred and 2,000 shares of common stock. This offer was duly accepted by the corporation and a permit was obtained authorizing the issuance of the stock to them for the consideration stated. Certain conditions were imposed by the Commissioner of Corporations which must be met before any stock could be issued. The ones which require consideration were that Boos and Callahan should make certain waivers as to dividends and, in the event of dissolution, that the by-laws should be amended and that the property in question should be transferred to the corporation.

The waivers were executed and delivered, the by-laws were amended by vote of the board of directors, and the transfers were made by Boos and Callahan. It is now claimed that no authority was shown in the directors to amend the by-laws, and it is further claimed that the transfer of the lease by Boos and Callahan was insufficient because it attempted to transfer an interest in community real property and their wives did not join therein. Assuming these facts to be true, appellants say that there was a failure to comply with the terms of the permit and that any stock sold or issued would have been void and would have carried no stockholders' liability.

[3] The by-laws were not offered in evidence, and the record is silent as to the authority of the directors to amend them. Minutes of a meeting of the directors were placed in evidence, from which it appeared that a resolution was duly adopted, both Boos and Callahan voting in favor thereof, amending the by-laws in the particulars required by the permit. No objection was made to the introduction of this evidence. The amendment was certified to the Commissioner of Corporations and, so far as the record discloses, was treated as sufficient. The directors who passed the resolution were the owners of all but three shares of the subscribed stock; it is not questioned that they acted in good faith, in a bona fide attempt to amend the by-laws and understood that their attempt was successful. Callahan was president of the corporation and Boos was a director. It was their duty to see that the proceedings were regular and sufficient. It ill becomes them now to plead their own negligence. Upon the record before us and especially in view of the failure of defendants to object to the foundation laid for the introduction of the minutes of the directors' meeting, we have no hesitation in holding that the evidence that the by-laws were amended in conformity with the requirements of the permit is sufficient for all the purposes of the case.

[4, 5] The next point requiring decision is that the transfer of the lease was ineffectual without the signatures of the wives of the assignors. The argument is made that the lease was an interest in community real property as to which the husbands were unable to convey good title unless their wives joined in the instrument of conveyance. We think it is unnecessary to decide this question and are not disposed to do so. If we should agree with the claim of appellants

that the consent of the wives was necessary, we should have to decide the point urged for reversal against them because, for reasons which we think are obvious, they cannot be heard to urge this objection. Their position is that they rendered to the corporation a title that was defective; that they accepted it on behalf of the corporation as the consideration paid for their stock and in compliance with the terms of the permit, and that they now desire to depend upon its invalidity and insufficiency to escape liability as stockholders. The defense does not appeal to us as having substantial merit. If the transfer required the signatures of their wives, the defendants are presumed to have known it, and it was their duty to obtain them; if that could not be done, they should not, as directors of the corporation, have accepted the transfer, nor should they have permitted the other directors to do so. They rest their defense upon the proposition that they failed, both in making the transfer and in accepting it for the corporation, to comply with the terms of the permit, knowing that the corporation was relying upon the sufficiency of the conveyance. Had they done what they now claim they should have done, the sufficiency of the assignment would not be in question. The situation calls for the application of the rule that, having remained silent when they should have spoken, they cannot now be heard to speak when they should remain silent. The Corporate Securities Act (St. 1917, p. 673, as amended) is a protective measure, but it is not designed for the protection of those who violate it. One who participates in a violation of the act, and by means thereof acquires corporate stock, cannot establish the void character of his stock by proving the unlawful act. *Domenigoni v. Imperial Live Stock, etc., Co.*, 189 Cal. 467, 209 P. 36.

A case quite in point is *Stewart v. Engelberg*, 207 Cal. 595, 279 P. 661. Upon facts not distinguishable from those in the present case, it was held that stock given in exchange for property passed upon payment of the purchase price and compliance with the terms of the permit of the Commissioner of Corporations, and that it was immaterial that the certificate had not been issued. It was there said, and the quotation is applicable here: "From the above recital of facts it seems too clear for controversy that 254 shares of stock were on and after June 4, 1925, the date of filing of the first waiver, in the category of subscribed capital stock owned by said Harry Klarman. Every condition of the permit had been complied with.

The stock had been fully paid for; only the formal issuance of the certificate remained to be done, but this was not required to bind him. The whole scheme and plan was that of Klarman and his brother and it would be an undue submission to form and a disregard of substance to hold otherwise than that Harry Klarman was the chief stockholder at the time the contract with plaintiff was entered into."

[6, 7] The next point requiring discussion is that Böös and Callahan were held to a joint and several liability for the entire debt going with the ownership of 4,000 shares of stock, instead of a liability for one-half of the amount. It is contended that each is presumptively the owner, in any event, of not more than 2,000 shares and that his liability is limited accordingly. It is claimed also that the evidence is insufficient to show a joint ownership of the stock, but we think it is immaterial whether they owned it jointly or in common or in what proportions they owned it. That question does not concern the creditor. They acted jointly in their contracts with the corporation. Their interests were not segregated. They were entitled to a certificate in their joint names. The liability attached to the ownership of the whole and was imposed upon each of them. Such a liability is presumed to be joint and not several. Civ. Code, § 1431. The court found their ownership to be joint, and it is argued that in such a case the ownership is in equal shares. Civ. Code, § 683. But section 1431 and not section 683 controls as between the parties to the obligation. *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 59 P. 390, 78 Am. St. Rep. 35. The judgment was, therefore, not excessive.

[8] The same defendants claim to have been released from their stockholders' liability by the repeal of article 12, § 3, of the Constitution, and sections 322 and 322a of the Civil Code, by which the liability of stockholders was imposed. It is pointed out that when section 322 was repealed the repealing act (St. 1931, p. 444) contained a saving clause which rendered the repeal inapplicable to causes of action then existing. This provision is claimed to be ineffectual because of what is argued to be a defective title of the repealing act. We cannot agree with the argument presented on this point, but regardless of the effect of the saving clause in the act repealing section 322, creditors' rights against stockholders were preserved by section 404 of the Civil Code (now

section 280), which operated generally to save existing causes of action from the operation of repealing and amending statutes. Furthermore, the question of continuing liability was settled in favor of creditors by the decision of *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866.

We find no error in the record, and the judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 222

MANCINI v. ULLMAN.
Civ. 10065.

District Court of Appeal, Second District,
Division 1, California.
April 17, 1935.

1. Limitation of actions ☞100(1)

Where defendant's fraud in obtaining money during 1928, 1929, and 1930 was not discovered by nonresident until May, 1933, action commenced on October 23, 1933, for recovery of the money *held* not barred by limitation or laches (Code Civ. Proc. §§ 338, 339).

2. Pleading ☞237(1)

Allowing plaintiff to amend amended complaint to conform to proof *held* not error.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Zunilda Mancini against S. George Ullman. From a judgment for plaintiff, defendant appeals. On respondent's motion to dismiss appeal or affirm judgment.

Judgment affirmed.

Arthur C. Fisher, of Los Angeles, for appellant.

Herman Tepp, Ivan L. Hiler, and Jay J. Stein, all of Los Angeles, for respondent.

CONREY, Presiding Justice.

Appellant having filed his opening brief, respondent now moves to dismiss the appeal of defendant, or affirm the judgment, upon

the ground that the questions upon which the decision depends are so unsubstantial as not to require argument. The record is presented in a printed transcript which contains the judgment roll, together with a bill of exceptions in which there are no specifications of insufficiency of the evidence to sustain the findings.

[1] On several dates (January 23, 1928, April 12, 1929, and April 28, 1930), respondent, who resided in the city of New York, paid to appellant sums of money, in all amounting to \$6,900, all solicited and received as part of a fund to be used for the construction of a monument in the city of Los Angeles, to commemorate the name of Rudolph Valentino. Appellant actually used for that purpose only \$2,000. The court found that his representations to respondent, by means of which he obtained the money, were knowingly false. The transcript begins with an amended complaint, and does not show the date of commencement of this action. However, we accept as presumably correct the statement of counsel, in his brief, that the action was not commenced until October 23, 1933. But the facts shown by the findings are sufficient to excuse the failure of respondent to discover the fraud until May, 1933, when she promptly employed an attorney, and demanded repayment of the money sued for in this action, and then filed her complaint.

There is, therefore, no merit whatever in appellant's contention that the plaintiff's right of action is barred by the provisions of sections 338 and 339 of the Code of Civil Procedure; nor in the further defense based on the ground of laches of the plaintiff in delaying the commencement of her action.

[2] There is no substantial basis for the claim of appellant that the court erred in allowing plaintiff to amend her amended complaint to conform to the proof. Appellant argues that the points of amendment did *not* conform to the proof. But the trial court thought differently, and in the light of the findings we must assume that the court's ruling on this matter was supported by the evidence. There was no miscarriage of justice in the rendition of judgment against appellant.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

GARRATT v. BAKER et al. *

Civ. 9679.

District Court of Appeal, First District,
Division 2, California.

April 3, 1935.

Hearing Granted by Supreme Court
May 29, 1935.**I. Insurance ☞2**

Agreement among three married men that the two survivors should pay widow of first of them to die \$500 monthly so long as she and survivors should live *held*, in action by widow of one of them against the two survivors, not a mutual insurance contract, but a "gaming contract," without consideration, and void (Civ. Code, §§ 1559, 2558, 2587).

[Ed. Note.—For other definitions of "Gambling Contract," see Words & Phrases.]

2. Gifts ☞11

Mutual promises to make certain gifts are void.

3. Contracts ☞56

A promise for a promise is a sufficient consideration only when mutual, concurrent, and obligatory upon each of the promisors.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by May A. Garratt against A. H. Baker and another. From a judgment for defendants, and from an order refusing to vacate the judgment and to grant leave to amend complaint, plaintiff appeals.

Affirmed.

O. H. Sooy, of San Francisco, for appellant.

Christopher M. Bradley, of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiff sued to recover a judgment for money claimed under an alleged contract. The defendants filed a demurrer in which they alleged that the complaint was insufficient and in which they also made certain attacks claiming the complaint was ambiguous and unintelligible. The demurrer was sustained without leave to amend. Notice of the ruling was served on September 11, 1934. The next day judgment in favor of the defendants was entered. On the same day the plaintiff served a notice of motion to vacate the judgment and order sustaining the demurrer and

to grant leave to amend. At the same time she served a copy of her amended pleading. When the motion came on for a hearing it was denied. From the judgment and also from the order refusing to vacate the judgment and to grant leave to amend the plaintiff has appealed. The original complaint and the amended complaint are so similar in terms that we will address ourselves to the amended complaint. If it did not state a cause of action, it follows that the trial court did not err in rendering the judgment or in making the order, both of which have been appealed from. The amended complaint was as follows:

"Plaintiff complains of defendants, and for cause of action alleges:

"I. That Edward C. Garratt died at the County of Alameda, State of California, on the 19th day of November, 1932; that at all times herein mentioned during the lifetime of said Edward C. Garratt plaintiff was his wife, and is now his widow;

"II. That the defendants, being then married men, and the said Edward C. Garratt, during the lifetime of the said Edward C. Garratt, the exact date being unknown to plaintiff, at the City and County of San Francisco, State of California, in consideration of their mutual promises, agreed among themselves that to the widow of the first of them to die, the two survivors would pay monthly in advance the sum of \$500.00 per month so long as said survivors and said widow should live;

"III. That the said wives of the defendants survived the said Edward C. Garratt;

"IV. That on the respective dates herein after mentioned the defendants paid to the plaintiff upon and pursuant to said agreement the following sums, and none other, to-wit: (Here monthly sums are specified.)

"V. That there is now due and owing from the defendants to plaintiff upon said agreement the aggregate sum of \$4,750.00, and that plaintiff has demanded of the defendants, and each of them, payment of said sum, and neither the same nor any part thereof has been paid."

In support of her pleading the plaintiff claims that the agreement alleged constituted a contract of insurance. In another place she claims that she had pleaded a contract made for the benefit of a third person. In reply the defendants assert the agreement was not a contract of insurance but that it was a wa-

As to the contention that the purported contract was one made in behalf of a third person we think it may not be sustained for the following reasons. Section 1559 of the Civil Code provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." But the facts as alleged show that the surviving parties have attempted, at least, to rescind the agreement. The force and effect of that attempt depends on what follows.

[1] It is claimed that it was a contract of mutual insurance. But by a contract of mutual insurance one party is designated as the insured and he, in turn, becomes the insurer of others. Turning to the pleading it will be seen that the agreement as alleged did not, and could not, operate to insure but one person.

As a contract of insurance, it will be conceded the agreement could have been oral or it could have been in writing. But, whether oral or written, to be a contract of insurance it should have measured up with the calls of the statute. Section 2587, of the Civil Code provides: "A policy of insurance must specify: 1. *The parties* between whom the contract is made; 2. *The rate* of premium; 3. *The property* or life insured; 4. *The interest* of the insured in property insured, if he is not the absolute owner thereof; 5. *The risks* insured against; and, 6. *The period* during which the insurance is to continue." From the pleading it appears at once that no premium was named, but furthermore the insured was not to pay any premium. The sum of \$500 mentioned was but an installment of the total agreed to be paid to the beneficiary. The "life insured" was not specified, but depended on the future events as to its being the life of any one of three different persons. That omission was not only fatal to a contract of insurance but would be as to any contract. *Clark v. Great Northern Ry. Co.* (C. C.) 81 F. 282. "The period during which the insurance is to continue" is not fixed but depends on the subsequent happening of events as to which man died first and when such man did die, but not until then was the period fixed. Again section 2558 of the Civil Code provides: "Every stipulation in * * * every policy executed by way of gaming or wagering, is void." That requirement brings us to the consideration of another attack by the defendants.

In their brief the defendants say: "Upon the adventure stated in the complaint in this action, there never could be but one winning

widow. She would take the whole stake. The identity of the winning widow to be thus favored—perhaps—was as uncertain as the winner in any unfixed horse race." The rule of law applicable was under consideration in *Hankins v. Ottinger*, 115 Cal. 454, 47 P. 254, 40 L. R. A. 76. On page 458 of 115 Cal., 47 P. 255, the court cites and quotes from *Harris v. White*, 81 N. Y. 532. In the latter case, at page 539, the court said: "A bet or wager is ordinarily an agreement between two or more, that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance. There is in them this element that does not enter into a modern purse, prize or premium, viz.: that each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. 'Illegal gaming implies *gain and loss between the parties* by betting, such as would excite a spirit of cupidity.' (*People v. Sergeant*, 8 Cow. 139.) A purse, prize or premium is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain. Such is the meaning of the words now, in common understanding, in the practical use of them, and in the legislative purview, as will be seen by the citations which we make." In the instant case the promise made by each husband was not one " * * * offered by a person for the doing of something by others, into the strife for which he does not enter." The contest therefore was not one for a purse. Furthermore, in a contest for a purse the one who offers it " * * * has not a chance of gaining the thing offered; and if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain." We think the facts alleged bring this case within the definition of a "bet or wager," as that definition is set forth in the quotation first made from *Harris v. White*, supra.

[2, 3] The defendants make the further point that the agreement as alleged is invalid for want of consideration to support it. The plaintiff does not claim there was any material consideration; but she relies on the mutual promises of the three husbands which each made to the other. Without any consideration therefor each made a promise to make payments in the future. In other

words, each promised to make certain gifts. Such promises were void. 28 C. J. 648, § 42; Zeller v. Jordan, 105 Cal. 143, 148, 38 P. 640. One void promise did not create a valid consideration for another void promise. 13 C. J. 329, § 172; Denver Pressed Brick Co. v. Le Fevre, 25 Colo. App. 304, 138 P. 434, 436; Huttig v. Brennan, 328 Mo. 471, 41 S.W.(2d) 1054. Stating the rule another way, a promise for a promise is a sufficient consideration only when *mutual, concurrent, and obligatory* upon each of the promisors. 13 C. J. 327-329; Brown v. Brew, 99 Wash. 560, 169 P. 992; Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 187 P. 370, 190 P. 330; Shortell v. Evans-Ferguson Corp., 98 Cal. App. 650, 660, 277 P. 519. No one will claim that a promise to make a gift is *obligatory*. It follows that the agreement as made was void.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



6 Cal.App.2d 317

**BANK OF AMERICA NAT. TRUST &
SAVINGS ASS'N v. WREN.**

Civ. 9712.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Hearing Denied by Supreme Court
June 18, 1935.

Banks and banking — 67

Successor, through purchase and consolidation, to assets of bank to which continuing guaranty was given to support another's credit *held* entitled to enforce guaranty to full extent thereof, notwithstanding temporary extinction of debtor's obligation and renewal thereof after sale of bank's assets, where guaranty contemplated variations in amount of obligation and authorized renewal (Gen. Laws 1923, Act 652, § 31).

STEPHENS, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by the Bank of America National Trust & Savings Association against Stella

T. Wren. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles B. DeLong, of San Francisco, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and Howard Waterman, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

In July of 1923 Charles F. Wren and Stella F. Wren, the latter being appellant herein, executed and delivered to Merchants' National Bank of Los Angeles a "continuing guaranty" to support the credit of the Pickwick Corporation, as follows: "You will please give credit to the Pickwick Corporation and permit them to become indebted to you on endorsements, overdrafts, acceptances or other liabilities in a sum in United States gold coin not exceeding the total amount of Fifty Thousand Dollars (\$50,000), and as said The Pickwick Corporation contemplates a course of future dealings with you, you will please continue said credit, or if it should be reduced or satisfied by payments made by said The Pickwick Corporation renew the same from time to time for said amount, or any less sum, or otherwise keep said credit permanently up to the limit aforesaid, or any less sum. And these presents shall be deemed to be, and shall constitute to you a continuing guaranty in reference to, and embrace the original credit hereby authorized and all future liabilities of said The Pickwick Corporation to you under such original credit, and under any renewal or renewals thereof, and under any endorsement, acceptance, overdraft and other liability and under such successive transactions with you as shall either continue said liabilities, or from time to time renew them, and said guaranty shall remain and be operative until all present or future credit and credits and claims given by you as aforesaid and all liabilities incurred as aforesaid, not exceeding said limited amount, shall be fully paid, subject to the legal right to revoke the same at any time as to any transactions occurring after such revocation. And in consideration of the compliance by you to the above requests, we hereby promise and agree to pay you at any time, upon demand, in United States gold coin, the full amount of principal and interest due you from said The Pickwick Corporation as aforesaid not exceeding said sum of Fifty Thousand Dollars."

From the findings of the trial court, which are not disputed, it appears that the Merchants' National Bank made loans to the Pickwick Corporation on January 29, 1926, and thereafter; that on December 10, 1928, the Bank of America of California acquired the assets of the Merchants' National Bank; that April 10, 1929, the loans of the Pickwick Corporation were paid in full; that October 9, 1929, Bank of America of California loaned Pickwick Corporation \$100,000, which it increased to \$300,000; that on November 1, 1930, the Bank of America of California consolidated with Bank of Italy National Trust & Savings Association to form the Bank of America National Trust & Savings Association; December 26, 1930, Pickwick Corporation paid \$250,000 on account, and February 25, 1931, gave plaintiff a 61-day note for the balance of \$50,000; that \$20,039.50 was paid on the principal, and the interest was paid to October 22, 1932; that Pickwick Corporation failed and refused to pay this balance; that no communication relative to said guaranty, either written or verbal, ever took place between plaintiff or Bank of America of California and defendant. Judgment was rendered against defendant for the balance, plus interest and attorney's fees.

This appeal, taken on the judgment roll, challenges the right of the successor in interest to the banking corporation which was the original recipient of the guaranty to enforce that guaranty, especially where, as in this case, the original obligation was paid up, and there was a new extension of credit.

By the terms of the Bank Act in effect in July, 1923, when the guaranty was executed (Deering's Gen. Laws, 1923, vol. 1, p. 180, Act 652, § 31), the purchasing bank shall "ipso facto and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded and shall become subrogated and shall succeed to all rights, obligations, properties, assets, investments, deposits, demands, contracts, agreements, court and private trusts and other relations to any person, creditor, depositor," etc. Plaintiff bank, as successor to the original obligee, became entitled to rely upon the continuing guaranty; and since by its terms that writing contemplated that the amount of the obligation would vary from time to time, the temporary extinction of the entire obligation of Pickwick Corporation to the bank would not cancel or reduce appellant's

liability to the bank on the guaranty as to new loans, there being no withdrawal of the guaranty by appellant nor any act of the bank which would preclude it from asserting its right to rely thereon. Bank of America v. Granger, 115 Cal. App. 210, 1 P.(2d) 479; Barreiro v. Bank of Italy, 125 Cal. App. 153, 13 P.(2d) 1017; In re Estate of Barnett, 97 Cal. App. 138, 275 P. 453; Mercantile Trust Co. v. San Joaquin, etc., Corporation, 89 Cal. App. 558, 265 P. 583.

Judgment affirmed.

I concur: CRAIL, J.

STEPHENS, Presiding Justice.

I dissent.

I am unwilling to lend my indorsement to the extension of the Bank Act so as to further nullify the principles of guaranty that grew up through the experience of generations.



6 Cal.App.2d 307

**KREIDER v. AMERICAN SURETY CO.
OF NEW YORK.
Civ. 9841.**

District Court of Appeal, Second District,
Division 2, California.
April 19, 1935.

Attachment @230, 333

Where complaint affirmatively showed that note sued on was secured by pledge of personalty, and plaintiff did not allege that security had become valueless, writ of attachment held void, and hence was properly discharged on motion, precluding attachment creditor from subsequently recovering on undertaking to release attached property (Code Civ. Proc. § 537).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by John S. Kreider against the American Surety Company of New York. Judgment for defendant, and plaintiff appeals.

Affirmed.

Chas. L. Nichols and Carleton B. Wood, both of Los Angeles, for appellant.

Mathes & Sheppard and J. Stanley Mullin, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Action on an undertaking to release property seized under a writ of attachment in an action by appellant against California Thorn Cordage, Inc. Several days after the release of the property by the sheriff after his receiving the undertaking the trial court, on motion, made an order discharging the attachment and ordering the release of the attached property. This order was evidently made upon the ground that the statement in the affidavit for attachment, that the note sued on was not secured, was false and directly contradicted by the allegations of the complaint, which showed affirmatively that the note was secured by the pledge of personal property. Plaintiff recovered judgment on the note for \$6,316.99 and attorney's fees, and on execution being returned unsatisfied brought this action, which upon trial resulted in the judgment for respondent from which this appeal is taken.

Appellant claims it was error for the trial court to find that the writ of attachment was void, and places his chief reliance upon *Koehler v. Serr*, 216 Cal. 143, 13 P.(2d) 673, 875, 89 A. L. R. 262. In that case, also an action against sureties on a similar undertaking, there had been no discharge of the attachment in the previous action, and, as specifically mentioned in the opinion, the complaint as well as the affidavit were prima facie sufficient to support the issuance of the writ of attachment. There is an obvious difference between a case in which the absence of a basis for the issuance of a writ of attachment is not disclosed by the complaint nor raised in the action in which the attachment is issued and the case at bar, where the complaint discloses affirmatively that the action is not one in which attachment will issue and the writ is discharged on motion in the action in which it was issued. The *Koehler* Case does not hold that attachment proceedings are voidable only and never void because of lack of the foundationary requirements, but only that "*as applied to the present case* [italics ours], the attachment proceedings in the former action were voidable only." The case of *Passow & Sons v. U. S. Fidelity & Guaranty Co.*, 177 Cal. 31, 170 P. 1124, is also to be distinguished from the case at bar, for similar reasons.

It is evident from the affirmative allegations in the complaint in the action in which

the writ of attachment was issued that the promissory note sued upon was secured by a pledge of personal property, and there is no allegation there or in the affidavit that the security had become valueless. The action was not one in which the writ of attachment was authorized. Section 537, Code Civ. Proc. The case is not one in which the writ was irregularly issued, but one in which it was improperly issued, and the writ is therefore void. *Bullard v. Rosenberg*, 130 Cal. App. 542, 547, 20 P.(2d) 104; *Talcott Land Co. v. Hershisier*, 184 Cal. 748, 763, 195 P. 653; *Mudge v. Steinhart*, 78 Cal. 34, 39, 20 P. 147, 12 Am. St. Rep. 17.

The writ being void, there existed no legal right to the seizure of property thereunder, and the bond given by respondent to stay the execution was without consideration. Appellant was entitled to nothing under the void writ and parted with nothing to which he was entitled when the sheriff released the property.

Other points raised by appellant are disposed of by the views herein expressed.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



CALIFORNIA CASUALTY INDEMNITY EX-
CHANGE v. INDUSTRIAL ACCI-
DENT COMMISSION et al.*
Civ. 9731.

District Court of Appeal, First District,
Division 2, California.

April 5, 1935.

Hearing Granted by Supreme Court
June 3, 1935.

1. Master and servant ⇨403

Burden rests on applicant to prove case within Workmen's Compensation Act (Gen. Laws 1931, Act 4749).

2. Master and servant ⇨371

Workmen's Compensation Act is not an insurance act of workmen in general, and, to ascertain what injuries come within act, scope of contract of employment must be ascertained (Gen. Laws 1931, Act 4749).

3. Master and servant ⇨371

Whether employee is one employed to work at fixed place or is traveling agent,

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 758.

there must be causal connection between employment and injury which had its origin in risk connected with employment, and flowed from that source as rational and natural consequence, to entitle employee to compensation under Workmen's Compensation Act (Gen. Laws 1931, Act 4749, § 6 (a)).

4. Master and servant ☞375(1)

Accident arises "in course of employment" within Workmen's Compensation Act if it occurs while employee is doing what man so employed may reasonably do within time during which he is employed, and at place where he may reasonably be during that time (Gen. Laws 1931, Act 4749, § 6 (a)).

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

5. Master and servant ☞373

Death by asphyxiation of traveling salesman who, in obtaining lodging for night in cabin, lighted gas heater and closed windows and door held not to "arise out of and in course of employment" so as to entitle widow to compensation, since salesman was not authorized to lodge himself in unreasonable manner, notwithstanding he had right to lodge himself at such place and in such manner as he chose (Gen. Laws 1931, Act 4749, § 6 (a)).

[Ed. Note.—For other definitions of "Arising out of Employment," see Words & Phrases.]

Petition by the California Casualty Indemnity Exchange for a writ of review to have annulled an award made by the Industrial Accident Commission under the Workmen's Compensation Act in favor of the surviving widow and child of Charles Monahan.

Award annulled.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner has applied for a writ of review to have annulled an award made in favor of the surviving widow and child of Charles Monahan, who was asphyxiated. The admitted facts are that Charles Monahan was employed as a salesman by Pacific Casket Company; that as such salesman he traveled about the state in an automobile furnished by his employer, calling upon the customers and selling the goods of his employer; that for his services he received

from his employer a commission of 10 per cent. of the gross amount of the sales he made, and that the employer contributed \$5 per day toward defraying the decedent's traveling expenses, that is, the cost of meals, hotel accommodations, and transportation. The decedent had been on a trip north as far as Crescent City and on his return, January 26, 1934, at about 9 o'clock p. m., he arrived in said automobile at an auto camp conducted by one R. F. Unzelman at Santa Rosa, Cal. He obtained accommodations for the night. The next day at about 3 o'clock in the afternoon the proprietor, together with representatives from the sheriff's office, entered the cabin and found Monahan dead. On investigation it was found that all of the doors were closed and locked and all of the windows were closed. A gas heater was burning "full tilt." The autopsy disclosed that death had been caused by asphyxiation.

When the decedent arrived at Unzelman's, he went to the door of the house occupied by the proprietor. Mr. Unzelman came to the door, but as he was ill he merely delivered a key to Mr. Monahan and the latter said he would unlock the cabin assigned to him. The record is silent on the subject, but we may assume the gas heater was not burning because the cabin was not occupied at the time Mr. Monahan engaged it. The record shows affirmatively that although the door was locked the windows were open for the purpose of ventilating the cabin. It therefore appears that after Mr. Monahan entered the cabin he lighted the gas heater, locked the screen door and also the main door behind him, and he closed and locked the windows, and thereafter retired. In the room a small bottle was found. There was evidence it did not contain intoxicating liquor, but no evidence as to what it did contain. At the time he applied for lodgings, Mr. Unzelman stated to him that he was suffering from a cold and did not want to go out in the weather. Mr. Monahan replied that he was also suffering from a cold and stated to Mr. Unzelman that he knew of a remedy which he intended to purchase on arriving in San Francisco. The record discloses that after Mr. Monahan entered the cabin he became nauseated and vomited on the floor.

The respondent commission made findings in favor of the claimant and against the petitioner on all issues.

[1-4] The right to recover under the Workmen's Compensation, Insurance and Safety Act (2 Deering's Gen. Laws 1931, Act 4749,

p. 2276) depends on showing " * * * any injury sustained * * * arising out of and in the course of the employment. * * *" Section 6(a). The burden rests on the applicant to prove a case within the statute. *Enterprise Foundry Co. v. Industrial Acc. Comm.*, 206 Cal. 562, 275 P. 432. "As a rule commercial travelers may be regarded as acting in the course of their employment so long as they are traveling in their employer's business including the whole period of time between their starting from and returning to their place of business or home." *Bradbury on Workmen's Compensation*, p. 105. But it is settled law that the statute is not an insurance act of workmen in general. *Associated Oil Co. v. Industrial Acc. Comm.*, 191 Cal. 557, 217 P. 744. It makes no exception as to traveling agents in that regard. It is therefore necessary to ascertain what injuries come within the scope of the statute. To do so it becomes necessary to ascertain the scope of the contract of employment. *State Comp. Ins. Fund v. Indus. Acc. Comm.*, 194 Cal. 28, 227 P. 168. Having done so, some questions arise as to whether the facts of the injury bring the case within the scope of the contract so ascertained and determined. Whether the employee is one employed to work at a fixed place or is a traveling agent it is settled law that: "There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence." *Larson v. Industrial Acc. Comm.*, 193 Cal. 406, 409, 224 P. 744, 745. If, in the instant case, that rule is not easily applied, there is a well-defined rule to guide the way. Long before workmen's compensation acts were enacted in this country they had been enacted in England. Such statutes had been construed in many cases. Questions quite similar to the one presented to us had on several occasions been presented to the courts of England. (*Judicial Interpretations of Workmen's Compensation Law—Chartres.*) Of all of the numerous cases mentioned by the author *Moore v. Manchester Liner, Ltd.*, III B. W. C. C. 527, is probably the leading case in both England and America. The decision was rendered by the House of Lords. The facts in brief were as follows: James Moore was a seaman on board of a British vessel which put in to the American harbor, South Brooklyn. While the ship lay at anchor he obtained permission to go on shore to purchase certain necessities. Later he returned to the ship and attempted to board it by climbing a ladder which was the

only method provided. In doing so he fell into the water and was drowned. Lord Loreburn, delivering the opinion in the House of Lords, stated as follows:

"When we speak of a workman being employed it means that he is engaged to do certain things at certain times and in certain places. If the question is whether an accident befell him 'in the course' of that employment, the first inquiry is, was he doing any of the things which he might reasonably do while so employed? A seaman going ashore without leave is *not doing what he might reasonably do. He simply quits his employment for a time. Otherwise if he goes ashore with leave, for the employment is continuous, and implies leisure as well as labour.* The next inquiry is, Did the accident occur within the time covered by the employment? A man engaged for so many hours a day is in the employment only during those hours. If engaged for a month continuously day and night, he is in the employment during the whole month, except, of course, during any time he quits the employment. The last inquiry is, Did the accident occur at a place where he may reasonably be while in the employment? In some classes of work, especially where the engagement is intermittent, for so many hours a day, the place is the actual scene of his labour, a railway or quarry or factory. In other classes of work, where the engagement is continuous for day and night over a period of time, the place is wherever he may reasonably be during that time.

"And so, to sum it up, I think an accident befalls a man 'in the course of' his employment, if it occurs while he is doing what a man so employed may *reasonably* do within a time during which he is employed, and at a place where he may *reasonably* be during that time.

"It may seem at first sight that this is a formidable interpretation. It is not so in reality, because in every case the accident, to be a ground for compensation, must also be one arising out of the employment; and it is not often that such risks are run, except at the place where the man's work is to be done. A seaman, for example, who is ashore on leave and is knocked down by a waggon, is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business, he is during that errand in the same position as a messenger, and is protected against the same risks."

The opinion as so expressed by Lord Loreburn has been cited and followed in many decisions. For the purpose of this opinion,

it is sufficient to cite *Walker v. Speeder Machinery Corp.*, 213 Iowa, 1134, 240 N. W. 725, and the numerous cases cited or discussed by the Supreme Court of Iowa in its opinion. The same rule of law has been applied in this state. *Brusster v. Industrial Acc. Comm.*, 35 Cal. App. 81, 169 P. 258. If not directly in line, there are many expressions in the decisions of the Supreme Court of this state that are closely in harmony with the rule just stated. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 685, 686, 158 P. 212, L. R. A. 1916F, 1164; *Ward v. Industrial Acc. Comm.*, 175 Cal. 42, 44, 164 P. 1123, L. R. A. 1918A, 233; *Bethlehem Corp. v. Industrial Acc. Comm.*, 181 Cal. 500, 505, 185 P. 179, 7 A. L. R. 1180; *State Comp. Ins. Fund v. Industrial Acc. Comm.*, 194 Cal. 28, 33, 227 P. 168; *Hartford A. & I. Co. v. Industrial Acc. Comm.*, 202 Cal. 688, 691, 262 P. 309, 58 A. L. R. 1392; *San Bernardino County v. Industrial Acc. Comm.*, 217 Cal. 618, 625, 20 P.(2d) 673.

[5] To any rational mind it is patent that by doing what he did it became inevitable that within the space of a short time after Mr. Monahan had closed and sealed the cabin, as above stated, he would be rendered seriously sick or perchance that he would be smothered to death. Conceding that under his contract of employment he had the right to lodge himself at such place and in such manner as he chose, he was not authorized to do so in such an unreasonable manner as stated above. *Enfield v. Certain-Teed Products Co.*, 211 Iowa, 1004, 233 N. W. 141, 147. Under his contract he was employed as a traveling salesman, and, as such, he was authorized to do such things as he might reasonably do; but the injury he suffered by heating, closing, and sealing the cabin, in the manner hereinabove set forth, was not one arising out of his employment. It was one arising outside thereof. In other words, the decedent was not employed to do, nor was it within the contemplation of the parties that he should do, the acts which he did in the manner in which they were done. *Christensen v. Hauff Bros.*, 193 Iowa, 1084, 188 N. W. 851. The case last cited is very closely in point. The firm of Hauff Bros. was engaged in the farm machinery and hardware business in several different towns in the state of Iowa. Christensen was employed by the firm as manager of one of the places of busi-

ness. Under the direction of the firm he went to the principal place of business at Hinton. After transacting his business at that place one of the members of the firm delivered to him a railroad ticket, and he started to return. The train on which he was to take passage was a freight train. He did not attempt to board it until it was in motion. At that time he ran alongside of a flat car and attempted to place his hands on the floor of the car, spring up, and take a seat thereon. In making that attempt he fell, and from the injuries sustained he died in a short time. In 188 N. W. on page 854 the supreme court of Iowa said: "We do not think that Christensen, in his attempt to throw himself upon the flat car, without any standards or projections to take hold of, was doing a thing occasioned by the nature of his employment; and therefore such act and consequent injury could not be said to arise from out of his employment. There was no justification for Christensen's attempt to board the freight train by mounting the flat car in a most unusual manner and for reasons wholly unjustifiable. In attempting to jump onto the flat car he was not at a place where he might reasonably be, doing what a man so employed might reasonably do. We cannot conceive that Christensen's employment contemplated or comprehended any such unusual and rash act. If Henry Christensen, in attempting to board the flat car, was performing an act reasonably required by his employment, his injury and consequent death might be said to have causal connection with his employment, and therefore arise out of his employment. In other words, if upon consideration of all the circumstances there existed causal connection between the conditions under which Christensen's work was required to be performed and the resulting injury, it could then be said that he was, at the instant of the injury, within the scope of his employment. *If the conclusion may be logically reached that the workman's injury followed as a natural incident of his work and was reasonably contemplated in his employment, then it may be said to have arisen out of the employment. But we think such conclusion not reasonably possible.*" (All italics ours.)

It follows that the award under attack should be, and it is hereby, annulled.

We concur: NOURSE, P. J.; SPENCE, J.

**LINDEMANN v. SAN JOAQUIN COTTON
OIL CO. et al. * 1**
Civ. 5199.

District Court of Appeal, Third District,
California.

March 30, 1935.

Rehearing Denied April 29, 1935.

Hearing Granted by Supreme Court
May 27, 1935.

1. Appeal and error ⇨989

On appeal from judgment on jury's verdict, court will consider only facts and inferences therefrom tending to establish correctness of jury's findings.

2. Automobiles ⇨245(87)

Facts shown in action for injuries to guest of defendant driving codefendant's automobile *held* not to establish plaintiff's contributory negligence in riding with driver as matter of law; whether driver was intoxicated and plaintiff knew such fact, when he became aware thereof, and what he as reasonable man should then have done being for jury.

3. Negligence ⇨136(9)

Contributory negligence is law question only when reasonable men can draw but one inference, pointing unerringly to such negligence, from facts, and is fact question for jury in all other cases.

4. Automobiles ⇨245(50)

Whether intoxication of driver of automobile striking bulkhead of bridge proximately contributed to accident *held* for jury, in action for resulting injuries to his guest.

5. Appeal and error ⇨996

Where reasonable men's minds might differ on fact question, it is appellate court's province only to find whether there is sufficient evidence in record to support jury's finding thereon.

6. Appeal and error ⇨1004(1)

New trial ⇨76(1)

Neither trial nor appellate court may set aside jury's award of damages as excessive, unless excess appears as matter of law or recovery is so grossly disproportionate to compensation reasonably warranted by facts as to shock sense of justice and raise presumption that it resulted from passion, prejudice, or corruption (Code Civ. Proc. § 657).

7. Damages ⇨132(1)

Award of \$62,500 damages to 42 year old man, supporting wife and minor son by extensive farming operations, for fractures of skull, jaw, frontal and nasal bones, palate, and two costal cartilages, brain concussion, multiple body contusions, permanent injury to brain and median nerve of hand, altered

*For subsequent opinion see 55 P.2d 870.

facial appearance, unstable nervous condition and impaired eyesight and hearing, with resulting confinement in hospital and bed at his home under nurse's care, inability to attend to his affairs and impaired capacity for physical work, *held* not excessive.

8. Damages ⇨212

Instruction in action for injuries to farmer that value of his time while disabled must be determined on direct evidence, while compensation for his loss of earning power was left to jury's sound discretion, *held* not erroneous as instruction to determine loss of earnings on direct proof, though no evidence was introduced as to value of his time while disabled or earning power, in view of his testimony as to his profits from grain crop and cultivation of increased number of acres after accident, personal charge of farming implements and repair thereof before injuries, and inability to do physical work required or carry on business thereafter.

9. Appeal and error ⇨1015(5)

Trial court's finding on motion for new trial because of juror's misconduct, as to which conflicting affidavits were filed, is binding on appellate court.

10. New trial ⇨42(1)

New trial may be granted because of juror's untrue answers to questions on voir dire, if it appears that moving party was not aware of falsity thereof when impanelment of jury was completed, and did not discover fact before rendition of verdict.

11. New trial ⇨44(1)

Motion for new trial because of juror's misconduct *held* properly denied, where supporting affidavit showed that alleged misconduct occurred during first day of trial and that moving party's counsel were made acquainted with facts almost immediately and called matter to trial judge's attention before court reconvened on same day, but did nothing further.

12. Automobiles ⇨244(26)

Facts shown in action for injuries to cotton farmer while riding as guest of defendant cotton oil company's district manager in such company's automobile *held* to justify jury's implied finding that entire journey was on mission of company.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Rudolf Lindemann against the San Joaquin Cotton Oil Company, Thomas Ewing, and others. From a judgment for plaintiff against named defendants and an order denying their motion for judgment

notwithstanding the jury's verdict against them, they appeal.

Affirmed.

Chester O. Hansen, of Fresno, and Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for appellants.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

PULLEN, Presiding Justice.

Respondent herein as plaintiff recovered a judgment in the sum of \$62,500 based upon a verdict by a jury in that amount against San Joaquin Cotton Oil Company, a corporation, and Thomas Ewing, its district manager, for personal injuries sustained while riding as a guest of defendant Ewing, in a car owned by San Joaquin Cotton Oil Company. These defendants appeal both from the judgment and from an order denying their motion for judgment notwithstanding the verdict.

As grounds for reversal appellants urge that the evidence is insufficient to support the verdict in that plaintiff was guilty of contributory negligence which proximately contributed to his injuries; that the verdict was excessive; that the court erred in its instructions to the jury upon the subject of damages; that the jury were guilty of prejudicial misconduct, as was also the attorney for the plaintiff; and that the evidence was insufficient to support the implied finding that defendant Ewing was acting as agent for the oil company at the time of the accident.

[1] In the following recital of the facts as gathered from the evidence this court will, in accordance with the well-established rule, concern itself only with those facts, and inferences therefrom, that tend to establish the correctness of the findings of the jury.

It appears that plaintiff was a farmer in the San Joaquin Valley, allotting a large acreage of his lands to the production of cotton. Defendant San Joaquin Cotton Oil Company operated a number of cotton gins throughout the valley, and was heavily involved, financially, in aiding the growers in its territory, including plaintiff, to produce and market their cotton crops.

[2-4] About April 22 or 23, 1933, defendant Ewing called plaintiff on the telephone and informed him that an important meeting of the San Joaquin Agricultural Labor Bureau was to be held in Fresno on April 24th, and urged him to come and bring with him as many of the representative farmers from his

neighborhood as he could. Plaintiff accepted the invitation, and went to Fresno with Mr. Harry Fawcett, a neighbor. The meeting was held in the afternoon, and was over by 4:30 p. m. After the meeting adjourned some informal discussion took place in the lobby of the Californian hotel, where the meeting had been held, after which a group, including plaintiff and defendant Ewing, adjourned about 6 o'clock to some place several blocks from the hotel where liquor was obtainable. Both plaintiff and defendant each had a bottle or two of beer and four or five highballs. While there, Mr. Fawcett, having another engagement, left; Ewing inviting plaintiff to remain and he would take him home. Plaintiff accepted the invitation of Ewing stating that he wanted to talk to him and get his advice on certain matters pertaining to his cotton crop. About 8 o'clock plaintiff and Ewing left the resort and went to a restaurant near the hotel where they had dinner. No drinks were had after they left the liquor establishment. About 9 o'clock they got into Mr. Ewing's car, he driving; plaintiff to go to his home in Los Banos, Ewing to Chowchilla. Apparently nothing unusual occurred until they had reached a point somewhere near Madera, whether to the south or north thereof is not entirely clear. Plaintiff stated at one place in his testimony it was between Madera and Califa that Ewing was trying to see how fast his new Ford would go, and plaintiff then said to him: "Don't let's be in a hurry, we don't have to be." Apparently the driver then slowed down, but subsequently on several other occasions plaintiff asked Ewing to drive more slowly, which apparently he did. In the meantime they were discussing finances pertaining to plaintiff's cotton crop and other matters affecting their mutual business interests. When they reached a point near Chowchilla, where the highway to Los Banos leaves the main highway, plaintiff suggested to Ewing that he would accompany Ewing to Chowchilla and would then drive from there to Los Banos alone, and return the car the following day. To this Ewing would not agree, and they continued on toward Los Banos. Plaintiff again warned Ewing two or three times about driving too fast, and he slowed down. At the time of the accident, which occurred about 10:30 or 11 o'clock in the evening, Ewing was driving along a main paved county highway 18 feet in width, at a rate of approximately 45 to 50 miles an hour on the straightaways, slowing down to about 30 miles an hour as he approached the bridge where the acci-

dent occurred. Just a very few minutes prior to the accident plaintiff had closed his eyes, although he was not asleep. On several occasions plaintiff warned Ewing about driving at an excessive rate of speed, and was asked: "After you warned him did he slow down," to which he answered, "He was then slowing down some with his driving so I was not worried about it any more." Then, owing to the blinding headlights of an oncoming car, as claimed by Ewing, he swung too far to the right, and struck the bulkhead of a small bridge, causing the injuries of which complaint is here made.

Not only by the finding of the jury, but by the plea of contributory negligence, is it determined that at the time of the accident the companion of plaintiff was intoxicated. This was not a case, however, of an intoxicated driver who proclaimed that fact abroad by boisterous, erratic, or maudlin speech or action. Defendant Ewing denied he was intoxicated at any time during the day or evening in question. Plaintiff was asked if, in his opinion, Ewing was intoxicated at the time he got into Ewing's car to go home, and he replied: "Not what I would call intoxicated—maybe talking a little bit louder—we just felt the drinks we had."

Dr. Lum, a witness called by the plaintiff, testified, in regard to the intoxication of Ewing, upon cross-examination as follows:

"Q. You had no difficulty in determining that Mr. Ewing was intoxicated, did you? A. Yes I did; he was not dead drunk; his speech was pretty good; his first concern manifested was for the injured man, but the appearance of abnormality made me think so; I think that the alcohol had probably altered or slowed his reaction to such an extent that it would come within the limit of the definition as given by the Judge.

"Q. By that you mean, Doctor, away within the limits, or just the border line? A. It would not be away within the limits, I would say fairly definite within the limits.

"Q. In other words, it was so much so that you had no difficulty in arriving at that conclusion? A. I did have difficulty, yes, that is because of the definition of intoxication, there are so many definitions and it was largely a question of definition whether or not it would arrive within that definition."

During the journey they discussed business and crop conditions, plaintiff testifying he had extensive acreage and a very heavy loan from the oil company which required close

attention both on his part and on the part of the oil company which was financing him.

With these general facts before us, appellants ask this court to declare that under the circumstances plaintiff was guilty of contributory negligence in riding with Ewing, as a matter of law. However, we would not be justified in so holding, nor does the law assume that responsibility in face of the evidence and the finding by the jury in favor of plaintiff.

As was stated in *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, 538: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury."

So it was here for the jury to determine whether or not Ewing was intoxicated, whether that fact was known to plaintiff, and, if known, when he became aware of that fact, and what should he, as a reasonable man, have then done under the circumstances; also, whether the intoxication of the driver proximately contributed to the accident.

Appellants have filed a carefully prepared brief setting forth numerous authorities in support of their contention that plaintiff was guilty of contributory negligence, but we do not believe the cited cases sustain their contention. In *Jones v. Pacific Gas & Electric Co.*, 104 Cal. App. 47, 285 P. 709, 712, plaintiff was riding as a guest with one Cottrell and was injured when the automobile collided with a pole belonging to Pacific Gas & Electric Company. Judgment was entered in favor of the power company. The plaintiff appealed from that judgment, which was affirmed; the court holding in effect that the evidence as to intoxication sustained the finding of the jury. The court said, "From what the testimony shows as to the carousing of the party, the jury was warranted in drawing the inference that the defendant Cottrell was seeing lights where there were none," and "* * * what we have set forth is amply sufficient to justify the jury in coming to the conclusion that all of the men, at least, were under the influence of the intoxicating liquor. * * *"

In *Hirsch v. D'Autremont*, 133 Cal. App. 106, 23 P.(2d) 1066, 1067, plaintiff was a guest of defendant in his automobile, going from Los Angeles to Santa Ana. The plain-

tiff was injured and sued her host. A verdict was returned by the jury in favor of plaintiff, but a judgment notwithstanding the verdict was entered by the court from which plaintiff appealed.

In its opinion the court clearly indicated that it was only after a clear case of intoxication had been manifested, and that thereafter plaintiff had had an opportunity to withdraw from the car at a well-lighted service station where she could have communicated with her friends by telephone, that she was as a matter of law held to be guilty of contributory negligence, the court saying: "The evidence is conflicting as to whether Word was or was not under the influence of liquor when the party left Los Angeles and as to whether or not such fact was known to plaintiff; and the question whether or not she was guilty of contributory negligence in commencing to ride to Santa Ana was clearly for the jury. We are also of the opinion that the question as to whether or not plaintiff should have left the car when it stopped at the railroad crossing to let the freight train pass, considering that it was among orange groves and in the middle of the night, even though she then knew that the driver was under the influence of intoxicating liquor, is one upon which reasonable men might well differ and was in consequence one for the jury to determine."

[5] The same rule was applied in the case of Connor v. Johnson, 132 Cal. App. 449, 22 P.(2d) 760. In Whitsett v. Morton, 138 Cal. App. 628, 33 P.(2d) 54, this court analyzed the evidence, determining it was sufficient to support the verdict of the jury, as was the situation also in the case of Lynn v. Goodwin, 170 Cal. 112, 113, 148 P. 927, L. R. A. 1915E, 588. Appellants suggest that the case of Tomlinson v. Kiramidjian, 133 Cal. App. 418, 24 P.(2d) 559, 560, relied upon by plaintiff, can be distinguished from the case at bar in that in that case there was a cause of action for gross negligence as well as intoxication, whereas in the instant case plaintiff relied entirely upon intoxication, but a reading of that case seems to clearly indicate that the controlling question in the mind of the court was that of intoxication. It was there said: "From these facts we feel that it was a question for the jury to determine, under proper instructions, (a) whether the defendant Christian was drunk or under the influence of intoxicating liquor as defined in People v. Ekstromer, 71 Cal. App. 239, 246, 235 P. 69, and whether, if drunk, or under the influence of intoxicating liquor, this was the proximate cause of the accident; (b)

whether the deceased knew, or should have known, that defendant Christian was under the influence of intoxicating liquor when he last started to ride with him; and (c) whether the turning to wave at the passengers of the passing automobile while traveling at an excessive rate of speed was gross negligence, and whether such gross negligence, if so found, was the proximate cause of the accident. Krause v. Rarity, 210 Cal. 644-655, 293 P. 62, 77 A. L. R. 1327. From evidence that a person had been drinking intoxicating liquor and thereafter drives his car in a negligent manner, it does not follow as a matter of law that he was driving while under the influence of intoxicating liquor. There is no evidence in the record from which it can be said as a matter of law that deceased knew, or should have known, that Christian was under the influence of intoxicating liquor before he entered the automobile the last time, or that after discovering his intoxicated condition he had a clear chance to leave the automobile at a safe place. This clearly distinguishes the present case from Hirsch v. D'Autremont [133 Cal. App. 106], 23 P.(2d) 1066." Also, whether the factor of contributory negligence arose by reason of the intoxication or of the recklessness of the driver would make no difference in the application of the rule. Many other cases are cited to the same effect, but sufficient has been said to indicate that the rule undoubtedly is, that where the minds of reasonable men might differ, it is our province only to find whether or not there is sufficient evidence in the record to support the finding of the jury; the burden resting upon them to determine the disputed question of fact.

[6] The next point urged for reversal by appellant is that the damages were excessive. Under section 657 of the Code of Civil Procedure, providing for the granting of a new trial for "excessive damages, appearing to have been given under the influence of passion or prejudice," neither trial nor appellate courts are authorized to set aside an award of damages made by a jury as excessive "merely because the opinion of the judge is at variance with that of the jury. It is only when the excess appears as a matter of law or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice or corruption rather than honest and sober judgment that the court may exercise this power." 8 Cal. Jur., p. 834, citing many cases.

[7] We need but to recite the injuries enumerated by the medical men who testified in the case, and the condition of plaintiff, before and after the accident, to justify the award, and the action of the trial court in denying a new trial upon that ground.

At the time of the accident respondent was an able-bodied man forty-two years of age with a life expectancy of 26.7 years, supporting and caring for his wife and minor son. For many years he had carried on extensive farming operations and at the time of the accident was operating some 4,500 acres of land, 1,500 acres of which had been set aside for the growing of cotton, and approximately 3,000 acres of land planted to grain. The net income from the grain land that year was approximately \$20,000. We gather from the record that the accident interfered with the production of a cotton crop that year.

The accident occurred on April 24, 1933, and plaintiff remained in the hospital until May 21st, when he was removed to his home where he remained in bed under the care of nurses for approximately a month longer, when he was able to be about, but owing to his nervous condition his physician advised an ocean voyage which he took and which extended from November 6th to December 22d. At the date of the trial in March, 1934, plaintiff testified that although his nervous condition was improved he still became agitated and excited over small matters, and was unable to attend to his affairs or transact any actual business; a condition verified by the testimony of the doctors.

To enumerate except in the most general way the injuries sustained would unduly extend this opinion and encumber it with many technical terms, unintelligible except to a specialist. However, Dr. Lum, his attending physician, described fractures of the skull, fractures of the jaw, one of the fractures of the lower jaw going down through the first molar, severing it, and continuing through the mandible, fracturing off part of the alveolar process, fractures which caused a portion of the jaw to drop out of alignment, a fracture and separation of the frontal and nasal bones, a fracture extending into the left orbit and a fracture of the palate radiating back through the right antrum and into the floor of the frontal vault. Also a concussion of the brain and probably lacerations of the brain tissue and brain damage. Such injuries, Dr. Lum testified, causes hemorrhage in the brain and in healing leaves scars in that area interrupting the normal functions of the patient. Also there were

multiple contusions about the body, a median nerve injury on the left hand causing a vande-griff or talon hand. In the chest there was a fracture of the seventh and eighth costal cartilages. As to the brain damage, Dr. Lum was asked as to the probable effect of that injury, and testified that such a severe injury could alter one's personality, making them less stable, and occasionally developed a preliminary epilepsy, due to increased unstable brain substance. As to what to expect with reasonable certainty there were many things the doctor said could happen. Although the various fractures and contusions had healed, the brain injury and the median nerve injury are permanent. The doctor also testified there was not a complete paralysis of the legs, and plaintiff's general facial appearance was altered, the chin forced back, and there was a sag in the face. His nervous condition also was unstable, and he would never be able to do the physical work he did prior to the accident.

Dr. Sutton, a dentist, testified as to the injuries and repairs to the mouth and teeth, consisting of a compound fracture of the jaw, the splitting and breaking of the teeth and injury to the nerves of the teeth, and the correctional methods used. The doctor, when asked as to the pain and suffering caused by the appliances required to repair the damage said, "Well, I would say it was just awful," and that one particularly severe appliance remained in place for about six weeks. Dr. Sutton also testified that plaintiff would require practically a complete set of upper and lower artificial teeth. Dr. Fountain, who co-operated with Dr. Lum and Dr. Sutton, corroborated them in what was done and the effect upon the patient. Dr. McDowell, a specialist of the eye, ear, nose, and throat, testified he treated plaintiff after the accident and found his eyesight impaired, and prescribed the wearing of glasses. An examination of the hearing of plaintiff disclosed that that sense was approximately 30 per cent. deficient.

We believe that enough has been detailed to justify the award, having in mind the age of the patient, his life expectancy, his earning power, his inconvenience, pain, and suffering, and his temporary and permanent disability.

[8] Appellants criticise an instruction upon the measure of damages submitted by plaintiff and given by the court. The instruction as given reads:

"If you find that the plaintiff is entitled to recovery, the measure of his recovery is

what is denominated as compensatory damages, that is, such sum as will compensate him for the injuries, if any, he has sustained.

"The elements entering into this damage are as follows:

"1. Such sum as will compensate him for the expense, if any, that he has reasonably and necessarily incurred for medical and hospital aid and assistance, not exceeding the amount alleged in the complaint for this purpose, to-wit: \$2,265.25.

"2. Such sum as will compensate him for the expenses, if any, it is reasonably certain he must reasonably and necessarily incur, if any, for medical aid, hospital expenses and nursing in the future, because of such injuries.

"3. The value of his time, if any, during the period he has been disabled by the injury.

"4. If the plaintiff's power to earn money in the future has been impaired by the injuries, if any, such sum as will compensate him for such loss of power, if any.

"5. Such reasonable sum as the jury may award for physical pain and mental anguish suffered, if any, or reasonably certain to be suffered in the future, from the injuries, if any.

"The first three of these elements are the subject of direct proof and are to be determined by you upon the evidence you have before you, the last two elements are from necessity left to the sound discretion of the jury, but in any event the damages must be just, and cannot exceed the amount alleged in the complaint, to-wit: \$127,265.25."

Appellants criticise the last paragraph of this instruction, in that the jurors were instructed to determine the loss of earnings of plaintiff, if any, upon direct proof, whereas there was no evidence of any kind introduced as to the value of plaintiff's time while disabled, or to his earning power. The following is the evidence adduced upon the question of earnings:

"Q. Mr. Lindemann, referring to the question of your loss of earnings will you state whether or not it is true that last year off your grain crop, off of the land that was harvested after this accident, that you made a net profit of about \$20,000.00? A. Approximately so.

"Q. That was off your grain land was it not? A. Yes sir.

"Q. Is it or is it not true that since the accident and at the present time you have

under cultivation some 300 or 400 more acres than you had last year? A. Yes sir."

Plaintiff also testified that as a farmer prior to his injuries he personally took charge of his tractors and farming implements, making the necessary repairs and doing the actual work, but since that time he gets agitated and cannot attend to business so far as the physical requirements are concerned, is unable to use his crippled hand, cannot walk enough, nor operate a car as he once did, and at the time of the trial was able to carry on no actual business.

The objections urged by appellant to the instruction are very similar to those urged to an almost identical instruction given in *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 68 P. 72, which received the approval of the Supreme Court in a well-considered opinion delivered by Mr. Justice Harrison. To quote all of the pertinent parts therefrom would extend this opinion unduly, but reference is made thereto for a complete answer to the contention of appellants.

Appellants attempt to distinguish that case or lighten its effect as precedent to the instant case, but we think without avail. The court there said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable.

* * * The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury. It may be conceded that, in the absence of all evidence tending in any respect to show an impairment of his earning capacity, the jury would not have been authorized to include any compensation therefor in their verdict, but it does not follow that it was necessary that there should be direct or specific testimony that he was in the actual receipt of wages, or capable of earning a specific sum in any particular employment. * * * If the circumstances which were before the jury show that by reason of the injury he has become unable to perform the labor or transact the business which he was accustomed to transact or perform prior thereto, he is entitled to recover damages therefor; and from the nature of the investigation the amount of such recov-

ery must be left to the wise discretion of the jury. It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant, has had his earning power greatly impaired; and in such a case a jury would not be limited to nominal damages, although there should be no evidence that he was in the receipt of wages at the time of the injury, but would be authorized to give substantial damages. *Chicago, etc., R. R. Co. v. Warner*, 108 Ill. 538; *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472; *Gainesville, etc., Ry. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269; *Missouri, etc., Ry. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167. The rule for measuring damages is, however, the same, whatever may be the extent of the injury, but the measure of damages in any particular case will depend upon the facts in that case. No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence. 'Juries are in many cases permitted to exercise their own individual judgments as to values upon subjects presumptively within their own knowledge which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict.' *Cederberg v. Robison*, 100 Cal. 93, 34 P. 625."

This case has been cited with approval, and the principles there stated applied in the cases of *Girard v. Irvine*, 97 Cal. App. 377, 275 P. 840; *Campbell v. Bradbury*, 179 Cal. 364, 176 P. 685; *Holmes v. California Crushed Fruit Co.*, 69 Cal. App. 779, 232 P. 178.

[9-11] Appellants also urge misconduct of a juror as a ground for reversal. The record shows that a juror when asked upon her voir dire if she knew or was acquainted with plaintiff, or if she knew of plaintiff, by her silence indicated a negative answer.

By affidavits, one from the wife of defendant Ewing, appellants attempt to show a friendly greeting by the juror to the wife of plaintiff during an intermission in the course of the trial, and three from fellow jurors as to statements made in the jury room during their deliberations by the juror that plaintiff was changed in facial expression and disposition since the accident.

Counteraffidavits were filed by plaintiff, by the juror under attack, and by certain other jurors denying the allegations. These conflicting affidavits were before the trial court

upon the motion for a new trial, and the finding there made is binding upon us. A new trial may be granted upon the ground a juror made untrue answers to questions asked upon his voir dire, if it appears the moving party was not aware of the falsity at the time of the completion of the impanelment of the jury, and did not discover such fact during the trial and before the rendition of the verdict. 20 Cal. Jur., p. 54. It appears from the affidavit of Mrs. Ewing that the circumstances related by her were alleged to have occurred at the noon recess of the first day of the trial, and by the affidavits of counsel for defendants it appears they were made acquainted with the facts set forth in the affidavit almost immediately, and, before court was convened that same day, called the matter to the attention of the trial judge, but did nothing further in the premises. In *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 P. 92, 93, the court said, in a similar situation: "If the defendant or its attorneys had discovered these facts at any time during the trial, it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and thereupon offer a challenge to the juror guilty of the misconduct." It would obviously be improper to permit a party knowing of misconduct to withhold action and gamble on the outcome before making complaint. We cite the foregoing as an additional reason for upholding the action of the trial court in denying a new trial on the ground of misconduct of the jury.

As to the alleged misconduct of the attorney for plaintiff, we cannot find sufficient ground for a reversal. The alert and able counsel for appellants have emphasized the statements of counsel for plaintiff wherein he apparently went outside the record, but we cannot attach to these matters the importance that appellants do, nor can we believe the jury were influenced thereby, particularly in view of the admonition of the court.

[12] The last point to be considered is the claim that the evidence was insufficient to support the implied finding that Ewing was acting as an agent of San Joaquin Cotton Oil Company at the time of the accident. The following facts are in evidence: Ewing was the district manager of defendant San Joaquin Cotton Oil Company, with headquarters at Chowchilla, and whose territory covered the San Joaquin valley north of Fresno. Among his other duties were to solicit business from the farmers in that territory, set-

the accounts, arrange budgets and other details in connection with loans, and advise and counsel as to the production and sale of cotton. He had no fixed hours, but was on duty practically twenty-four hours a day. He also did a certain amount of contact and public relationship work as between his company and the farmers, creating and maintaining a friendly relationship between the company and the community.

The car involved in the accident belonged to the company, who paid for the gas and oil, except when the car was being used for the private business of Ewing, and there is no evidence that on this trip Ewing paid for any gas or oil. Plaintiff attended the meeting upon the invitation and solicitation of Ewing. This meeting was of the San Joaquin Valley Agricultural Labor Bureau, meeting for the purpose of fixing the general price for labor in cotton production for the approaching season, at which meeting Ewing was attending as a part of his duty as manager of the cotton company, and it was a part of his duty to see that the growers the company was financing attended these meetings. At the gathering after the meeting and before dinner it will be recalled that Mr. Fawcett, with whom plaintiff came to the meeting, stated he was leaving, and plaintiff was preparing to accompany him when Ewing said to plaintiff he had no special reason to go home and offered to take him home later, to which plaintiff replied he would accept the invitation as "he wanted to talk and get some advice from him."

After dinner the two men, plaintiff and defendant Ewing, got in Ewing's car, Ewing driving, and they proceeded toward Los Banos, the home of plaintiff. Ewing admits they discussed plaintiff's business during the trip and almost up to the time of the accident. Plaintiff testified he already had a heavy loan with the cotton company and had an extensive acreage under cultivation, and an additional loan was necessary to cut weeds; hence the need of a discussion between plaintiff and Ewing.

It seems to be the contention of appellants that when Ewing deviated from the main highway at Califa, there taking the road leading from the main highway to Los Banos, he then abandoned the business of his employer and embarked upon a matter of his own business or pleasure. But here we have a customer of appellant, whose financial interests were closely interwoven with the oil company, attending a meeting upon the in-

itation and solicitation of Ewing, a manager of the company. Ewing was anxious, undoubtedly, to retain plaintiff's co-operation, and in his capacity as ambassador of good will, keeping up his contacts and developing cordial relations between plaintiff and defendant, was impelled to make a 60-mile detour not on account of any close personal friendship between himself and plaintiff, but to advance the interests of his employer. We believe the facts and circumstances here show that the entire journey was on the mission of his employer, and the jury were justified in so finding.

The matters urged for reversal have been ably presented, and to discuss and analyze all the arguments and authorities presented would unduly extend this opinion, but sufficient has been said to indicate the views of this court upon the main issues presented, and for the reasons stated herein the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



6 Cal.App.2d 39

**DOWNER v. GRIZZLY LIVESTOCK &
LAND CO. et al.**
Civ. 5333.

District Court of Appeal, Third District,
California.
April 8, 1935.

1. Taxation — 176

If United States acquired title under conveyance whereby patentee of land in national forest sought to relinquish patented land prior to selecting other lands under federal statute, state would be precluded from subsequently taxing patented land, and title based on tax deed would be void (Act Cong. June 4, 1897, 30 Stat. 36; Const. art. 13, § 1).

2. Evidence — 47

Courts will judicially notice land department's rules and regulations governing procedure in relinquishing patented lands, such as lands in national forest, and selecting other lands under statute (Act Cong. June 4, 1897, 30 Stat. 36).

3. Public lands — 135(1)

Rule that conveyance of realty must be accepted before title passes *held* applicable

where patentee of land in national forest executed conveyance reciting desire to relinquish such land and to select other lands, and hence no title could pass to United States until approval of application for selection of other lands (Act Cong. June 4, 1897, 30 Stat. 36).

4. Public lands ⇐135(1)

Where patentee of land in national forest executed conveyance reciting desire to relinquish such land to United States and to select other lands under 1897 statute, and also executed irrevocable powers of attorney authorizing holder thereof to select such other lands, and holder's application for other lands was rejected and canceled because filed after repeal of statute, title held to have remained in patentee, and remedial statute enacted in 1922 for persons dilatory in filing land applications did not retroactively establish title in government, where patented land had been sold to state for taxes for 1921-1922, and hence title based on tax deed should be quieted as against holder of such powers of attorney (Act Cong. June 4, 1897, 30 Stat. 36; Act Cong. March 3, 1905, 33 Stat. 1264; 16 USCA §§ 483, 484; Const. art. 13, § 1).

5. Constitutional law ⇐110

Act of Congress cannot nullify federal court's antecedent decisions establishing property rights.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Fred C. Downer, also known as F. C. Downer, against the Grizzly Livestock & Land Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Walter S. Barrette, Ford Hendricks, and Victor P. Showers, all of Los Angeles, for appellants.

McAdoo & Neblett, of Los Angeles, for respondent.

Mr. Justice pro tem. RANKIN delivered the opinion of the court.

Defendants prosecute this appeal from a judgment quieting plaintiff's title to real property against the defendants and each of them. The case is submitted upon an agreed written statement of facts which may be summarized as follows:

The land involved is situated within the boundaries of the Santa Barbara national forest. United States patent was issued to Mary Stauch on May 5, 1904, and recorded in the office of the county recorder of Ven-

tura county on November 29, 1904. About January 26, 1905, Mary Harris (formerly Mary Stauch) and C. W. Harris, her husband, endeavored to avail themselves of the privilege granted them by the Forest Reserve Lieu Land Act of Congress, of June 4, 1897 (30 Stat. 36), of exchanging their said patented land referred to as "base" land, for other vacant government land commonly designated as "lieu" land. Pursuant to the provisions of said act and in accordance with the rules of the department of the interior appertaining to the procedure in such cases, they executed a conveyance purporting to quitclaim and relinquish said "base" land of the United States. This conveyance contains the recital: "Which land we desire to relinquish to the United States and select in lieu thereof an equal quantity of vacant land open to settlement as provided by the Act of Congress June 4, 1897," and was made "in consideration of the benefits acquired under the said Act of Congress," and at the same time, and as a part of the same transaction, for a valuable consideration, they issued two irrevocable powers of attorney whereby Andrew Morrow became their successor in interest and entitled to make a selection of "lieu" land in exchange for said "base" land.

On March 3, 1905 (33 Stat. 1264), the Act of June 4, 1897, was repealed. Three days thereafter Morrow filed his "lieu" land selection No. 527 in the United States land office at The Dalles, Or., together with the power of attorney hereinabove mentioned, and an abstract of title to said "base" land. Morrow's "lieu" land selection application was rejected as not filed in time, and following an appeal to the commissioner of the United States land office, wherein the rejection was sustained, the application was finally canceled by letter "R," dated March 8, 1907. From this date on to November 22, 1926, so far as shown by the record, Morrow exercised no acts of ownership or dominion over said land by possession, payment of taxes, or otherwise.

On November 15, 1917, C. M. Bruce, assistant commissioner of the general land office, at Washington, D. C., wrote to Walter K. Slack, as agent for plaintiff, that as the cancellation of the selection was a refusal of the government to accept the reconveyances, title did not pass from Mary Harris, and that the government disclaimed either ownership or jurisdiction over the land.

Congress passed the Act of September 22, 1922, 42 Stat. 1017 (16 USCA §§ 483, 484), for

the relief of those who had been dilatory in their filings for "lieu" land under the Act of June 4, 1897. About November 22, 1926, Morrow made application to the commissioner of the general land office under the provisions of this relief act for the reconveyance to him of the said "base" land, and having submitted proof of his claim, the commissioner, on February 9, 1928, issued a quitclaim and relinquishment to Andrew Morrow, his heirs and assigns, of all title to the said lands which the United States may have acquired by virtue of that certain deed executed by Mary Harris and her husband on January 26, 1905. This quitclaim was duly recorded in February, 1928, and in September of that year, Morrow conveyed the land to defendant Grizzly Livestock & Land Company by warranty deed.

It further appears that said land was assessed to plaintiff, Fred C. Downer, for the fiscal year 1918-1919, and sold to the state for taxes levied thereon for that year and redeemed in 1920 by F. C. Downer. The land was again sold to the state for nonpayment of taxes for the year 1921-1922, and thereafter deeded to the state by the tax collector. On May 4, 1928, by tax collector's deed, title passed from the state of California to Streetter D. Knipe, and on September 23, 1930, he conveyed his interest in the property to Fred C. Downer, the plaintiff.

No question is raised as to the regularity of the tax deed nor is any claim of title by prescription made.

Respondent claims, and the trial court found as a conclusion of law, that the United States never accepted the deed whereby the Harrises, in 1905, attempted to quitclaim and relinquish to the United States the property described therein and in the complaint, and that said real property then was, and at all times thereafter has remained, subject to taxation under the laws of the state of California.

Appellants take the position that during all the time subsequent to the date of the Harris deed and up to February 9, 1928, title to the land was vested in the United States and was not subject to taxation. They base their argument upon the assumption that the solution of the problem rests upon the interpretation of the three Acts of Congress hereinabove referred to.

[1] Briefly stated, the only question to be determined is whether or not the United States ever accepted title to the "base" land. If title passed and became vested in the

United States, of course no tax could be levied, and plaintiff's title, based upon the tax deed, would be void. California Constitution, article 13, § 1; *Gottstein v. Adams*, 202 Cal. 581, 262 P. 314.

[2] The transaction by which the attempt was made to select other land in lieu of the Harris land was carried on under the provisions of the Act of June 4, 1897, and rules and regulations governing the procedure in such cases promulgated by the land department pursuant to its power and authority, of which the courts will take judicial notice. *United States v. McClure* (C. C.) 174 F. 510, 511; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 L. Ed. 1064.

[3] Evidently Morrow complied with the rules and regulations prescribed by the land department and his application was properly filed, but the question here involves the legal effect of that procedure. A conveyance of real property must be accepted before title passes, and the fact that the United States is a party does not change or modify the rule. It must be remembered that the transaction took place at a time when only the Act of June 4, 1897, was in effect. It is difficult to understand how any claim can be made that the later acts, or any construction of the same, could affect the legal rights of any party, acquired under the provisions of the original act. It was evidently the purpose of the Act of Congress to provide a means by which one owning land in a national forest reservation could make an offer to exchange his land for other vacant government land and carry on negotiations with the land department for the consummation of such exchange. Manifestly, the execution and recordation of the deed to "base" land, reciting upon its face the object and purpose of the execution of the deed, did not and could not constitute a contract between the grantor and the United States, but it simply evidences the readiness and willingness of the grantor to make the exchange. No title could pass until the application to select the "lieu" land is approved. This question is clearly decided in the case of *United States v. McClure*, supra, where the court said: "But the title does not pass to the land offered in exchange until the deed is accepted. The mere execution and recording of a deed and the tender thereof vests no title in the government. Until the deed and title are examined and approved, it is a mere assertion by the applicant of his title and right to make the selection. *Cosmos Exploration Co. v.*

Gray Eagle Oil Co., *supra*; C. W. Clarke, 32 Land Dec. Dep. Int. 233; W. E. Moses Land Scrip & Realty Co., 34 Land Dec. Dep. Int. 460. But the equitable, if not the legal, title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto, either legal or equitable, and the Land Department has no authority to determine the validity of the title offered, if it is defective, or there is some adverse claim thereto." To the same effect are the following cases: *State v. Hyde*, 88 Or. 1, 169 P. 757, 761, 171 P. 582, Ann. Cas. 1918E, 688; *Roughton v. Knight*, 219 U. S. 537, 31 S. Ct. 297, 55 L. Ed. 326; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 L. Ed. 1064.

[4, 5] It is therefore obvious that title never passed to the United States but remained in Mary Harris and that the land was still subject to assessments and taxation under the laws of the state.

The Harris deed, upon its face, constitutes constructive notice to the effect that the deed was executed for the purpose of initiating the right to select "lieu" land in exchange for the land therein described. Appellants at all times had constructive notice of the status of the title to the property, and are not now in position to complain, for the reason that they took no steps to pay the taxes on the property, or otherwise protect their rights. They elected to ignore, through a long period of time, the right of the state to tax the property.

Appellants apparently contend that the Act of September 22, 1922, being remedial in its nature, has the retroactive effect of establishing title in the United States as of the date of the Harris deed, and that said act circumvents the decisions of the Supreme Court. In this connection it must be remembered that there was a levy and delinquency of taxes upon the "base" land before the passage of this act. Certainly an Act of Congress cannot nullify the decisions of the Supreme Court of the United States establishing property rights before the passage of the Act by Congress. In support of their construction of the remedial Act of September 22, 1922, appellants rely mainly upon the case of *Begue v. Grizzly Live Stock & Land Co.*, 1 F.

Supp. 229, decided by the United States District Court, Southern District of California, on September 15, 1932, and argue that it is determinative of the instant case because it establishes the rule that title vested in the United States upon the filing and recording of the Harris deed in 1905, and that therefore the prior decisions upon the subject may no longer be considered as authority. We cannot hold that the Begue Case can be so construed. In that case, Begue, desiring to exchange his land for other lands, employed the procedure prescribed by the land department of the United States, and executed his relinquishment to the United States and power of attorney to one Sigler; in effect he sold the land to Sigler and the latter paid him at least a part of the consideration at the time, and whatever remained due in the way of consideration was a personal credit extended by Begue to Sigler. Sigler sold his right to Morrow, who was dilatory in making his selection, as he was in the instant case. After the date of the so-called remedial Act of Congress of September 22, 1922, Begue claimed title to the land on the ground that the same never vested in the United States. As between Begue and Morrow, the commissioner of the general land office held that the latter should prevail, and issued his quitclaim deed to him. The point decided in that case was that the sale of the scrip, or right to exchange land, carried with it all of the rights of the vendor in and to the "base" land, as well as in and to the "lieu" land after the same was selected. Only the parties to the original transaction were claimants of the title to the "base" land. It is clear that Begue, after selling all his rights to the "base" land, and/or "lieu" land, and receiving payment therefor, could not prevail as against the vendee. The decision does intimate that title vested in the United States, but the intimation is purely dictum, as the question was not directly involved and the opinion fails to discuss or consider the line of decisions herein cited.

Respondent's title under the tax deed having vested under the law and decisions of the Supreme and Circuit Courts of the United States prior to the enactment of the Act of September 22, 1922, that act cannot be construed as canceling or in any manner affecting the validity of that vested right.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, Acting P. J.

6 Cal.App.2d 35

SPENCER et al. v. BARNES.

Civ. 5331.

District Court of Appeal, Third District,
California.

April 6, 1935.

1. Process Ⓒ88

Required service of papers in action or proceeding wherein party has attorney of record must be made on such attorney, but attorney's representation of party in other matters does not authorize such service.

2. Judgment Ⓒ898 (4)

Testimony that certain person said he was attorney for defendant and another and had appeared in proceeding before court in pending action as attorney for such parties held not competent to show that he was defendant's attorney on whom notice of motion to set aside satisfaction of judgment against defendant might be served.

3. Attorney and client Ⓒ88

Entry of judgment under court's direction finally determines rights of party, and latter's attorney ceases to have any authority except for purpose of sustaining and enforcing judgment or seeking to have it set aside or reversed.

4. Judgment Ⓒ898 (4)

Service of notice of motion to set aside satisfaction of judgment and issue execution on attorney not shown to be judgment debtor's attorney of record was not notice to judgment debtor.

5. Judgment Ⓒ898 (4)

Order setting aside satisfaction of judgment and directing issuance of execution, without reciting or finding on its face that service of notice of motion for such relief was made on judgment debtor or that he was present or represented at hearing, held invalid as mere ex parte order.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by A. B. Spencer against Legene S. Barnes. Judgment for plaintiff, and, from an order setting aside a satisfaction of the judgment, substituting parties plaintiff and directing enforcement of the judgment and issuance of execution on the motion of Floyd S. Sisk, as trustee in bankruptcy of the estate of Andrew M. Strong, and others, defendant appeals.

Reversed.

Dana R. Weller and C. F. Culver, both of Los Angeles, for appellant.

A. W. Brunton, of Los Angeles, for respondents.

RANKIN, Justice pro tem., delivered the opinion of the court.

Appellant prosecutes this appeal from an order entered herein February 2, 1933, setting aside satisfaction of judgment, substituting parties plaintiff, and for enforcement of judgment and issue of execution.

A. B. Spencer, plaintiff in this action, secured a money judgment against appellant, as defendant therein, on July 29, 1912, and the judgment became final about August, 1914. On June 19, 1930, Spencer assigned said judgment to Grace D. Barnes, and the following day Grace D. Barnes executed and delivered a full satisfaction of the judgment.

This proceeding was instituted by Floyd S. Sisk, as trustee in bankruptcy of the estate of Andrew M. Strong, a bankrupt; George Gardner, as trustee in bankruptcy of the estate of Lewis R. Works, a bankrupt; Katherine Stigle Etheridge, Oscar Hayter, and Mary P. Slater, none of whom were parties to the action, by filing notice of motion to set aside the satisfaction of judgment and to be substituted as parties plaintiff and for enforcement of the judgment and issue of execution. The motion is addressed to Legene S. Barnes, defendant, and to G. M. Spicer, his attorney, and also to other persons. So far as disclosed by the record, the moving parties made no attempt to serve any one with notice of the motion except G. M. Spicer. Proof by affidavit was made that G. M. Spicer was served by mail with a copy of the moving papers.

Appellant raises and argues several points in his brief, but one of which is necessary to discuss in this opinion.

Appellant's first contention is that he had no notice of the motion; therefore the court had no jurisdiction to make the order appealed from. Answering this contention, the respondent argues that G. M. Spicer was attorney for appellant and that service upon such attorney constitutes due service upon appellant. This, of course, is a proceeding in which notice is necessary. None of the parties thereto, except the moving parties, were present in court when the motion was heard and the order itself is in form an ex parte order.

[1] It is true that in all actions or proceedings where a party has an attorney of record, the service of papers, when required, must be made upon the attorney, but the fact that the attorney may have represented the party in other matters does not authorize service in a matter in which he does not appear as an attorney. *Sullivan v. Dunne*, 198 Cal. 183, 190, 244 P. 343.

[2] The only showing in the record to in any way establish the respondent's claim that Spicer was attorney for appellant is found in the testimony of two witnesses taken upon the hearing of the motion without notice to any of the interested parties that oral testimony would be taken. Conceding that the moving parties were entitled to produce oral testimony, we find nothing in the testimony of these two witnesses that is competent to establish the fact that Spicer was the attorney for appellant. One of these witnesses testified that in the month of June, 1930, one G. M. Spicer called him on the telephone and represented to him he was attorney for Legene S. Barnes and Grace D. Barnes, and that Spicer thereafter called at the witness' office and stated that he was attorney for Legene S. Barnes and Grace D. Barnes, and more particularly for Grace D. Barnes. The second witness testified that G. M. Spicer had appeared in a proceeding before the court in the above-entitled action as attorney for Legene S. Barnes and as attorney for Grace D. Barnes.

[3] If it is a fact that Spicer was at any time attorney of record for appellant, the record would be the best evidence thereof. The testimony of the two witnesses, even if considered as secondary evidence, fails to establish the fact, or any fact, other than that said Spicer claimed to be acting for appellant as his attorney about the year 1930 and some time prior thereto. It is well settled in this state that, when a judgment in a cause has once been entered under the direction of the court, the rights of the client have been finally determined and the attorney ceases to have any authority except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed. 3 Cal. Jur. 668; *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817; *Knowlton v. Mackenzie*, 110 Cal. 183, 42 P. 580.

[4, 5] Appellant was entitled to notice of the motion. Notice to G. M. Spicer was not notice to appellant, for the reason there is no showing that Spicer was attorney of

record for appellant. The order does not upon its face recite or find that any service was made upon appellant or any other person, or that appellant was present or represented at the hearing. It therefore follows that the order appealed from was in legal effect nothing more than an ex parte order.

The order appealed from is reversed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.



DABNEY v. EDWARDS. *

Civ. 8866.

District Court of Appeal, Second District,
Division 1, California.

April 3, 1935.

Rehearing Denied May 1, 1935.

Hearing Granted by Supreme Court
May 29, 1935.

1. Frauds, statute of ☞55

Term "real estate" at common law and in its generally accepted meaning, and as used in statute of frauds, is synonymous with "real property" (Civ. Code, § 1624, subd. 5).

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

2. Landlord and tenant ☞70

At common law, estates for years were classified as chattels real and regarded as personalty.

3. Brokers ☞43(1)

Interest created by oil leases for term of years, even though providing also for continuation thereof so long thereafter as gas is produced in paying quantities, held "personalty" and not "real estate" within statute of frauds, and hence real estate broker orally authorized to sell such leases could recover commission (Civ. Code, § 658, subd. 3; §§ 765, 773, and § 801, subd. 5; § 802, subd. 6; § 1624, subd. 5).

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

4. Stipulations ☞14(10)

In broker's action for commission which defendant vendor agreed to pay salesman on sale of oil leases, stipulation that salesman was licensed real estate salesman under broker, who was duly licensed, supported finding that salesman was broker's agent.

5. Brokers —40

That vendor agreeing with real estate salesman to pay commission on sale of oil leases did not know that salesman was broker's agent did not prevent broker from recovering commission as undisclosed principal.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Walter E. Dabney against L. T. Edwards. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Appeal from order denying new trial dismissed and judgment affirmed.

E. V. Knauf, of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, for respondent.

ROTH, Justice pro tem.

On January 25, 1929, Edward C. Doak was a licensed real estate salesman acting under Walter E. Dabney, the respondent, a licensed real estate broker. On that date he was authorized orally by appellant to sell for appellant certain oil leases, all of which were for a term of years, and two of which provided, in addition to the term specified, that the leases were to continue "so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save * * *." The sale of the leases was consummated, appellant contending in the court below that Doak had agreed to accept 2½ per cent. commission, which was paid. Doak testified and the court found upon sufficient evidence that the agreement called for a commission of 5 per cent., one-half of which was to be paid as installments were paid on the purchase price of the leases, and the other one-half on the happening of a contingency which did occur prior to the bringing of the lawsuit. Respondent admitted the receipt of one-half of the commission, and proved that the contingency upon which the payment of the other one-half depended had occurred, and demanded payment of the additional 2½ per cent. for which he obtained the judgment, from which this appeal is taken. There is also an appeal from an order denying motion for new trial.

Appellant's primary contention is that the agreement to employ respondent was of the kind required to be in writing, and that, since it was oral, respondent cannot recover. The question presented, therefore, is whether an

agreement employing and authorizing a real estate broker to sell an oil lease is within the statute of frauds; or more specifically, does such an agreement contemplate the purchase or sale of "real estate" as the term is used in subdivision 5, § 1624, of the Civil Code?

[1-3] Real estate at common law and in its generally accepted meaning is synonymous with real property. Estates for years at common law were classified as chattels real and regarded as personal property. Except in those cases where our courts have construed some particular statute, which by its own terms so defined real estate as to include an estate for years, a claim to an estate in or a right to possession of real property, the common law definition has been definitely maintained and indorsed by the courts of this state. 10 Cal. Jur. 601; *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 P. 680; *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 686, 687, 102 P. 932, 24 L. R. A. (N. S.) 1066; *County of Ventura v. Barry*, 207 Cal. 189, 277 P. 333; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 P. 243; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609; *Barr Lumber Co. v. Perkins*, 214 Cal. 531, 6 P.(2d) 948.

A perusal of the foregoing cases discloses the persistence with which our courts have maintained that "the common law upon the subject has not been changed by our statutes.

* * * [And that] there is a marked difference between things real, and an interest or estate in things real." *Jeffers v. Easton, Eldridge & Co.*, supra, 113 Cal. 345, at page 353, 45 P. 680, 681. This position is further demonstrated by a comparison of the cases of *Pike v. Psihogios*, 68 Cal. App. 145, 228 P. 722, 723, and *Nittler v. Continental Casualty Co.*, 94 Cal. App. 498, 271 P. 553, 558, 272 P. 309. In both cases hearings were denied by the Supreme Court. Both cases involved the construction of section 2 of "An act to define real estate brokers and salesmen * * *" approved May 17, 1919 (see *Deering's Gen. Laws*, 1931 Ed., Act 112). In the *Pike* Case the court said: "It will be observed that section 2 of said act, in its enumeration of the acts which only a duly licensed real estate broker may perform, does not specify either the sale of personal property, or the sale of a lease to real property. It was therefore not necessary for Katugios to obtain a license under said section 2 to perform the services rendered by him to the plaintiff, and which form the basis of this counterclaim." In 1925, section 2 of the act

In question was amended. Stats. 1925, p. 600. Thereafter the court in the Nittler Case ruled exactly opposite to the rule in the Pike Case, the court saying: "As a result of the Pike decision, the Legislature, at its next session amended this section of the act so as to expressly include within the definition of a real estate broker one who negotiated for or sold or exchanged a lease in real property."

While the exact question presented here has never been decided in this state with reference to oil leases, it has been squarely decided with reference to ordinary leases. *Guy v. Brennen*, 60 Cal. App. 452, 213 P. 265. The legal doctrine announced by *Guy v. Brennen*, supra, is that the words "real estate" as used in subdivision 5, § 1624, Civil Code (subdivision 6 at the time of that case), mean real property and not personal property and the corollary which follows, to wit: That a contract of employment made with a real estate broker "to sell a lease for years" is not within the statute of frauds and need not be in writing. This doctrine is apparently followed with approval in *Layne v. Malmgren*, 99 Cal. App. 742, 279 P. 670; *County of Ventura v. Barry*, 207 Cal. 189, 277 P. 333; *Spalding v. Bennett*, 93 Cal. App. 577, 269 P. 948; *Lind v. Huene*, 205 Cal. 569, 271 P. 1087; *Edgecomb v. Callahan*, 132 Cal. App. 248, 22 P.(2d) 521. Other authorities are to the same effect: 17 Cal. Law Review 187; *Nelson Law of Real Estate Brokerage*, page 25; *Myers v. Arthur*, 135 Wash. 583, 238 P. 899; *Lowenmeyer v. National Lumber Co.*, 71 Ind. App. 458, 125 N. E. 67; *Barr v. Campbell Mill Co.*, 154 Wash. 83, 280 P. 929, 284 P. 1119.

Appellant vigorously assails this doctrine, contending that there is a substantial distinction between an oil lease and an ordinary lease (*Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 P. 483, 486, 20 L. R. A. (N. S.) 211); and that *Guy v. Brennen*, supra, has in effect been overruled in the case of *Wilson v. Earp*, 91 Cal. App. 538, 261 P. 112.

In the *Graciosa Case* the court says, 155 Cal. 140, at pages 144, 145, 99 P. 483, 486, 20 L. R. A. (N. S.) 211, speaking with reference to the difference between an oil lease and an ordinary lease: "There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the plaintiff under its oil lease. * * * The plaintiff, it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the

estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. * * * The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. Civ. Code, § 801, subd. 5; section 802, subd. 6; *Harvey C. & C. Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928-937 [6 L. R. A. (N. S.) 628], and cases there cited; *Thornton on Oil Leases*, § 51. * * * The right of the lessee under this contract is more than that of the ordinary lessee. It is of a different character and for a different purpose. He has no right at all to the usufruct of the soil. His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another."

In the *Graciosa Case*, as is suggested by the foregoing excerpt, the court was considering whether an oil lease could be assessed and taxed severally and separately from the real estate, the court holding that it could be so separately taxed, saying, 155 Cal. 140, at page 145, 99 P. 483, 486, 20 L. R. A. (N. S.) 211: "It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it."

In the *Graciosa Case*, the court nowhere says that such a lease is real property, but on the contrary says: "This right constitutes, for the term prescribed, a servitude on the land and a *chattel real at common law*." (Italics ours.)

It must be apparent, therefore, that even though our courts have recognized that there are substantial differences between an oil lease and an ordinary lease, that such recognition has not, by any decisions of the courts of

this state, made an oil lease real property in the generic common-law sense of that phrase. Illinois has announced a contrary doctrine (*Bruner v. Hicks*, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332), but our courts have held uniformly and unequivocally that the interest created by an oil and gas lease is a term for years, and as such it is personalty. *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; *Barr Lumber Co. v. Perkins*, 214 Cal. 531, 6 P.(2d) 948; *Moore v. Heron*, 108 Cal. App. 705, 292 P. 136.

Appellant criticizes the soundness of the rule announced by *Guy v. Brennen*, supra, because the court in its opinion in that case failed to take into consideration, or at least in its opinion failed to refer to subdivision 3, § 658, or subdivision 5, § 801, Civil Code, adding further that section 773 of the Civil Code suggests a general distinction between "chattel" and a "chattel real."

No specific mention is made in the *Brennen* Case of these sections, but in *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 P. 680, 681, the court makes clear that by section 765 of the Civil Code, California follows the common-law distinction between freehold estates and estates for years, and says: "The same distinction is to be found in section 14, and in sections 657-663 of the same Code." And further, that the right of taking minerals mentioned in section 801, subd. 5, Civil Code, is not an incorporeal hereditament which constitutes the subject of the oil lease, but is an easement attached to other land as an easement appurtenant thereto. In other words, section 801 has to do with easements over a servient tenement appurtenant to a dominant tenement. There is no such question in this case.

The fact that section 773 of the Civil Code provides that "an estate for life may be created in a term of years" can have no significance, for the reason as stated in the *Jeffers* Case, 113 Cal. 345, pages 352, 353, 45 P. 680, "A term for years is only personal property,—a chattel real. 'An estate for life, even if it be per autre vie, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate.' 2 Bl. Comm., p. 143. See, also, pages 385-387. 'All leases for years are held by law to be of less value, perhaps it would be more proper to say of less dignity, than estates for life; estates for life being freeholds, and for years but chattels, and regarded as part of the personal estate, and cast upon the executor.' * * * The common law up-

on the subject has not been changed by our statutes. The provision of section 1113 of the Civil Code that only certain enumerated covenants shall be implied in transfers of property is expressly limited to a conveyance by which 'an estate of inheritance or fee simple is to be passed'; and by section 765 the common-law distinction between freehold estates and estates for years is followed, and it is declared that 'estates for years are chattels real.' The same distinction is to be found in section 14, and in sections 657-663 of the same Code. There is a marked difference between things real, and an interest or estate in things real. 'The nature of the thing itself, therefore, does not determine the character of any particular estate that may exist in it, whether personal or real, but the extent and duration of the estate.' 2 Cooley Bl., p. 15, note 1." In short, at common law an estate for life, even though imposed upon an estate for years, was regarded as a freehold and as real property. But an estate for years, even for "a thousand years is only a chattel, and reckoned part of the personal estate" (*Jeffers v. Easton, Eldridge & Co.*, supra), and this common-law distinction has been maintained in this state.

The case of *Wilson v. Earp*, supra, in so far as it differs with the principles herein announced, cannot be followed.

[4] Appellant urges further that at the time the oral contract in question was made, he did not know that Doak, the salesman, was working for respondent Dabney. At the time of the trial, counsel for the parties stipulated: "Mr. Doak in January, 1929, was a licensed real estate salesman under Walter Dabney, the plaintiff, who was a duly licensed broker under the Real Estate Act of that time." The foregoing stipulation amply supports the finding of the court that Doak was in fact the agent of respondent Dabney.

[5] Appellant further urges that, since he did not know that Dabney was the principal of Doak, Dabney should not be permitted to recover the commission involved as an undisclosed principal. The right of an undisclosed principal to recover, however, is too well established to be open to question. *Satisfaction Title, etc., Co. v. York*, 54 Colo. 566, 131 P. 444.

The judgment is affirmed; the appeal from the order denying motion for new trial is dismissed.

We concur: CONREY, P. J.; YORK, J.

6 Cal.App.2d 14

SNOFFER v. CITY OF LOS ANGELES.

Civ. 8802.

District Court of Appeal, Second District,
Division 1, California.

April 5, 1935.

Rehearing Denied May 1, 1935.

Hearing Denied by Supreme Court
June 3, 1935.**1. New trial** ⇨143(2)

Verdict of jury cannot be impeached by juror's affidavit showing misconduct of jury in considering facts not in evidence, with statement of eight other jurors that affidavit was correct (Code Civ. Proc. § 657).

2. Eminent domain ⇨277

Ordinance of intention held sufficient to charge property owner with notice of change of grade of street; hence failure of property owner to make objection to proposed grade barred his claim against city for damages to his property caused by change of "grade" of street which means to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent (St. 1923, p. 106, § 3).

Ordinance declared intention of city council to order improvement of street by grading and construction of concrete pavement, and recited that all work should be done in accordance with and to grade shown on special plans and profiles referred to as being particularly numbered and on file in office of city engineer; that plans, profiles, and specifications were referred to for complete description of proposed improvement and for description of grade to which work was to be done, and were made a part thereof; and that proceedings for improvement should be had under the Improvement Act.

[Ed. Note.—For other definitions of "Grade," see Words & Phrases.]

3. Eminent domain ⇨270

Though city cannot damage property without compensation to owner, it may limit time within which and place where claims against it must be presented.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Otto S. Snoffer against the City of Los Angeles, a municipal corporation. From a judgment in favor of plaintiff, and from an order granting his motion for a new trial, defendant appeals.

Judgment and order reversed with directions.

E. H. Delorey, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff sued for damage to real property which he alleged was caused by the act of the defendant city in changing the grade of La Brea avenue. He had judgment upon the verdict of a jury for \$300, and thereafter moved for a new trial. This motion was granted, and the defendant appeals from the judgment and from the order granting the new trial.

The motion for new trial was made upon the grounds of: "1. Insufficiency of the evidence to justify the verdict of the jury, in that the evidence adduced at the trial related to the question of damages to plaintiff herein on June 1, 1929, and that the jury took into consideration in assessing damages matters not produced in evidence at times and dates subsequent to the date of damage. 2. The verdict of the jury and judgment entered thereon is against the law. 3. Irregularities in proceedings of the jury. 4. Irregularities in proceedings of opposing counsel. 5. Misconduct of the jury in that the jury took into consideration facts not in evidence, upon which facts the jury arrived at its verdict."

[1] The first, third, and fifth cause specified as grounds for a new trial were supported by the affidavit of one of the jurors, with a statement of eight of the others to the effect that such affidavit was correct. According to this affidavit, the jurors considered as evidence matters within the personal knowledge of some of them and not shown by the evidence, were confused by some of the rulings of the court, and did not understand the law. The verdict of a jury cannot be impeached upon any such showing. In *Rosenberg v. George A. Moore & Co.*, 194 Cal. 392, 396, 229 P. 34, 35, the Supreme Court again approved its earlier statement in *People v. Findley*, 132 Cal. 301, 64 P. 472, where it said: "It is the settled law of this state that the verdict of a jury cannot be impeached by the affidavits of jurors showing misconduct on the part of any member of the jury, except where the verdict is reached 'by a resort to the determination of chance.' Code Civ. Proc. § 657. Nor can a verdict be impeached by the hearsay statements of jurors regarding such misconduct, *People v. Azoff*, 105 Cal. 632 [39 P. 59]." The affidavit should not, therefore, have been considered by the trial court and it afforded no basis for the order upon the three grounds

mentioned. Also, as no affidavit was filed supporting the fourth ground, the order could not have been based thereon.

This leaves for consideration only the ground that "the verdict and judgment entered thereon is against the law." For while the appellant seeks to show that the new trial was granted upon the ground of the insufficiency of the evidence to sustain the verdict and the judgment thereon, the record does not support that position. It is true that the minute order of the court recites that the motion is granted "on all the grounds set forth in the Notice of Intention to move for a new trial and particularly on the grounds of the insufficiency of the evidence to sustain the verdict." But this was not one of the grounds specified in the motion for a new trial. The first ground of the motion mentions insufficiency of the evidence, but as relating only to the asserted misconduct of the jury. The order could not, therefore, have been made upon the general ground of the insufficiency of the evidence to sustain the verdict.

We have, therefore, the situation of the respondent insisting in support of the order granting a new trial that the verdict of the jury is against the law, and the appellant asserting the same thing on its appeal from the judgment. The respondent does not point out any reasons for this position other than the grounds for a new trial which have heretofore been discussed.

[2] Appellant contends that the respondent property owner can recover no judgment, for the reason that he did not file any written protest against the improvement of the street at the time specified in the ordinance of intention, and also that he did not present his claim for damages with the board of public works of the city. Error is also predicated by appellant upon the action of the trial court in striking out testimony concerning the value of the property.

So far as the record shows, La Brea avenue prior to the acts complained of was a public street for which no official grade had been established by the city. The improvement of the street was initiated by an ordinance declaring the intention of the council of the city of Los Angeles to order the improvement of La Brea avenue and other streets "by certain grading, and by the construction of certain concrete pavement" and other improvements. Pertinent provisions of this ordinance are "that all of the work aforesaid shall be done in accordance with and to the grade shown on special plans and profiles" referred

to as being particularly numbered and on file in the office of the city engineer; that "said plans, profiles and specifications are hereby referred to for a full and complete description of said proposed work or improvement, and for the description of the grade to which the work is to be done, and are made a part thereof"; and "that the proceedings for the said aforesaid improvement shall be had and taken under and in accordance with an act of the Legislature of the State of California designated and known as the 'Improvement Act of 1911', approved April 7, 1911." St. 1911, p. 730, as amended, Deering's Gen. Laws, 1931 Ed., Act 8199.

Section 3 of the act referred to (as amended), as it existed at the time of the passage of the ordinance and the doing of the work complained of in this action, provided as follows: "The grade to which any work shall be done or improvement made shall be such as may be shown on the plans or profiles therefor or it may be done on such a grade as may have been formally established by the city council. If any official grade has already been adopted or established for any of the streets, avenues, or other places or property, proposed to be improved, it shall be lawful for the resolution of intention to provide that said work shall be done to new grades or grades different from those so established or adopted, and shall refer to plans, profiles or specifications for the description of the grade at which the work is to be done. Any property owner whose property is to be assessed to pay the costs and expenses of the proposed improvement may at the time fixed in the resolution of intention for hearing of objections to the proposed work and improvement, appear before the city council and make objection to the proposed grade or proposed modification of grade. A failure to make objection at such time shall be deemed to be a waiver of all objections to the proposed grade or proposed change or modification of grade and shall operate as a bar to any claim for damages or any subsequent action looking to the prevention of the work or the recovery of damages on account of the performance of the work to such grade or changed grade. The provisions of this section relative to grades are alternative and shall not repeal other provisions of this act or other statutes relative to change of grade." Stats. 1923, c. 56, § 3, pp. 106, 107.

Plaintiff made no objection to the proposed improvement, and appellant contends that such failure of plaintiff to present his objections to the council bars any recovery by him under the quoted provisions of the act. Re-

spondent excuses his failure to make objection on the ground that the ordinance of intention is insufficient by its terms to charge the property owners with notice of any change of grade.

By the improvement act under which the proceedings were taken, "the said resolution of intention shall be sufficient if it states in general terms the class or kinds of work contemplated such as grading, paving, sewerage or other work or improvements, and gives in general the location of the proposed improvement and refers to plans, profiles, detailed drawings and specifications or such of them as may be suitable or proper for the full and detailed description of the said proposed work or improvement." Improvement Act of 1911, § 3, as amended, *supra*. The ordinance of intention gave as much information as the statute required, and was certainly sufficient to charge the property owner with notice of the proposed improvement. As early as 1865 the Supreme Court said: "The Board are not required to describe the work with any more exactness than it is described by law itself. When the Board say they intend to grade a certain street, they have said all that is needed by way of description. No property holder can be in doubt as to what is to be done. He knows that the street is to be so filled in or excavated, as the case may be, as to make it conform to the official grade of the city; all of which the word grade itself imports, and the description of the work would have been no better or more complete had this definition of the term been employed instead of the term itself. The notice is to be read to the property holder in the light of the law which confers the power upon the Board, for that law is, so to speak, a part of the notice. By that law he is informed that the Board can only grade a street to the official grade of the city, and he is therefore fully informed as to what the Board intended to do, and he has no right to assume that they intend to make a grade not authorized by law and use the assumption as a foundation upon which to ground an objection to the notice." *Emery v. San Francisco Gas Co.*, 28 Cal. 345, 376. "To grade a street" is to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent." *Wilcoxon v. City of San Luis Obispo*, 101 Cal. 508, 35 P. 988, 989. In another leading case it was said: "When the owner of property was told by the resolution in the present case that the street was to 'be graded to the official grade and macadamized,' he was given such description of the work as would intelligently convey the intention of

the board as to the work contemplated, and its character and extent. The words, 'graded to the official grade and macadamized,' have well-understood meanings, and their use alone at once conveys to the mind the nature and character of the work, and the materials to be used." *Schwiesau v. Mahon*, 128 Cal. 114, 116, 60 P. 683, 684.

[3] Notice of the proposed improvement being sufficient, plaintiff's claims were barred by his failure to make objection within the time fixed in the ordinance of intention. A city in initiating a proceeding under the Improvement Act in question does so upon the condition expressly stated in the law, that any property owner who intends to claim damages on account of the improvement will make that fact known. If no objections are received, the city has a right to proceed upon the assumption that no claims for damages can thereafter be made. The purpose of requiring objections before any work is actually done is to enable the city to determine what damages, if any, will have to be paid by reason of the improvement. When objections are filed, the city then has an opportunity to determine whether to proceed with the improvement or to abandon it. If property owners were allowed to wait until after the work was completed before they were required to make their claims known, a city might be faced with demands for such amounts as, had they been known before, would have justified the abandonment of the proposed improvement. The fact that no claims for damages can be made against the city other than those preserved by means of objections filed within the time fixed by the ordinance of intention is certainly one of the important things for the city council to know in determining whether or not to go on with the proposed work. While a city cannot damage property without compensation to the owner, it may limit the time within which and the place where claims against it must be presented. *Sala v. City of Pasadena*, 162 Cal. 714, 718, 124 P. 539.

Upon both reason and authority it must be held that the claims of the plaintiff became barred by reason of his failure to object to the grade fixed, within the time specified in the ordinance of intention.

The order granting respondent's motion for a new trial is reversed, and the judgment is reversed, with directions to the trial court to enter judgment for the appellant.

We concur: CONREY, P. J.; HOUSER, J.

6 Cal.App.2d 21

**FISCH & CO., Limited, v. SUPERIOR COURT,
IN AND FOR LOS ANGELES
COUNTY, et al.**

Civ. 10148.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1935.

Hearing Denied by Supreme Court
June 3, 1935.

1. Judgment ⇨197

Order of nonsuit, entered by clerk in minutes pursuant to order of trial court, became a "final judgment" which could not be nullified by trial court by subsequent order permitting plaintiff to file amended complaint against defendant in whose favor order of nonsuit was made, though such defendant had filed cross-complaint against another defendant in which plaintiff was not a party defendant (Code Civ. Proc. §§ 473, 581, 582).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

**2. Judgment ⇨336, 403, 485
New trial ⇨1**

Judgment can be nullified by court which rendered it only on motion for new trial, or on application to set it aside within six months, or by motion therefor at any time where judgment is void on its face, or by independent suit in equity where judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake (Code Civ. Proc. § 473).

3. Electricity ⇨19(1)

Gas and electric corporation held not a "necessary party" to action for negligence in letting city's and corporation's high-power electric lines drop and come in contact with power lines furnishing electricity to plaintiff, thereby causing a fire (Code Civ. Proc. § 389).

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

Petition for a writ of mandate by Fisch & Company, Limited, against the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable Arthur Keetch, as Judge thereof.

Alternative writ discharged, and peremptory writ denied.

Harry J. Miller and Theodore Weisman, both of Los Angeles, for petitioner.

Everett W. Mattoon and D. DeCoster, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Petitioner seeks a writ of mandate directed to respondents requiring them to take certain action desired by petitioner in case No. 373593, filed by the latter as plaintiff in respondent court. The suit is against the Los Angeles Gas & Electric Corporation and the Department of Water & Power of the city of Los Angeles (hereinafter referred to for convenience as defendant city) for damages alleged to be due to their negligence in letting their respective high-power electric lines drop and come in contact with power lines furnishing electricity to plaintiff, thereby causing a fire. When issue was joined and the trial commenced before respondent judge with a jury, plaintiff put on its case and at the conclusion thereof the gas and electric corporation moved for a nonsuit, which was granted on the ground that there was no evidence upon which said corporation could be held liable. The trial proceeded against defendant city, and several days later the court decided that the defendant gas and electric corporation was a necessary party to the case in order to effect a complete adjudication of the issues. The jury then engaged in trying the case was discharged, permission to file an amended complaint identical with the original pleading was granted, with provision that an alias summons issue to bring back said corporation into the case, and it was then sent back to the calendar department of respondent court to be reset for trial when ready. An amended complaint was filed and summons was issued and served on defendant corporation. The latter served and filed a demurrer thereto and a notice of motion to vacate and set aside the order requiring defendant Los Angeles Gas & Electric Corporation to be made a party to the action and permitting the amended complaint, to strike same from the files as to said defendant and to quash summons. Upon hearing the said motions were granted. Petitioner, plaintiff in said action, asks that respondent court be required to assume jurisdiction as to said defendant gas and electric corporation and proceed to trial on the amended complaint.

[1, 2] When the order of nonsuit was entered by the clerk in the minutes pursuant to the order of the trial court, it was effective for all purposes and became a final judgment, even though it was not a judgment on the merits as contemplated by section 582 of the Code of Civil Procedure. Code Civ. Proc., § 581; Finch v. Ekstrom, 115 Cal. App. 381, 1 P.(2d) 516; Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018; Leese v. Sherwood, 21 Cal.

151. While such a judgment is reviewable on appeal and also when inadvertently made may be set aside under section 473 of the Code of Civil Procedure, it is not subject to change by the trial court in the manner indicated by the record as presented to us. A judgment can be nullified by the court which rendered it only: (1) On motion for a new trial; (2) by a motion under the provisions of section 473 of the Code of Civil Procedure, where application is made to set it aside within six months; (3) by motion therefor at any time where the judgment is void on its face; or (4) by an independent suit in equity, where the judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake. *Benning v. Superior Court*, 34 Cal. App. 296, 167 P. 291; *In re Estate of Soboslay* (Cal. App.) 39 P.(2d) 871; *Robinson v. Southland Produce Co.*, 112 Cal. App. 106, 296 P. 303. The said judgment not having been properly set aside, an attempt to bring back defendant corporation into the case for the purpose of making it subject to a second judgment in the same case would be futile and purposeless, since any such second judgment would be a nullity under the authorities above cited.

[3] We have further considered the final conclusion of the trial court to the effect that the amended complaint should be excluded and the summons quashed, and are satisfied that such latter order was correct, for the added reason that defendant Los Angeles Gas & Electric Corporation was not an essential party within the meaning of section 389 of the Code of Civil Procedure. See *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 284 P. 445, and cases therein cited. While convenience might be served by having both defendants in court at the trial, it was not necessary. Petitioner had the right to sue them jointly or severally, and whether its claim here prevailed or was defeated as to defendant city, it was not thereby precluded from suing defendant corporation in another action. *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, at page 157, 86 P. 178.

While these proceedings transpired, and until they were dismissed on a date subsequent to the filing of petition for writ of mandate in this court, there was on file in said action in respondent court a cross-complaint of defendant gas and electric corporation against defendant city, in which petitioner was not a party defendant. We find nothing in that aspect of the case upon which we could hold that the rule with reference to the finality of the judgment of nonsuit as

above enunciated would in any manner or to any extent be thereby abrogated.

After motion for nonsuit was granted, defendant corporation filed its cost bill, which respondent court has refused to strike from the file. Under the views above expressed, we obviously should not accede to petitioner's request and require it to take such action.

The alternative writ is discharged, and a peremptory writ denied.

We concur: STEPHENS, P. J.; CRAIL, J.



5 Cal.App.2d 755

HALL v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.

Civ. 1341.

District Court of Appeal, Fourth District,
California.

April 4, 1935.

Rehearing Denied April 30, 1935.

Hearing Denied by Supreme Court
June 3, 1935.

1. Electricity ⚡19(3)

Res ipsa loquitur doctrine could not be invoked to support judgment against electric company for destruction of building in fire alleged to have been caused by defective wiring, where plaintiff alleged and introduced evidence of specific acts of negligence which she maintained caused fire.

2. Negligence ⚡121(2)

Res ipsa loquitur doctrine cannot be relied on by plaintiff who alleges specific acts of negligence as cause of injury.

3. Electricity ⚡19(5)

Circumstantial evidence that fire started from heat generated by arc caused by contact between defectively taped power cables and grounded gutter box held to support finding of negligence on part of electrician employed by electric company who installed wiring.

4. Appeal and error ⚡931(1)

Evidence, in so far as subject to opposing inferences, must on review be regarded in light most favorable to support of judgment.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Carrie L. Hall, individually, as administratrix of the estate of Della Elizabeth Hall, deceased, and as executrix of the last will of George W. Hall, deceased, against the San Joaquin Light & Power Corporation and others. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Thomas J. Straub, of San Francisco, F. H. Pearson, of Fresno, and W. R. Dunn, of San Francisco, for appellant.

U. G. Hayden, of Fresno, for respondent.

MARKS, Justice.

Carrie L. Hall, Della Elizabeth Hall, and George W. Hall were the owners of farm property near the town of Kerman about 13 miles west of the city of Fresno. Buildings and personal property on this farm were destroyed by fire on the morning of June 23, 1929. After that date, Della Elizabeth Hall and George W. Hall died and Carrie L. Hall became the duly appointed, qualified, and acting administratrix and executrix of their respective estates. This action was instituted to recover damages which resulted from the fire. It was alleged that the fire was caused by defective electrical wiring. Barney Schultz was not served with summons, and the action against Francis O. Wyant was dismissed during the trial. Judgment was rendered against appellant for \$9,365, and this appeal followed.

Appellant presents but one ground for reversal of the judgment—that the evidence is insufficient to support the findings and judgment. It urges that the doctrine of *res ipsa loquitur* does not apply here and that when that doctrine is eliminated there remains no evidence of negligence to support the judgment.

[1, 2] We agree with appellant that the doctrine of *res ipsa loquitur* cannot be invoked in support of the judgment as the respondent alleged with great particularity in an amendment to her complaint, the acts of negligence which she maintained caused the fire. She also introduced evidence of specific acts of appellant which she maintained caused the fire. The trial court found in accordance with the allegations of the amendment to the complaint and the supporting evidence. It is well settled that the doctrine of *res ipsa loquitur* cannot be relied upon by a plaintiff who alleges specific acts of negligence as the cause of injury. *Ingle due v. Davidson*, 102 Cal. App. 697, 283 P. 837.

[3] The doctrine of *res ipsa loquitur* having been eliminated from the case, it remains for us to determine the question of the sufficiency of the evidence to support the findings of particular acts of negligence upon which the judgment must rest if it is to be affirmed. This will require a somewhat detailed analysis of that part of the evidence tending to support the questioned finding. From such an analysis, the difficulties confronting the plaintiff at the trial in her attempt to support her allegations of specific acts of negligence, of the trial judge in deciding the questions of fact, and of this court on appeal will become immediately apparent.

On the farm were numerous buildings, including a dwelling, and a tank house with a tool room attached to it. The first floor of the tank house was divided into two rooms, a storeroom and a separator room. These rooms had cement floors. The second floor formed a bedroom which was occupied by John Brooks, a laborer on the farm. Above the bedroom was an inclosed water tank. Attached to and on the south side of the tank house and adjoining the separator room was a tool room with a dirt floor. In this tool room was a well from which domestic water was pumped. The pump was operated by a five horse power single phase motor. The switchboard which controlled the supply of electricity for both power and lighting purpose was placed on the outside south wall of the tank house, which was also the outside south wall of the separator room. This board was really within the tool room. It was a wooden board upon which were attached the necessary electrical apparatus and wires, and was set out from the wall. Immediately behind it was a window. On June 22, 1929, several panes of glass were broken from this window. There were no solid doors in the tool room or on the first floor of the tank house. They were all screen doors which permitted the circulation of air. The buildings on the farm were all constructed of wood. The electrical equipment and wiring had been originally installed in 1919, and was of sufficient capacity to accommodate an electrical current of 110 volts.

Prior to June 22, 1929, respondent desired to have an electric stove and an electric refrigerator installed in the dwelling. The installation of the stove required the increase of the current to 220 volts and also required a change in the meters and some of the wiring. She engaged appellant to make the necessary changes in the transformers, meters, and power leads, and employed Wyant to change the wiring.

After studying the record in detail, and with reproductions of drawings before us, we will attempt to describe the switchboard with its electrical apparatus and wiring, and the connecting wiring, as it existed before and after the change, as clearly and accurately as the uncertainties in the record will permit. In so doing, we will not attempt to distinguish between the portions of the equipment and wiring in the tool house and the tank house, but will refer to them as though all were in or attached to the tank house. We will use the designations "right" and "left" as though we were standing facing north and the switchboard which was attached to the outside on the wall of the tank house and separator room. If we become confused in our endeavors, we feel that we may be somewhat excused by the manner in which the witnesses were permitted to testify in the trial court from drawings and from diagrams on a blackboard not only concerning the switchboard but in describing the wiring and other objects. They were permitted to locate various articles "here" and "there" which, of course, was intelligible to counsel and the trial judge. Only three of the drawings are reproduced in the record and no attempt is made to designate where "here" and "there" might be. No attempt has been made to reproduce the blackboard diagrams. As to many objects, we are entirely at sea when we attempt to isolate "here" from "there" or "there" from "here." Of course, if we should locate something "here" when it should have been "there," the appellant will have to be the unfortunate sufferer, as it was its duty to present the record, though counsel for respondent freely participated in the method of trial which has caused our confusion. We have called the attention of the bar to the unsatisfactory record which such a method of trial produces. We feel that our description of the switchboard is fairly accurate, but we are not so confident that we have correctly described other wiring and appliances.

We will first describe the switchboard and its connecting wires as they existed before the change was made. Two No. 4 feed wires came down through a 1½ inch conduit. They were fastened to posts at the head of a main knife switch which was on the upper left-hand corner of the switchboard. One light wire was taken from each of these posts and passed down on each side of the switch and into the left end of a galvanized iron gutter box 4 by 4 by 24 inches in its dimensions. These wires passed through the gutter box and out its right end, from which point they were taken upwards and attached to two

posts on the top of a knife switch which controlled the lighting circuit. Two wires were connected to posts at the bottom of this switch and led to the light meter. Two wires came from this meter and passed up into a ½ inch conduit and furnished the feed back to the dwelling. Each of these wires was tapped before entering this conduit by wires furnishing light for the tank house. The wires from these taps found their way inside of the separator room, where a wire or wires ran up its wall, across its ceiling, and down its side to the separator. A light was taken off at the center of the ceiling. Other wires were taken off from this circuit and furnished lights for the bedroom in the tank house and for the tool room. The two wires furnishing power for the motor were taken off from posts on the lower end of the main switch. These wires passed into the left end of the gutter box and one of them up through its top to a current transformer. Energy was taken by a similar wire from this transformer which passed through another opening in the top of the gutter box. This wire then passed along the gutter box and out of an opening in its bottom near its right end and into a starter. The other wire passed through the gutter box, out of it through the same opening and into the starter. Other similar wires passed from the starter through a metal conduit to the motor. They were each either No. 4 or No. 6 in size and were formed by twisting together either five or seven strands of No. 12 or No. 14 copper wire and inclosed in insulation. We will refer to the first described as power cable No. 1 and the other as power cable No. 2 in order to distinguish them from each other and from the No. 12 light wires used elsewhere. A tap was made in the power cable No. 2 inside the gutter box by attaching a No. 12 wire to it which led through the top of the gutter box to the power meter. Two wires also connected the power meter with the current transformer.

The changes in the wiring were made on the afternoon of June 22, 1929, by Chester Marshall and other employees of appellant, and Francis O. Wyant, an independent contractor employed by plaintiff.

The employees of appellant made the following changes in the wiring which we must mention: The meter box was placed on the outside of the dwelling from which current was taken to the tank house by means of the No. 4 wires leading to the switchboard. Marshall removed the transformer, power meter, and light meter from the switchboard. He cut the No. 12 light wires loose, but did not remove them. He cut the tap wire from

power cable No. 2 and placed rubber tape and friction tape over the end of this wire which projected slightly from power cable No. 2. He spliced power cable No. 1. The testimony most favorable to respondent shows that in doing this he cut the insulation back from the two ends, twisted the ends of the cable together, and taped the joint with rubber and friction tape without soldering the joint. He then placed the loose light wires and the two power cables back in the gutter box. Brooks testified that "he put some wires together there and taped them. Some he left open." Marshall shoved the power cables and wires back into the gutter box when he completed his work. He gained admission to the gutter box by taking off the lid which was screwed to its face. He had trouble removing the screws and did not remove the one in the lower left-hand corner, but left the lid hanging and attached to the gutter box by that screw.

Wyant went to work when Marshall had finished. He removed from the gutter box and switchboard the light wires Marshall had cut. He connected the light wires that came through the $\frac{1}{2}$ inch conduit to the top, and the light wires serving the tank house to the bottom of the light switch we have mentioned. He did nothing to the power wires. He changed the wiring on the motor to accommodate the new current of 220 volts.

All work was completed at about 6 o'clock in the afternoon of June 22, 1929, the installation was tested by turning on electric lights and the motor, after which the workmen left.

Wyant testified that he removed all loose light wires from the gutter box and took them off from the switchboard. This testimony is undisputed. We think it fair to conclude that the wires which Brooks described as being untaped and "left open" by Marshall were all removed by Wyant.

When the residents of the farm retired on the night of June 22, 1929, all electric lights were turned off and no appliances were operating. Normally there should have been no electric current flowing in any of the wires after that time. Brooks was awakened at about 2 o'clock on the morning of June 23. He described the conditions he found as follows: "I was awakened in the night by smoke, and my room was full of smoke; couldn't breathe. I couldn't think what was the matter. I jumped up and ran down the stairs to see what was the matter and opened this door into this separator room here. And that room was all full of black smoke. And there was a fire right in this—on this switch-

board; it was all afire. So I came around from the separator room into the tool shed with the intention of starting this five horse-power motor to flood the tank, to see if I could put the fire out. These wires in this gutter, bottom of this switchboard, were all red-hot. They were all a mass of flames. So I knew there was no use trying to start the motor. (Sentence stricken out.) I went around to the back, and there was a door in the back part of the separator room opposite this door. * * * I went around to the back and opened the back door, and the smoke was so dense and black that I couldn't see anything from there, so I went around to the front and went in the separator room again and the fire was following these wires, went up this wall across this ceiling and down the power pole (undoubtedly a mistake. Light wire on wall must have been intended.) to the separator switch. Those wires were all burning across that wall. Mr. Hayden: Q. You say the wire was burning. I suppose that was the insulation? A. The insulation was burning." No other witness testified concerning the fire inside the tank house and tool shed.

Appellant suggests that the fire might have been and probably was caused by (1) spontaneous combustion; (2) something burning thrown into oil; (3) the defective work of Wyant.

There is no evidence that there was any waste or refuse in the tank house or in the tool house that could have been ignited by spontaneous combustion. Neither is there any evidence of the presence of oil in either building. When Brooks first saw it, the fire was not burning below the gutter box, which was several feet above the floor.

The testimony of the witnesses for appellant seems to have absolved Wyant and his work from any blame. They testified that if the bare wires had come into contact, this would have caused such a rush of current that the fuse would have been blown out before a fire could have been ignited. They were equally positive that contact between a naked light wire and wood would not have caused a fire because wood is a nonconductor of electricity and a contact between the wire and the wood would not have created a circuit. They were of the opinion that there would have to have been a contact between a wire and grounded metal or such other conductor to have ignited a fire. There is no showing that there was any such conductor near the wires which had been worked on by Wyant.

Appellant produced expert witnesses who performed various experiments which, with

their technical knowledge and learning, convinced themselves that it would have been impossible for any fire to have started from the switchboard, the gutter box, or any wiring which had been worked on by its employees, even assuming the existence of all of the conditions claimed by respondent. Respondent produced one expert who was of the firm opinion that the fire was started from the splicing and taping of power cables No. 1 and No. 2 which had been done by Marshall and left by him in the gutter box. All experts are in agreement that if the splice and the stump of the cut tap wire had been properly taped, no fire could have originated from that source.

The theory of the expert produced by respondent must be summarized. When the power cable and the tap wire were cut by Marshall, the end of the tap wire formerly attached to power cable No. 2 and the end of each wire forming power cable No. 1 were left with sharp knife like edges. If any of the ten or fourteen sharp ends of the wires in the spliced cable were left protruding from the tape on the splice, or had cut through the tape, they would have come in contact with the metal gutter box, a circuit would have been formed and a flow of electricity started, if the gutter box were grounded. The same would have been true if the sharp end of the tap wire had cut through the tape surrounding it. A steady contact between an exposed wire and the gutter box, if grounded, would have caused a steady flow of electricity which would not have caused a dangerous amount of heat. If contact between the exposed wire or wires and the gutter box had been broken at regular intervals of about sixteen a second, an arc would have been formed which would have generated sufficient heat to ignite the insulation on the power cables in a period of time ranging from fifteen minutes to one hour. If the arc were once formed, it itself would have developed sufficient energy or resistance to keep the power cable vibrating and the arc continuing for an appreciable period of time. The length of the arc need not have been more than $1/1000$ of an inch. The evidence showed that a breeze was blowing with a velocity of between 6 and 14 miles an hour during the night of the fire. The metal cover of the gutter box was hanging from one corner of the gutter box attached to it by a screw. A window with panes of glass broken from it was immediately behind the switchboard. The doors of the tool house and separator room were of screen, thus permitting the wind to blow through the broken window over which the cover of the gutter box hung. The wind would cause the cover to vibrate,

which vibration would have been communicated to the gutter box sufficiently to set up a chattering of the cables which would have caused the arc. A vibration caused by force illustrated by light tapping with a lead pencil had caused an arc in experiments and would have been sufficient to cause the vibration and the consequent arc and fire.

All experts agreed that no flow of electricity could have occurred without the gutter box being grounded. Some time after the fire an iron pipe similar to those used as "ground stakes" was found driven into the earth immediately below this switchboard. It had a piece of copper wire about 1 inch long attached to it by a metal clamp similar to those used to attach ground wires to ground stakes. A piece of copper wire was found in the dirt near this stake with both ends of the wire showing evidence of having been burned and one of them fitting the end of the wire attached to the ground stake. There is evidence that the ground stake was seen in place before the fire, though no one testified that a ground wire was seen attached to it. There is also some slight evidence that a ground might have existed through the starter and metal conduit connecting to it. The foregoing evidence is sufficient to support the inference that the gutter box was grounded.

We think the evidence sufficient to support the inference that the fire started in the gutter box. The natural phenomena that fire travels upward much faster than downward is well known. When Brooks first saw the fire, he said the power cables in the gutter box were glowing. This glow may well have been produced by the charring remains of the insulation on these cables. The wooden switchboard was burning, as was a small portion of the wall for a short space above it. The light wires up the wall of the separator room and across its ceiling were smoking or burning and but little fire had been communicated to the adjacent wood. It is more reasonable to conclude that the fire started in the gutter box and climbed upwards than it is to assume that it started at a higher point and descended into the gutter box. Furthermore, there is no proof that would locate the cause of the origin of the fire above the gutter box and certainly nothing indicating it started below it.

It must be admitted that the only evidence of negligence on the part of Marshall is produced by inferences to be drawn from the evidence. If Marshall had left one or more of the strands of the cable protruding from the taped splice, the contact with the metal

of the gutter box could have occurred. If the sharp edges of the tap wire and the strands of the cable had been covered by the tape and had Marshall rubbed them over the rough surface of the galvanized iron gutter box in returning the power cables to it, the sharp edges could have cut the tape and made contact with the gutter box, thus starting the flow of electricity. These are facts from which the inference may be drawn that the foregoing combination of circumstances actually happened and that the fire evidently originated in the gutter box from the defectively taped power cables. Had the splice and cut tap wire been properly taped and the wire edges smoothed into place even without soldering, the power cables would have carried safely at least 2,000 volts of electricity for many years without danger of fire. As the fire could have been caused only by contact between an exposed wire and the gutter box, and as a wire would not have been exposed except for carelessness by Marshall in doing his work, the trial judge was at liberty to draw the inference of negligence on Marshall's part.

[4] In *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123, it was said: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. *Anderson v. Los Angeles Transfer Co.*, 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 519, 520, 153 P. 951; *Hassell v. Bunge*, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' *Bandle v. Commercial Bank of Los Angeles*, 178 Cal. 546, 547, 174 P. 44, 45."

We have reached the conclusion that as the trial court drew the inference of negligence on the part of Marshall from the evidence, and having particularly found that such negli-

gence existed and that it was the proximate cause of the fire and resulting loss to respondent, we cannot disturb the judgment on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



COTTLE et al. v. CITY OF LOS ANGELES.*

Civ. 8595.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Rehearing Denied May 16, 1935.

Hearing Granted by Supreme Court
June 17, 1935.

1. Eminent domain ⇨148

Property owners *held not entitled*, before reduction of claims to judgment, to interest on claims for unliquidated damages arising from unlawful changing of street grade (St. 1911, p. 730, as amended).

2. Municipal corporations ⇨293(2)

Ordinance of intention to make street improvement, constituting the only notice to property owners, should inform property owners of proposed change of grade in street without requiring them to resort to conjecture or examination of technical plans and profiles (St. 1911, p. 730, as amended).

3. Eminent domain ⇨280

Published ordinance of intention to make street improvement "by certain grading by construction of certain concrete paving" *held* insufficient notice to property owners of intention to change grade, even though owner had actual notice of proposed change before time for protest arrived; hence, failure to file protest against improvement did not constitute waiver of right to damages arising from changing of street grade (St. 1911, p. 733, § 3).

4. Eminent domain ⇨277

Where ordinance adopted by city council of Los Angeles inaugurated street work, filing of claim for damages resulting from change of grade thereunder with city council without filing of same with board of public works *held* proper, and sufficient as prerequisite to filing of suit for damages (St. 1911, p. 730, as amended).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Charles Cottle and another against the City of Los Angeles. Judgment for plaintiffs, and defendant appeals.

Modified, and, as modified, affirmed.

Ray L. Chescbro, Frederick Von Schrader, Charles F. Reiche, and Arthur W. Nordstrom, all of Los Angeles, for appellant.

E. H. Delorey and A. Feldman, both of Los Angeles, for respondents.

WILLIS, Justice pro tem.

By ordinance appellant, City of Los Angeles, proposed that Riverside drive, a public street, "be improved by certain grading by the construction of certain concrete paving." The ordinance was adopted under the provisions of the Improvement Act of 1911 (St. 1911, p. 730, as amended). It further provided for the time and place of protest against the proposed improvement by persons who had any objections. Respondents owned property affected by the proposed improvements, but filed no protest. In the performance of work under this ordinance a change of grade resulted by reason of cuts and fills adjacent to respondents' property, which injuriously affected the use of their property. They filed a claim for damages in proper time with the city council, which rejected the same. They thereupon filed suit, and after trial recovered judgment from which this appeal is taken.

Appellant contends: (1) That by failing to file a protest as required by section 3 of the Improvement Act of 1911 (St. 1911, p. 733, § 3) respondents waived any claim for damages; (2) that the filing of a claim with the board of public works was a prerequisite, under provisions of the charter of the city of Los Angeles, to a cause of action against the city for damages; and (3) that the court erred in allowing interest on the amount of damages awarded.

[1] Respondents concede error in the allowance of interest. This we approve and commend, as it has heretofore been decided that a claim for unliquidated damages arising from unlawful changing of a street grade could not draw interest before reduction to judgment. *McNutt v. City of Los Angeles*, 187 Cal. 245, 201 P. 592.

[2-4] Since the lodging of the appeal in this case both the remaining contentions have been decided adversely to appellant's contentions. In the case of *Musto-Keenan Co. v. City of Los Angeles*, 139 Cal. App. 506, 34 P. (2d) 506, 509, it was contended that the claimant for damages resulting from a change of

grade caused by performance of work under an ordinance adopted under the provisions of the Boundary Line Act of 1911 (St. 1911, p. 1018, as amended) which provided for improvement of a street "by certain grading and rolling," had waived any claim for damages arising from a change of grade in the making of such improvement, as provided in section 4 of said act (St. 1911, p. 1019, § 4, as amended by St. 1929, p. 1716). Upon comparison of section 3 of the Improvement Act with section 4 of the Boundary Line Act, we note that they are substantially the same in language and effect. The court held that a resolution of intention under the Boundary Line Act which provided for certain grading, but which did not state there was to be a change of grade, did not import notice to owners of affected property of a proposed change of grade, and that their failure to protest at the time specified did not constitute a waiver.

Appellant seeks to distinguish the *Musto-Keenan Co.* Case from the one at bar, by claiming that respondents herein had actual notice that there was to be a change of the grade of the street in front of their property before the time for protest arrived, and that therefore the language of the ordinance referring to "certain grading" did not mislead them and becomes immaterial. In the case cited, the court said: "When it is recalled that the resolution of intention, when published, constitutes the only notice provided by law, and must be 'such as may reasonably be held to afford adequate opportunity for knowledge of the designed improvement by the property owner who exercises reasonable care in the matter of his property' (*Sala v. City of Pasadena*, supra [162 Cal. 714, 124 P. 539]), it is apparent that the notice shall inform an owner of any proposed change of grade, and he shall not be compelled to resort to conjecture nor to an examination of technical plans and profiles to determine if the work is to be done to the established grade or to new grades." In harmony with the foregoing, we are of the opinion that actual notice to an affected owner of a change of grade proposed to be made under an ordinance providing only for grading does not constitute the basis of waiver of a claim for damages by such owner on failure to protest. In this same case, which was decided by the District Court of Appeal of the Third District, and also in the case of *Haigh v. City of Los Angeles*, 139 Cal. App. 595, 34 P.(2d) 779, decided within the same week in this court, it was held that where ordinances adopted by the city council of the

city of Los Angeles inaugurated street work and ordinary street improvement, a claim for damages resulting from change of grade thereunder was properly filed with the city council, and that it was not necessary to file the same with the board of public works. In both these cases petitions for hearing by the Supreme Court were denied, and we consider them as applicable to, and determinative of, these two questions on the appeal in this case.

The judgment is modified by striking therefrom the words and figures as follows, "with interest thereon at the rate of seven per cent. (7%) per annum from March 19, 1929," and, as so modified, it is affirmed, costs of appeal to be assessed against appellant.

We concur: STEPHENS, P. J.; CRAWL, J.



**FILLMORE UNION HIGH SCHOOL DIST.
OF VENTURA COUNTY et al. v. COBB.***

Clv. 5269.

District Court of Appeal, Third District,
California.

April 5, 1935.

As Modified on Denial of Rehearing
May 4, 1935.

Hearing Granted by Supreme Court
June 3, 1935.

1. Constitutional law ☞63(3)

Statute, permitting attendance at high schools in other districts than those in which students reside only on terms agreed on by district boards or prescribed by county superintendent of schools, and requiring latter to apportion amounts agreed on or prescribed, *held* not unconstitutional as delegating legislative authority to superintendent (School Code, §§ 3.301, 3.306, as amended by St. 1931, pp. 2428, 2429).

2. Schools and school districts ☞154

Terms, adopted by high school district boards or county superintendent of schools, for attendance at high schools in other districts than those in which pupils reside, in exercise of discretionary authority delegated by statute, are presumed to be reasonable, in absence of contrary proof (School Code, §§ 3.301, 3.309, as amended by St. 1931, pp. 2428, 2429).

3. Constitutional law ☞62

Legislature may delegate authority to administrative boards or officers to adopt rea-

sonable rules and terms to carry out general purpose of statute, though conferring discretion or imposing necessity on such boards or officers to determine terms, qualifications, or facts.

4. Schools and school districts ☞154

Certain pupils' attendance at high school of another district than those in which they resided before adoption of terms and determination of amount of tuition by county superintendent of schools did not estop latter from fixing terms and conditions pursuant to statute; such pupils having acquired no vested right to attend such school (School Code, §§ 3.301, 3.306, 3.309, as amended by St. 1931, pp. 2428, 2429).

Appeal from Superior Court, Ventura County; Frank C. Collier, Judge.

Suit by the Fillmore Union High School District, and other such districts in Ventura County, against Blanche T. Reynolds, as County Superintendent of Schools. From a judgment for plaintiffs, defendant appealed, after which Kirk Cobb was substituted as appellant.

Judgment reversed, with direction.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for appellant.

Charles F. Blackstock, of Oxnard, and Fergus L. Fairbanks, of Fillmore, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant Blanche T. Reynolds appealed from a judgment enjoining her, as Superintendent of Schools of Ventura County, from apportioning or transferring funds belonging to the several union high school districts which have been joined as plaintiffs in this proceeding, to compensate the Ventura Union High School District as tuition for certain pupils residing outside the last-mentioned district. The appellant contends that it is her duty, as Superintendent of Schools of Ventura County, in the absence of an agreement between the districts involved, to fix the terms and apportion the funds of the respective high school districts so as to authorize eligible pupils residing in the plaintiffs' districts to attend the Ventura Union High School District. The defendant's action in that regard is justified by her under the provisions of section 3.301 and 3.306 of the School Code (as amended by St. 1931, pp. 2428, 2429). The respondents assert that these statutory provisions are unconstitutional.

al for the reason that they confer an unlawful delegation of legislative authority.

Five separate organized high school districts in Ventura county are joined as plaintiffs in this proceeding. The Ventura school maintains junior college classes which are not conducted in the other schools. For several years pupils who reside in these districts represented by the plaintiffs have attended the Ventura Union High School without the imposition of terms or tuition. The school boards failed to agree upon any such terms or tuition. In the fall of 1932 the Superintendent of Schools of Ventura County fixed the terms and amount of tuition applying to pupils residing in other districts who attend the last-mentioned school and proceeded to apportion the funds of the respective districts in accordance therewith, pursuant to the provisions of sections 3.301 and 3.306 of the School Code. The amount of tuition and the apportionment of school funds of the various districts were specified in a communication from the superintendent to the boards of the several districts as follows:

"This is * * * to inform you of the amount of tuition to be transferred from the various high schools in Ventura County sending students to the Ventura High School for the year 1931-32. * * *

"The requirements of Chapter 1141 of the Statutes of 1931 * * * prohibiting the attendance of nonresident students at any high school without an agreement between the interested school boards, has put the question up to the County Superintendent of Schools as per said statute, because no such agreement seems possible in Ventura County.

"Therefore, these are the terms prescribed for attendance of Ventura County nonresident high school students: Inasmuch as no elementary school district is allowed by law to pay to a junior high school for tuition for its seventh and eighth grade students an amount per unit of average daily attendance greater than the cost per unit in its first six grades of its own school, and, inasmuch as some of these high schools have to tax themselves to the legal limit to maintain their high schools, it is the opinion of the County Superintendent of Schools that the amount of tuition to be paid to the Ventura Union High School District for tuition in the junior college courses for the year 1931-32, and until further notice, should be the difference between the total cost per unit of average daily attendance in the district in which the stu-

dent resides and the amount received per unit from the state and county.

"In the case of the two very smallest high school districts in the county, where the cost per unit is very high, the amount to be paid should be the difference between the cost per pupil in the Ventura Union High School District and the amount received from the state and county.

"Following are the costs and computations showing the amount to be paid to Ventura High School by each district. This transfer will be made at the time when the county high school tax money is received in December, 1932. The units of A. D. A. for which this tuition is transferred are taken from Mr. Van Dellen's report in July, 1932.

Cost per A. D. A. in High Schools for 1931-32.

Fillmore	\$219.20	Cost per A. D. A.	
Moorpark	331.80	"	"
Nordhoff	162.79	"	"
Oxnard	234.61	"	"
Santa Paula	188.77	"	"
Simi Valley	289.59	Cost per A. D. A.	
Ventura	200.36	"	"

Received from State per A.	
D. A.	24.76
Received from County per	
A. D. A.	73.50
Received from both.....	98.26

Cost per unit to the district.

Nordhoff	\$162.79	Total	
Less	98.26	State & County	
	64.53	Cost to District.	
Santa Paula	\$188.77		
Less	98.26		
	90.51	Cost to District.	
Ventura	\$200.36		
Less	98.26		
	102.10		

All others cost more than Ventura. Therefore the cost to Ventura will be the unit price.

Fillmore	\$200.36
	98.26
	102.10
Santa Paula	\$188.77
	98.26
	90.51
Nordhoff	\$162.79
	98.26
	64.53

All others 102.10

Therefore the amounts of tuition to be apportioned by the County Superintendent of

Schools, as required by section 3.306 of the School Code, are as follows:

From Fillmore, with 15 units of A. D. A. in the Junior College Course of the Ventura High School as reported by District Superintendent Van Dellen:

	15 times	102.10.....	\$ 1531.50
From Moorpark	2 times	102.10.....	204.20
From Nordhoff	3 times	64.53.....	193.59
From Oxnard	35 times	102.10.....	3573.50
From Santa Paula	54 times	90.51.....	4887.54
From Simi Valley			00.00
Total all schools			10390.33

"Very truly yours,

[Signed] Blanche T. Reynolds

"County Superintendent of Schools

"M.S."

The trial court adopted findings in accordance with the preceding statement of facts, and rendered judgment restraining the defendant from apportioning or transferring funds from the treasures of the plaintiffs to the Ventura Union High School District as tuition for pupils residing outside the last-mentioned district. From that judgment this appeal was perfected.

[1, 2] We are of the opinion sections 3.301 and 3.306 of the School Code are not unconstitutional. They do not constitute an unlawful delegation of the legislative authority to a county superintendent of schools. The reasonableness of the rules which were adopted and the amount of tuition required to be paid by pupils living outside of the district are not questioned. We must assume from the absence of a showing to that effect that there was no abuse of discretion on the part of the Superintendent of Schools of Ventura County in fixing the terms and tuition upon which such pupils may attend the Ventura Union High School. Unless the act complained of is unconstitutional as an unlawful delegation of authority to an administrative officer, pupils are not entitled to attend a high school outside of the district in which they reside unless the terms upon which such attendance is permitted have been fixed and determined either by an agreement of the school boards of the districts which are involved or by the superintendent as provided by section 3.301 of the School Code. Section 3.309 of that Code (as amended by St. 1931, p. 2429) provides in that regard: "No student residing in one high school district shall be admitted to the high school of another high school district * * * if terms have not been agreed upon for the admission of such student as required by this article."

The two sections of the School Code, upon the asserted unconstitutionality of which the respondents in support of the judgment in this case rely, read as follows:

"3.301. Any person who is, under the provisions of this article, eligible to attend a high school and who resides in a high school district, may attend a high school in a high school district in the same county, other than that in which he resides, only upon such terms as may be agreed upon by the high school boards of the two districts, or, if such boards fail to agree, on such terms as the county superintendent of schools may prescribe."

"3.306. When terms have been made and agreed upon by high school boards as provided for in this article, or, if such boards fail to agree, when terms have been prescribed by the county superintendent or superintendents of schools, as provided in this article, the superintendent of schools of the county in which the person resides is hereby authorized and required to apportion and cause to be paid to the special fund of the high school district which such person attends, from the funds of the proper high school district or from the unapportioned county fund of his county such amounts as shall have been agreed upon by such high school boards or as shall have been prescribed by such superintendent."

The preceding sections do not delegate to the superintendent of schools legislative authority. They merely authorize the adoption of reasonable rules, terms, and conditions upon which students who reside in the county may be permitted to attend a high school other than the one in whose district they reside. Section 3.301, supra, provides for an alternative method of adopting such terms and conditions. First they are to be adopted by the interested school boards by agreement or contract, and in the event those boards fail to adopt such reasonable rules and terms, then the county superintendent of schools is authorized to do so. The attendance of the pupils in a high school within the county in a district other than the particular one in which they reside is made conditional upon the adoption of such reasonable rules and terms. The general scope or purpose of such terms is prescribed by the statute. The county superintendent is not authorized to increase or diminish the general school funds which are apportioned to the county. As a matter of equity he is merely authorized to apportion the funds already provided for by law so as to pay to the high school attended

by the pupils the reasonable cost of teaching the pupils. This is certainly just and within the general scope of the act which specifically authorizes either the school boards or the administrative officer, the superintendent of schools, to adopt terms and regulations permitting pupils to attend high schools outside of the particular district in which they reside. It would be impracticable for the Legislature to attempt to specifically prescribe all the terms and rules under which pupils may be permitted to attend high schools outside the particular district in which they reside since the equity of such terms may depend upon peculiar local conditions. It would therefore seem to be wise and proper that the adoption of such terms within the general scope prescribed by the statute be delegated to the interested school boards or to the superintendent of schools. It necessarily follows that such delegated discretionary authority should be exercised by the board or administrative officer in a fair and reasonable manner. The terms which are adopted are presumed to be reasonable, in the absence of proof to the contrary. In upholding a statute authorizing a state board of architecture to adopt rules regulating the admission of persons to practice the profession of architecture in California, the Supreme Court said in that regard in *Ex parte McManus*, 151 Cal. 331, 90 P. 702, 704: "The authority conferred by the terms of the statute is to pass * * * rules which must be reasonably adapted for the purpose of determining the qualifications of all applicants to practice the profession of architecture from an examination of the applicant on subjects pertaining to that profession. It was not necessary in the act to declare in terms that the rules and regulations which the board might adopt should be reasonable ones. * * * There is always implied in a grant of authority, such as here conferred, that it shall be exercised reasonably and fairly so as to effectuate the end contemplated."

[3] It is a well-established rule of law that authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer within the scope of the legislative act. 6 R. C. L. p. 179, § 179; 5 Cal. Jur. p. 683, § 97; 1 Cooley's Const. Lim. p. 228; *School District No. 7, etc., v. Hunni-*

cutt (D. C. Okl.) 51 F.(2d) 528; *People v. Kuder*, 93 Cal. App. 42, 269 P. 198, 630; *In re Halck*, 215 Cal. 500, 11 P.(2d) 389; *Ex parte McManus*, 151 Cal. 331, 335, 90 P. 702; *In re Weisberg*, 215 Cal. 624, 12 P.(2d) 446, 450. In 1 Cooley's Const. Lim. (8th Ed.) p. 231, it is said in that regard: "Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws."

In the case of *In re Weisberg*, supra, in upholding a statute authorizing the state fire marshal to license certain establishments for sponging and pressing garments, the Supreme Court said with respect to these delegated powers: "We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by *Carter v. Stevens*, supra, 211 Cal. 281, 289-293, 295 P. 28, and *Gaylord v. City of Pasadena*, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, 'it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the

public business." Union Bridge Co. v. United States, 204 U. S. 364, 367, 27 S. Ct. 367, 51 L. Ed. 523."

[4] The fact that certain pupils who reside in other school districts had attended the Ventura Union High School prior to the adoption of the terms and amount of tuition therefor by the superintendent of schools does not estop that officer from fixing the terms and conditions referred to in section 3.301 of the School Code. Such students were evidently attending that school unlawfully. The privilege of attending a high school other than the one which is situated in the same district in which the pupil resides is a mere permissive right dependent upon the previous adoption of the terms and conditions therefor by agreement of the respective school boards, or upon their failure to do so, by the superintendent of schools. Section 3.309, School Code. The pupils acquired no vested right to attend the Ventura school by previously unlawfully doing so.

What has been previously said is not intended to give the superintendent of schools authority to determine rules or terms or fix tuition retroactively so as to affect pupils in their past attendance upon the school, but upon the contrary these rules and the apportionment of funds are to apply only to pupils who attend the school after the rules and terms are adopted and the apportionment made.

The judgment is reversed, and the court is directed to enter judgment in accordance with the foregoing opinion.

We concur: PULLEN, P. J.; PLUMMER, J.



5 Cal.App.2d 738

ATKINSON et al. v. DISTRICT BOND CO.

Civ. 9515.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1935.

1. Contracts ⇨346(11)

Recovery of damages for breach of contract on proof of excuse for plaintiff's non-performance of his part thereof cannot be had on allegation of full performance.

2. Contracts ⇨346(8)

Evidence of defendant's repudiation of contract, for breach of which plaintiffs sued,

held admissible, though complaint alleged full performance thereof by plaintiffs and no amendment of complaint was requested or made, where they also alleged repudiation of contract and elected at beginning of trial to proceed on such theory.

3. Contracts ⇨313(2)

Party refusing to treat executory contract as subsisting or binding on him prevents performance by other party in legal effect, but mere declaration of intention not to be bound does not amount to breach creating effectual renunciation of contract.

4. Contracts ⇨313(2)

To justify party to executory contract in treating adverse party's renunciation thereof as breach, latter party must have distinctly, unequivocally, and absolutely refused to perform whole contract or covenant going to whole consideration.

5. Contracts ⇨313(1)

Party's declaration of intention not to be bound by executory contract gives other party right to elect to treat declaration as brutum fulmen, hold fast to contract and wait until time for performance, or to treat declaration as final assertion by declarant that he is no longer bound by contract and wrongful renunciation of contractual relation.

6. Contracts ⇨313(1)

Party's declaration of intention not to be bound by his executory contract becomes breach thereof, excusing performance thereof by other party and giving latter immediate right to recover damages, on his election to treat declaration as final repudiation of and wrongful renunciation of contract.

7. Contracts ⇨313(2)

Bond company's letter, notifying firm bidding for city street improvement contract that company withdrew its offer to buy warrant and bonds issued in payment for work and declaring its contract to do so "void and rescinded," was mere declaration of intention not to be bound thereby and did not amount to breach effecting renunciation of contract.

8. Contracts ⇨313(2)

Bond company's letter, declaring it impossible to advance money to street improvement contractors or purchase bonds or warrant issued in payment for work, and disclaiming liability under contract to do so, held tantamount to distinct, unequivocal, and absolute refusal to perform contract and sufficient to justify recipients in treating declaration as breach and wrongful renunciation thereof, entitling them to sue immediately for damages.

9. Contracts ⇨313(1)

City street improvement contractors, awarded new contract, involving substantial

Increase in amount of warrant and bonds to be issued in payment for work, on their new bid, presented after city council rescinded original award to them, and immediately entering into contract for sale of warrant and bonds to another company than one which had repudiated contract to purchase original warrant and bonds, *held* to have acquiesced in rescission of first award and right to contract thereon and elected to treat latter company's declaration of intention not to be bound by its contract as final repudiation constituting breach, on which cause of action for damages arose.

10. Contracts ⇨321(1)

After one party's absolute repudiation of or refusal to perform contract, other party cannot continue to perform and recover damages based on full performance of his part thereof.

11. Contracts ⇨321(1)

Parties, awarded city street improvement contract on bid rescinded by city council after bond company repudiated its contract to purchase warrant and bonds issued in payment for work, *held* not entitled to recover damages from such company on basis of their subsequent bid, award of contract thereon and bonds issued thereunder.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by R. C. Atkinson and another, doing business under the firm name of Atkinson & Reish, against the District Bond Company, a corporation. Judgment for plaintiffs, and defendant appeals.

Reversed.

Dryer, Castle & Richards, of Los Angeles, for appellant.

De Forrest Home, Wilbur D. Finch, and Eugene Kelly, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal by defendant from a judgment for damages for breach of contract.

Plaintiffs, doing business under the firm name of Atkinson & Reish, allege in their complaint that they entered into an agreement in writing with defendant on March 16, 1931, wherein they agreed to bid for certain street improvement work in the city of Santa Barbara, Cal., and to perform the work if a contract was awarded to them, defendant agreeing to buy the warrant and bonds issued in payment of the work at a price of 96 per cent. of their par value, if approved by an accredited bond attorney, and

also agreeing to loan to plaintiffs sums not exceeding 75 per cent. of the contract price for the work, at 7 per cent. per annum until date of bonds; that on June 18, 1931, plaintiffs' bid was accepted for the work and a contract awarded by the city for the price of \$49,009.33; that prior thereto, and on March 23, 1931, defendant repudiated its agreement to buy the bonds and loan money, and notified plaintiffs that it would not carry out the agreement; that plaintiffs notified defendant that they would not release defendant. It is then alleged that plaintiffs performed all the terms and conditions of the agreement with defendant, and that plaintiffs were compelled, by reason of defendant's refusal to carry out its agreement, to borrow money at 12 per cent. per annum and to sell the warrant and bonds to be issued on the street improvement contract to others at 83 per cent. of their par value, all to the damage of plaintiffs in the sum of \$3,343.13.

In its answer defendant denied that it repudiated the agreement, alleged that the street improvement proceedings on which the award was made were illegal and void, and that it was thereby released from the obligations of such agreement, admitted that plaintiffs notified it that they would hold defendant to said agreement, and denied that plaintiffs had performed the agreement, and alleged that, pursuant to a resolution of the city council of Santa Barbara dated March 5, 1931, plaintiffs had filed a bid, but that no award or contract was made thereon by the city, by reason whereof defendant was relieved of its obligations to plaintiffs under their agreement.

[1, 2] In an opening statement at the beginning of the trial, counsel for plaintiffs announced that plaintiffs were going to stand directly upon the repudiation or anticipatory breach as alleged, notwithstanding the allegations of performance on their part and refusal of defendant to perform. Upon the offer of proof of repudiation, defendant objected to its admission; the objection being founded on the ground that proof of repudiation is not admissible in a case where the complaint is founded on allegations of full performance. The rule is well understood that a recovery on proof of excuse for non-performance cannot be had on an allegation of full performance. *Peek v. Steinberg*, 163 Cal. 127, 124 P. 834; *Kirk v. Culley*, 202 Cal. 501, 261 P. 994. We find herein, however, that plaintiffs alleged repudiation as well as performance, both of which were put in issue by the answer, and that they elected at the beginning of trial to proceed on the theory of

repudiation, thus abandoning the theory of full performance by plaintiffs followed by breach by defendant. Notwithstanding no amendment of the complaint was requested or made, we are satisfied that no error occurred in admitting the evidence relating to repudiation over defendant's objection. It is with the probative effect of such evidence that our chief concern is here aroused.

The evidence reveals that the agreement here in question was executed on March 16, 1931. On March 19, plaintiffs submitted their bid for \$44,174.80. On March 23 defendant notified plaintiffs in writing that it withdrew its offer to take the warrant and bonds and declared that the contract of March 16 "is made void and rescinded" on account of erroneous information furnished concerning the job. On March 26 the contract was awarded to R. C. Atkinson, instead of to the bidder, Atkinson & Reish, by reason of a mistake in signature on the bid. On April 15 the attorneys for plaintiffs sent a letter to defendant in answer to defendant's letter of March 23, stating therein that "our clients will not cancel the contract or execute the release you request in your letter of March 23rd, but on the contrary, will hold you strictly to your admitted obligations, and if you fail to properly perform your contract they will look to you for satisfaction of any loss sustained by them by reason of your contract." On April 17 an attorney for plaintiffs sent a letter to defendant in substance requesting a definite statement of its intention in respect to performance of the contract. On April 18 defendant replied thereto, inclosing an opinion of attorneys in respect to the validity of the improvement proceedings, and stating that, in view thereof, "it would be impossible for us to advance any money or purchase any bonds or warrant issued for the cost of this job," and that "in any event, under the legal complications involved, we disclaim any liability under said contract." On April 23 plaintiffs' attorney replied to this letter, stating that "Mr. Atkinson wishes me to state that he has never at any time, either expressly or otherwise, released the District Bond Company from any obligations under the contract and, furthermore, that he has at all times advised your office that he is ready, willing and able to perform the contract and expects the District Bond Company to perform it also." On April 30 the city council rescinded the award of March 26 to R. C. Atkinson, and on June 4 readvertised for bids on that work. On June 18, plaintiffs submitted their bid in the firm name in the

sum of \$49,009.32, which was accepted and the contract for the work awarded thereon, and on June 20 plaintiffs made an agreement with another finance company to take the warrant and bonds to be issued, and when issued upon this last award, at 83 per cent. of par value. On July 6 the city council and plaintiffs executed the contract for the street improvement work on the award of June 18, and on February 27, 1932, the bonds were issued in payment of the work performed under this contract. The complaint herein was filed on March 16, 1933.

Upon this evidence the court found that defendant, by its letter of March 23d, had repudiated the contract, and that plaintiffs had notified defendant that they would expect it to carry out its contract, and that, in event defendant failed so to do, they would hold it responsible for all damages which they might sustain thereby; that the city advertised for bids to be opened on June 18, 1931, and that plaintiffs filed their bid; that on that date it was accepted and an award made on said bid for \$49,009.32 and a contract executed between the city and plaintiffs for the doing of said work; that, as a result of said repudiation, plaintiffs were compelled to sell the bonds elsewhere for less than defendant had agreed to pay, to plaintiffs' damage in the sum of \$2,638.97, and had been compelled to borrow money at the rate of 12 per cent. instead of at 7 per cent., as provided in said contract, to their further damage in the sum of \$421.87, making a total damage of \$3,060.84. The court also made a finding that, except as otherwise found, all the allegations of the complaint were true, except that "no finding is made as to the allegations of paragraph VI of plaintiffs' complaint which were treated as surplusage and concerning which no evidence was offered." The allegations referred to, and as to which no findings were made, related to full performance by plaintiffs. In addition, the court found that the street improvement proceedings were not illegal, as alleged in the answer.

[3-6] Where one party to an executory contract refuses to treat it as subsisting or binding upon him, there is, in legal effect, a prevention of performance by the other party. A mere declaration, however, of a party of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. To justify the adverse party in treating the renunciation as a breach, the refusal to per-

form must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute. The real operation of a declaration of intention not to be bound appears to give the promisee the right of electing either to treat the declaration as *brutum fulmen* and, holding fast to the contract, to wait until the time for performance has arrived, or to act upon the declaration and treat it as a final assertion by the promisor that he is no longer bound by the contract, and as a wrongful renunciation of the contractual relation into which he has entered. If he elects to pursue the latter course, it becomes a breach of contract, excusing performance on his part and giving him an immediate right to recover upon it as such. Upon such election the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages. 6 Cal. Jur. 458-460; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 P. 356.

[7-9] Viewing the evidence herein and the findings based thereon in the light of the foregoing rules, it is manifest that the letter of March 23, 1931, was a mere declaration of defendant not to be bound, and of itself did not amount to a breach so as to effect a renunciation of the contract. And by their letter of April 15, 1931, in response thereto, plaintiffs negatived any acquiescence therein by declaring that they would not release defendant from the contract, but would hold it strictly to its obligations, and, if not properly performed, would look to it for satisfaction for all loss sustained. However, on April 18, 1931, in reply to a request from plaintiff's attorney for a definite statement of its intention, defendant sent a letter in which it declared that it would be impossible to advance the money or purchase the bonds or warrant issued on the job, and that in any event it disclaimed any liability under the contract. This was tantamount to a distinct, unequivocal, and absolute refusal to perform, and constituted, and was sufficient to justify plaintiffs in treating it as, a breach and in exercising their election between waiting for time of performance on defendant's part and treating it as a final assertion by defendant that it was no longer bound, acting thereon as though it were a wrongful renunciation. With the parties occupying this situation in respect to repudiation, on April 30, 1931, the city council rescinded the award of March 26, 1931, to plaintiff (R. C. Atkinson), and on June 4, advertised for bids. On June 18,

1931, plaintiffs presented a new bid, which was accepted; the award made thereon and a contract executed with the city on such new award involving a substantial increase in the amount of the warrant and bonds to be issued. Immediately after the last award and on June 20, 1931, plaintiffs entered into a new contract with another finance company to take the warrant and bonds to be issued under the last award at 83 per cent. of their par value. By these acts plaintiffs must be held to have acquiesced in the rescission of the first award and the right to any contract thereon and as having elected to treat defendant's declarations as final assertions not to be bound, thereby translating the repudiation into a breach, upon which a cause of action for damages arose. *Sobelman v. Maier*, 203 Cal. 1, 262 P. 1087. The rights and liabilities of the parties are therefore to be regarded as culminating, and the contractual relation terminated, except for the purpose of maintaining an action for damages, as of the date of April 18, 1931.

[10, 11] This brings us to a consideration of the only other question presented on this appeal, namely, Did the court err in its findings of damages based on evidence of loss sustained upon a subsequent performance by plaintiffs under a later and different award? The rule, according to text-writers and our decisions, appears to provide that, after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. *Williston on Contracts*, vol. 3, p. 2347; *Richardson v. Davis*, 116 Cal. App. 388, 2 P.(2d) 860, and cases there cited. In the latter case it is stated that a party to a contract has the power to stop performance on the other side by explicit direction to that effect, subjecting himself to such damages as will compensate the other party for the breach, and that the party thus forbidden cannot go on and thereby increase the damages. Herein plaintiffs agreed to bid on the work, and, if a contract was awarded, to perform it and sell the bonds thus secured to defendant, the latter agreeing to buy them at 96 per cent. of their par value. Plaintiffs partially performed by their bid of March 19, and then the repudiation intervened. The award was made on plaintiffs' first bid and later rescinded. At this juncture plaintiffs were under no obligation to defendant to perform the agreement by again bidding for the work, as defendant had repudiated it, and they had no right to go on and thereby increase the damages for such

breach. Nor were plaintiffs under any legal duty to bid again for the work. It therefore becomes manifest that it was error to assess damages on the basis of evidence of the subsequent bid and award and bonds issued thereon. The damages, if any other than nominal, which will compensate plaintiffs must be ascertained and determined under the theory of repudiation and not under that of subsequent performance.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 91

KIMBLES v. KELLY et al.
Civ. 9926.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1935.

Hearing Denied by Supreme Court
June 10, 1935.

1. Automobiles ⇐193(6)

Automobile owner *held* not liable for injuries to pedestrian where possession of owner's automobile had been secured from garage by discharged chauffeur by misrepresentation and was being driven by another at time of accident (St. 1931, p. 2133, § 146).

2. Automobiles ⇐240(2)

In action against automobile owner for injuries to pedestrian, evidence that possession of automobile had been secured from garage by discharged chauffeur by misrepresentation, and was being driven by another at time of accident, *held* not incompetent as proof of unpleaded defense.

3. Evidence ⇐317(9)

In action against automobile owner for injuries to pedestrian, declarations made to police after accident, by driver and by discharged chauffeur who secured possession of automobile from garage by misrepresentation before accident, *held* inadmissible as hearsay.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Emma Kimbles against John Kelly, Barry Brannen, and another. From a judgment for second-named defendant, plaintiff appeals.

Affirmed.

J. P. Leonard, of Los Angeles, for appellant.

Nourse, Betts & Jones and J. Howard Edgerton, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

It appears from the evidence that about noon on May 15, 1932, an automobile owned by defendant Brannen, and being driven by defendant Kelly, ran upon the sidewalk at the northeast corner of Hollywood boulevard and Hudson street in Los Angeles, and struck and injured the plaintiff. Plaintiff instituted suit for damages against both Brannen and Kelly, but Kelly was never served with process. The judgment went for Brannen for his costs, and plaintiff appeals.

[1] Respondent Brannen left the city of Los Angeles on about May 1, 1932, leaving the car in the care of his sister, a Mrs. Babbitt, and was in New York City at the time of the accident. At the time Mr. Brannen left the city, he had in his employ a chauffeur named Cunningham, and the day after Mr. Brannen left, Mrs. Babbitt, acting under the authorization of her brother, discharged Cunningham. About 4 a. m., on May 15, 1932, about two weeks after his discharge, Cunningham went to the garage where the Brannen car was kept and falsely declared to a car washer there employed that his employer had sent him for the car and by this misrepresentation secured possession of and drove the car away. What Cunningham did thereafter and how Kelly came to be driving the car is left to pure conjecture as there is no proof on these subjects and neither of these men were available as witnesses at the trial.

The attempt of appellant to tie a claim of liability upon Brannen by the theory that Cunningham gave Kelly permission to drive the car follows the failure of appellant's counsel to take into consideration the testimony that Cunningham was discharged from his employment about two weeks before the accident and that, in taking the car from the garage on May 15th, Cunningham committed a felony. Section 146, California Vehicle Act (St. 1923, p. 564, as amended by St. 1931, p. 2133).

With the foregoing facts in mind, sustained by evidence, the trial court is fully supported in its finding that Kelly was neither the agent, servant, nor employee of Brannen and was driving the car without the latter's consent or permission.

[2] The evidence of these facts was not proof of an unpleaded defense, as claimed by appellant, but was competent evidence in rebuttal of claims necessary for appellant to prove before he could recover.

[3] Appellant sought to introduce in evidence the declarations of Kelly and Cunningham made to the police after the accident. These declarations so obviously fall within the classification of incompetent hearsay as to require no citation of authority to support the ruling of the court sustaining objections thereto.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 309

SHORT v. STUYVESANT INS. CO. OF NEW

YORK et al.

Clv. 9890.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

1. Malicious prosecution ☞71(2)

In malicious prosecution action, issue of probable cause is determinable by court as matter of law, unless there is some evidence in dispute which requires submission to jury.

2. Malicious prosecution ☞64(2)

In action against fire insurance company for malicious prosecution of charge of presenting false claim of insurance, evidence held to show as a matter of law that there was probable cause for prosecution (Pen. Code, § 549).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Hazel M. Short against the Stuyvesant Insurance Company of New York and others. Judgment for named defendant, and plaintiff appeals.

Affirmed.

Haight, Trippet & Syverton, of Los Angeles, for appellant.

Joseph W. Pierce, Hindman & Davis, E. Eugene Davis, and Angus C. McBain, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff brought this suit for malicious prosecution, and at the conclusion of the evidence the trial court directed the jury to return a verdict for defendant insurance company. From judgment entered thereon, plaintiff appeals.

Defendant had issued a policy for \$3,000 covering plaintiff's household furniture. Shortly after it had been moved to a new address a fire broke out which had definite appearance of being of incendiary origin and which destroyed most of the furniture. Plaintiff submitted proof of loss to the company, including a claim for a grand piano, which she declared under oath she had purchased for \$1,240. The check given by her for that amount had included payment for a radio worth several hundred dollars and a clock worth about \$40, so that to the extent of the value of the two latter articles the claim for loss of the piano was actually excessive and false, notwithstanding plaintiff's assertion that they were in the nature of a premium or inducement for her to buy the piano.

[1, 2] It appears without substantial conflict that investigators for the arson squad of the Los Angeles fire department, in pursuing their inquiry as to the cause of the fire, ascertained the facts as to the claim made by plaintiff and presented the evidence to a deputy district attorney, who prepared and approved a complaint, which was signed by the captain in charge of the arson detail, charging plaintiff with violation of section 549 of the Penal Code in presenting a false claim of insurance. An adjuster representing defendant company was at that time busying himself in an effort to effect a settlement of the claim; but it nowhere appears that he requested the prosecution nor that he had any part in it, except that he furnished the investigators the limited information he had about the case. At the preliminary hearing of the criminal case it was dismissed, and the defendant, plaintiff here, was discharged. In the instant case, before directing the jury to return a verdict for defendant, the trial court made a finding that there was probable cause for the prosecution. This was an issue to be determined by the court as a matter of law, unless there was some evidence which was in dispute and which therefore required submission to the jury under appropriate instructions limiting their function to ascertaining the facts. *Franzen v. Shenk*, 192 Cal. 572, 221 P. 932; and cases therein cited; *Davis v.*

Pezel, 131 Cal. App. 46, 20 P.(2d) 982. Plaintiff contends that the evidence shows that defendant, through its adjuster, was endeavoring to use the criminal process to defeat a civil liability, and that therefore a prima facie case of want of probable cause is made out. Evidence to support this theory is lacking, since it does not appear that defendant's agents instigated or pressed the prosecution, and it does appear that the officials did so on the basis of evidence obtained by their own investigation.

We conclude that the trial court's determination that there was probable cause for the prosecution was correct, and that a verdict for defendant was properly directed.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 1

DUNLOP v. O'DONNELL et al.

BRUNSWIG DRUG CO. v. SAME.

Civ. 1135, 1136.

District Court of Appeal, Fourth District,
California.

April 4, 1935.

Rehearing Denied April 30, 1935.

Hearing Denied by Supreme Court
June 3, 1935.

1. Municipal corporations ☞663(1)

In action by landowner, claiming title to center line of street on which premises fronted, to enjoin construction of private tunnel for installation of steam pipes under street in front of premises, deed from city to owner's predecessor in title held to have carried fee to center line of street, as against contention that conveyance of municipally owned land by a municipality conveyed title only to side line of abutting street (Civ. Code, §§ 831, 1112).

2. Public lands ☞222

Patent to former pueblo lands in California issued by United States to city is conclusive evidence of title of city in such lands (Treaty of Guadalupe Hidalgo, 9 Stat. 922).

3. Public lands ☞223(7)

Person obtaining conveyance from California city while city's claim for pueblo lands was pending before United States tribunals for determining titles to such lands

took whatever interest he acquired subject to determination of that claim, and final determination of claim took effect by relation on day when petition was presented to land commission and is to be considered as effective from that date (Treaty of Guadalupe Hidalgo, 9 Stat. 922).

4. Public lands ☞223(7)

Title to property abutting on street under which private tunnel was sought to be constructed held to have vested in United States by treaty and to have passed to city under patent thereafter issued; hence deed from city carried title acquired by city and could be attacked only by one relying on title antedating title of United States (Treaty of Guadalupe Hidalgo, 9 Stat. 922).

5. Public lands ☞223(7)

In action by abutting landowner, claiming title to center line of street through conveyance from city, to enjoin construction of private tunnel for installation of steam pipes under street in front of premises, city's deed, delivered after city had obtained title to property from United States for purpose of carrying out contract of sale entered into by predecessor pueblo while title was in United States, was to be construed according to California law at time of delivery of deed (Treaty of Guadalupe Hidalgo, 9 Stat. 922; St. 1850, p. 155, § 3; Civ. Code, §§ 831, 1112).

6. Public lands ☞223(7)

Under Mexican law, property, although set apart for common use, was subject to control of sovereign power and consequently was not so dedicated to public use as to prevent city from obtaining title in fee from United States or from passing, under authority given it by state, such title as may be passed by municipality under laws of state (Treaty of Guadalupe Hidalgo, 9 Stat. 922; St. 1850, p. 155, § 3; Civ. Code, §§ 831, 1112).

7. Municipal corporations ☞663(1)

In action by abutting landowner claiming title to center line of street through conveyance from city to enjoin construction of private tunnel for installation of steam pipes under street in front of property, city held to have possessed title in fee to street in front of property so that deed from city conveyed title thereto to center line of street subject to use of same for street purposes (Treaty of Guadalupe Hidalgo, 9 Stat. 922; St. 1850, p. 155, § 3; Civ. Code, §§ 831, 1112).

Appeal from Superior Court, Los Angeles County; Joseph F. Chambers, Judge.

Separate actions by Edna Earl Dunlop and by the Brunswick Drug Company against F. J. O'Donnell, C. W. Stimson, and another.

Judgment for plaintiff in each case, and the named defendants appeal.

Judgments affirmed.

Walter R. Leeds and Frank P. Jenal, both of Los Angeles, for appellants.

Mott, Vallee & Grant, of Los Angeles, for respondents.

O'Melveny, Tuller & Myers, of Los Angeles, as amici curiæ in support of respondents.

BARNARD, Presiding Justice.

The material facts and issues in these two actions, which have been consolidated for the purposes of this appeal, are identical and everything said herein will apply to each case.

The respondent is the owner of a certain parcel of land abutting on the northerly side of Third street between Spring and Broadway streets in the city of Los Angeles. The appellant O'Donnell, as the agent of the appellant Stimson, commenced the construction of a tunnel containing a permanent cement conduit some 5½ feet wide under the northerly half of said Third street, in front of the respondent's property. This tunnel was being constructed for the purpose of installing therein pipes and other equipment for taking steam and hydraulic power from one building to another under a private contract entered into by the appellant Stimson and other private parties. While a permit to construct the tunnel had been secured from the municipal authorities, under an ordinance regulating the making of excavations in public streets, it is conceded that the same would be operated as a private business venture and not as a public utility. After written notice protesting against the construction of this tunnel and claiming ownership in fee of this portion of the north half of said Third street, the respondent brought this action to enjoin the appellants from constructing or maintaining such a tunnel through this property. The facts were stipulated at the trial, findings and judgments were entered in favor of the respondent, and this appeal followed.

Among other things, it was stipulated that the respondent is the owner of a portion of lot 6, block 4, of Ord's survey, city of Los Angeles, county of Los Angeles; that the usable portion of this property abuts on Third street and is improved with a business block; that the respondent derails title from one John Temple; that the property was conveyed to the said Temple by the city of Los Angeles by a deed dated May 3, 1855; that the property in question is a part of the pueblo lands originally granted to the pueblo

of Los Angeles by the King of Spain, both for the public purposes of the pueblo and for the purposes of subdivision and disposition by the pueblo authorities to settlers within the pueblo; that by treaty all of California, including the pueblo of Los Angeles, became a territorial possession of Mexico in 1819; that in 1848 all of California was ceded to the United States by the treaty of Guadalupe Hidalgo; that from 1848 to the admission of California as a state and the adoption of a Constitution in 1850 California was under the military rule of the United States; that the city of Los Angeles was incorporated April 4, 1850; that in 1849, the pueblo of Los Angeles employed one Ord to make a survey and to plat certain of the pueblo lands; that a map of said survey and plat was filed with the pueblo of Los Angeles on August 29, 1849, but was not recorded until about the year 1875; that this plat was and is generally known as Ord's survey; that on or about November 7, 1849, a public auction of certain of its pueblo lands was held by the pueblo of Los Angeles; that lot 6, block 4, of Ord's survey was sold to John Temple and a receipt showing said purchase was issued; that under the Act of Congress of May 3, 1851, the city of Los Angeles started its application to the board of land commissioners to secure title to the old pueblo lands on October 19, 1852; that on August 9, 1866, a patent was issued by the United States which gave to the city of Los Angeles title to the old pueblo lands; that on May 3, 1855, the city of Los Angeles, by deed, conveyed the property here in question to John Temple; that Third street, as shown on the map of Ord's survey, has at all times since the filing of said map been a public street in the city of Los Angeles; and that appellant Stimson does not intend to operate the tunnel in question as a public utility, the purpose of said tunnel being to permit him to afford certain services to such parties as he may elect to deal with for his personal profit and benefit under private contract. It was further stipulated that the appellants have not secured the consent of the respondent for the construction of the proposed tunnel and that the appellants have no right, title, or interest in that portion of Third street other than an interest as property owners in the city of Los Angeles and such rights as they may have acquired under the permit for the construction of the tunnel which was issued by the board of public works of said city.

It is conceded that the sole issue presented to the trial court for determination under the pleadings and stipulation of facts was the

legal correctness of the claim that the respondent is the owner in fee of the adjoining portion of the north half of Third street, subject only to an easement for the use of the same for street purposes. In other words, the controversy is as to whether the conveyance of this property by the city to John Temple by deed describing the same as a certain lot according to the map of Ord's survey carried with it the fee to the thread or center line of Third street, upon which the property faced, or whether the said conveyance carried title only to the north edge of that street as delineated on that map.

[1] The first point raised by appellants is that this deed conveyed title only up to the side line of the street and not to the thread or center line thereof, for the reason that the property now owned by the respondent was originally municipally owned land of the city of Los Angeles. While it is conceded that a similar conveyance by a private party would carry the fee title to the center of the street, in the absence of anything showing a contrary intention, it is urged that under a general rule of law, a conveyance of municipally owned land by a municipality conveys title only to the side line of the abutting street and not to the thread or center line thereof. In support of this proposition the appellants cite certain cases from other jurisdictions but none from this state.

After reading all of the cases cited by both parties, we are unable to agree that a general rule exists to the effect contended for by the appellants. It is true that some conflict appears in the decisions. In some cases the rule contended for by the appellants has been more or less established because of local statutes. See *Ryerson v. City of Chicago*, 247 Ill. 185, 93 N. E. 162; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. 449. Except where such statutory limitation exists, we think the weight of authority and the better reasoning of the cases support a contrary rule. In addition to the cases cited, see *Paige v. Schenectady By. Co.*, 178 N. Y. 102, 70 N. E. 213; *Geddes Coarse Salt Co. v. Niagara, etc., Co.*, 207 N. Y. 500, 101 N. E. 456; *Willock v. Beaver Valley R. Co.*, 222 Pa. 590, 72 A. 237, 238; *Hines and Cosgrove v. Kingston Coal Co.*, 186 Pa. 43, 40 A. 151; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *City of Boston v. Richardson*, 13 Allen (95 Mass.) 146. In the last case cited the court said: "It was also argued that a different rule should be applied to boundaries of this kind in public grants, because they are to be taken most strongly against the grantee.

Commonwealth v. City of Roxbury, 9 Gray [Mass.] 451, 492. But that rule, like its converse in favor of the grantee in private grants, is only to be resorted to when the language is so ambiguous that all other rules of construction fail." In *Willock v. Beaver Valley R. Co.*, supra, it is said: "There is no sufficient reason why the same rule should not apply to the commonwealth under the facts of the case at bar. The reasonable construction to be placed upon the acts of assembly authorizing the laying out of the town and the sale of lots in this case and of the acts of the officers intrusted with the execution of these powers, is that the Legislature intended the purchasers of lots to enjoy every privilege and be invested with every legal right passing to any purchaser of a lot abutting on a public street, and this would pass the title of the fee to the center of the street to the purchaser as in the case of a purchase from an individual grantor." In *Hines and Cosgrove v. Kingston Coal Co.*, supra, the court calls attention to some of the unnecessary evils and confusion which might well arise if the fee in a street should be separated from that of the abutting property.

In *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 10 P. 510, 513, in considering a contention similar to that made here, the court, after considering our Code sections and other authorities with reference to the rule governing a conveyance by a private person, says: "We cannot agree to the rightfulness of defendants' contention that a different rule should prevail with respect to the ownership of a street up to its center or thread, on which one's lot abuts, where sales of Sonoma pueblo lands have been made by the commissioners authorized so to do from sales of lands made by other persons." The different rule contended for in that case and here, with respect to the effect of a deed from a municipality, has never been adopted in this state. On the other hand, the language of the decision just referred to plainly indicates an approval of the other rule, and that decision has not been challenged these many years. It may well be that property rights have in the meantime been acquired in reliance thereon and whether or not that case be taken as definitely establishing the rule, its weight may be added to the authorities and the reasoning in support of what, in our opinion, is the better rule.

The appellants seek to distinguish that case on the ground that the city of Sonoma had been disincorporated; that commissioners had been appointed by the Legislature to dis-

pose of its remaining lands; that the trust under which the pueblo had held title to its streets was terminated; and that the commissioners, in deeding the property, were acting in a proprietary and not in a municipal capacity. It has long been the custom for many of our cities to dispose of lands held by them for the purpose, among other things, of encouraging settlement and the general development of the community and, in so doing, these cities may be said to have acted in a proprietary rather than a municipal capacity. This is peculiarly true of cities holding pueblo lands and we see no distinction, in this respect, between the sale of such lands by the city of Los Angeles and the similar sale by commissioners appointed for that purpose which was under consideration in the case referred to.

Our Code sections, in establishing a rule in this regard as between private persons, make no exception with respect to a conveyance from a municipality. Civ. Code, §§ 831 and 1112. Not only do we see no good reason for establishing a different rule in such a case, but this would seem to be especially true with respect to former pueblo lands, since portions of such lands were originally allotted to the pueblos for the very purpose of subdivision and sale to private persons and since these former pueblos, on becoming California cities and after perfecting their titles in accordance with an act of Congress, became holders of large tracts of such land so designed for subdivision and settlement and which were later conveyed into private ownership. In making such sales and conveyances to private owners and settlers, these cities were acting in a proprietary rather than a municipal capacity and many large areas in many cities have been so conveyed. The fact that pueblo lands have been thus subdivided and sold in a manner so similar to that in which private subdivision has been carried on, and the fact that the cities in so doing have acted more in a proprietary than a municipal capacity, make it especially appropriate to apply to such cases the rule that is applied to conveyances made by a private subdivider.

We therefore hold that, in so far as the appellants' first contention is concerned, the deed from the city of Los Angeles to John Temple carried the fee to the thread or center line of the adjoining portion of Third street.

The second point raised is that the deed from the city to John Temple did not have the effect of conveying a fee title to the thread or center line of the street for the reason that

the city of Los Angeles never had any ownership or title, in so far as the street is concerned, which could be conveyed, since the property now owned by the respondent and the abutting portion of Third street were once owned by the pueblo of Los Angeles. It is appellants' contention that while this territory was under Spanish and Mexican rule a pueblo held certain of its lands in trust for the general community; that in lands so set apart for the common use the pueblo had no title which could be conveyed; that land used for street purposes must be held to have been set apart for common use; that the city of Los Angeles succeeded to the title and rights of the former pueblo of that name; and that the city acquired only the limited title possessed by the pueblo, under section 3 of the act of the state Legislature incorporating the city which reads as follows: "The Corporation created by this Act, shall succeed to all the rights, claims, and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred, and obligations created, by the Ayuntamiento of said Pueblo." Stats. 1850, p. 155.

This argument assumes that the former pueblos could not sell and transfer all of the tracts of land held by them for the purpose of disposal to individuals, but must retain a part thereof for public purposes, and also assumes that title to the pueblo lands passed to the state of California and that the city acquired its title thereto by legislative grant from the state.

The history of pueblo lands, the manner in which they were held, and the nature of the title thereto have been exhaustively treated in many decisions in this state, especially in earlier cases, and need not be here considered at length. In a general way, it may be stated that such lands were granted to the pueblo for the benefit of its inhabitants but to be used and treated in various ways. Some of the lands were set apart for the common use of all, the income from another part was to be used to defray the expenses of municipal administration, while other portions were to be conveyed to individuals to be held in private ownership. While the lands set apart for common use could not be sold or disposed of, the pueblo authorities were usually given the right to convey to individuals such portions of the land as were intended for that purpose. The power of alienation exercised by the pueblo authorities over the latter class of lands was subject to the control of the sovereign power or its agents and could, therefore, be enlarged, decreased, or taken away

by that superior authority. Whatever title the pueblos had was held in trust with the right in the sovereign to regulate and control the manner in which the trust should be administered and executed. *Welch v. Sullivan*, 8 Cal. 165; *Hart v. Burnett*, 15 Cal. 530; *San Francisco v. Canavan*, 42 Cal. 541; *City of Monterey v. Jacks*, 139 Cal. 542, 73 P. 436.

Under the Mexican law, the lands to be conveyed to settlers by a pueblo were to become and did become entirely separate and distinct tracts from those tracts which were reserved and kept for a common use. *Welch v. Sullivan*, *supra*. It may be assumed that the lands kept for common use and which could not be alienated included the part thereof which was used for streets, but we can find no authority for the proposition that any such limitation on the power of alienation was expressly applied to any portion of those other tracts which were set apart for sale and settlement.

[2, 3] Under the Treaty of Guadalupe Hidalgo (9 Stat. 922), the title to all lands in California not held in private ownership passed to the government of the United States. Under that treaty, as well as by the law of nations, the United States was bound to protect the private rights which individuals had acquired. Under an Act of Congress passed on March 3, 1851 (9 Stats. 631), suitable provision for this was made. By a tribunal thus established, with the assistance of the courts, such claims of title were to be adjudicated and when allowed were to be confirmed by a patent. In *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62, it was held that a city succeeding to a pueblo could not found a claim of title to pueblo lands upon any grant from the state of California. It was further held that, with respect at least to lands which it had held in its proprietary capacity and which it was authorized to dispose of into private ownership, a pueblo was in the same position as any holder of a private claim and was required to present its claim of title to such lands for confirmation under this Act of Congress, and that under the terms of that act a failure to present such claim within the time prescribed in that act had the effect of making the land a part of the public domain. The city of Los Angeles complied with the provisions of this Act of Congress, making application on October 19, 1852, and a patent confirming title in the city being issued on August 9, 1866. In *Dean v. City of San Diego* (D. C.) 275 F. 228, it was held that a city of California has no title to any lands as successor to a Mexican pueblo

except as its claim was presented to and confirmed by the board of land commissioners under the Act of Congress referred to. A patent to such former pueblo lands issued by the United States government is conclusive evidence of the title of a city in such lands. *United Land Ass'n v. Pacific Imp. Co.*, 139 Cal. 370, 69 P. 1064, 72 P. 988; *People v. San Francisco*, 75 Cal. 388, 17 P. 522; *Moore v. Wilkinson*, 13 Cal. 478; *Knight v. United Land Ass'n*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974. One who obtained a conveyance from a city while the city's claim for pueblo lands was pending before the United States tribunals took whatever interest he acquired subject to the determination of that claim, and the final determination of that claim took effect by relation on the day when the petition was presented to the land commission and is to be considered as effective from that date. *United States v. Hare*, Fed. Cas. No. 15,303, 4 Sawy. 653.

[4] Under these authorities the fee to the land here in question vested in the United States until it passed to the city of Los Angeles under the patent issued and by relation as of October 19, 1852, when the application was filed. Similarly the deed from the city to John Temple carried the title which the city had acquired and, aside from any other considerations, that title can now be attacked only by one who relies on a sufficient title issued by competent authority prior to July 7, 1846, when title passed to the United States. *Welch v. Sullivan*, *supra*.

[5] In *San Francisco v. Canavan*, *supra*, it was held that when California became a state it succeeded to the power which Mexico had formerly exercised over its municipalities, in respect to the control and disposal of its lands, as soon as the title of the pueblo, or its successors, and the nature of the trust in which the land was held should be recognized by the proper tribunals of the United States. In *Richert v. City of San Diego*, 109 Cal. App. 548, 293 P. 673, 677, this court said: "In due course, the power formerly lodged in the Mexican government regarding the management, control, or disposition of these pueblo lands became vested in the state of California, to be exercised by its Legislature, and has there since remained, except in such instances as that body has in turn delegated it to the municipal authorities."

While the city of Los Angeles acquired title to the lands here in question and while it held the same under certain trusts for the benefit of its inhabitants, it became a municipality under the laws of California and this state

succeeded to the powers formerly exercised by Mexico, with respect to regulating the way in which the municipality might act, including the power to direct the manner in which the city might dispose of such lands. In section 3 of the original charter, as above set forth, the state gave to the city the rights, claims, and powers of the former pueblo in regard to property but subject to the liabilities and obligations incurred and created by the governing body of the former pueblo. This included the right to sell these lands until and unless that right was taken away by the state, which was not done before this particular land was disposed of. The charter had expressly made such power of disposal subject to any obligations previously assumed by the governing body of the pueblo. Such an obligation had been assumed and created in 1849 when the governing body of the pueblo sold this property to John Temple, giving him a receipt for the purchase price. At that time title to the property rested in the United States and the city was without power to convey the same except by consent of the United States. *United States v. Hare*, supra. In effect, therefore, the charter directed the new city to complete and fulfil that obligation, which was done by the delivery of a deed after the Act of Congress had been complied with. The patent subsequently issued inured to the benefit of the grantee in this deed, both under the civil law (*Welch v. Sullivan*, supra) and under our law. (Cases above cited.) We think this deed, thus authorized and in effect directed to be delivered by the Legislature, is to be measured by the situation existing at the time it was delivered and after the city had acquired title from the United States, and is to be governed by and be construed in accordance with the laws of this state and not by the laws of Mexico which had prevailed in that territory some years before. The first session of the Legislature in 1850 provided that the common law should prevail in this state rather than the civil law. In conveying this land to John Temple the city acted not as the successor of the former pueblo, but by virtue of the power given it by this state. At the time it acted, under this authority, the common law prevailed here, and we think that act of the city is to be measured by and governed by the law of this state, which had authorized and empowered the city to act in the matter. While the former pueblo had agreed to sell this land to John Temple in 1849, title was then in the United States and the pueblo was powerless to carry out that agreement without the consent of Congress. The delivery of a deed under the implied di-

rection of the Legislature, after confirmation of title, operated to fulfil this obligation, but such act was the act of an American municipality and not of a Mexican pueblo. The city and all its acts were then subject to the laws of this state, under which it was created and under which its only powers were held. We see no escape from the proposition that the act of the city in giving the deed, like all other lawful acts of the city, was governed by California law.

It is urged that the civil law applied to a contract made during that period while this territory was under the military control of the United States but in this action we are neither interpreting nor enforcing the original contract whereby this land was sold to John Temple. Regardless of any such contract or the law which might govern it at the time it was made, the contract was either carried out or breached when the deed was delivered. The only question here is as to the effect of the deed which was delivered. Such a question and the extent of the title conveyed by this deed is to be determined by the law of the state in which, and under the authority of which, it was given.

[6] Another consideration is that these pueblo lands were not dedicated to the public in the sense in which we use that term. In *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237, at page 247, 39 P. 762, 765, the court says: "I do not understand that these properties were commons in the common-law sense. They were communal property, subject to be administered by the pueblo authorities. The public could be dispossessed, and the character of the lands changed. They might be sold or converted into solares or suertes, which could be reduced to private ownership. They were not dedicated to the public." While certain rights were formerly given to the pueblo authorities with reference to the land here in question, these rights were not fixed, might be changed, and were subject to the control of the sovereign power even to the extent of permitting or refusing to permit the land to be sold into private ownership. This right of control over disposition passed to the state. When the same rights formerly exercised by the pueblo were given by the state to the city, the right to sell the land remained subject to the control of the superior authority, which was now the state. There had been no dedication to public use which could not be changed by this superior authority and it must follow that any sales made were subject to any expression of the sovereign will, in other words, to the laws

of the state. In our opinion, there is nothing in the record to indicate that the land here in question had been so dedicated to public use under the Mexican law as to prevent the city from obtaining title in fee from the United States or from passing, under authority given to it by the state, such title as may be passed by a municipality under the laws of this state.

[7] We conclude that the city of Los Angeles had title in fee to this portion of Third street and that the deed from the municipality conveyed title thereto, subject to the use of the same for street purposes, to John Temple and to the respondent as his successor. No other attack having been made upon it the judgment must be sustained.

The judgment in each case is affirmed.

We concur: MARKS, J.; JENNINGS, J.

PARR-RICHMOND TERMINAL CORPORATION, Limited, v. RAILROAD COMMISSION OF CALIFORNIA et al.

S. F. 15038.

Supreme Court of California.

April 18, 1935.

Rehearing Granted May 16, 1935.

1. Wharves ☞17

Wharfinger's conduct whereby wharfinger succeeded by indirection in giving rebate to certain shippers and brought about condition under which unequal and discriminatory rates were in effect held to constitute violation of rebate and preference sections of Public Utilities Act (Gen. Laws 1931, Act 6386, §§ 2 (z), 17 (b), 19).

2. Public service commissions ☞7

Under Public Utilities Act prohibiting rebates and preferences, any practice which opens door to preference and discrimination may be prohibited (Gen. Laws 1931, Act 6386, §§ 17 (b), 19).

3. Wharves ☞17

Wharfinger could not object to Railroad Commission's order directing wharfinger to desist from permitting car loading and unloading of freight without assessing and collecting charges contained in published tariffs on ground that wharfinger made no refund to shippers and did not establish preferential charges where wharfinger offered shippers privilege of dickering with private unloaders for lower charges, and thus accomplished by indirection what it could not do directly (Gen. Laws 1931, Act 6386, §§ 2 (z), 17 (b), 19).

4. Wharves ☞17

Wharfinger could not justify its action in permitting car loading and unloading of freight without assessing and collecting charges contained in published tariffs on ground that same discriminatory practice prevailed in certain docks which were publicly owned and therefore beyond regulatory power of commission, where there was no evidence that private car unloaders operating in such docks ever made charges less than standard rate, or that any shipper made any special profit (Gen. Laws 1931, Act 6386, §§ 2 (z), 17 (b), 19).

In Bank.

Petition by the Parr-Richmond Terminal Corporation, Limited, to review an order of the Railroad Commission of the state of California and others, wherein the commission suggested that petition be dismissed.

Order affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark and Thelen & Marrin, all of San Francisco (Max Thelen and F. C. Hutchens, both of San Francisco, of counsel), for petitioner.

Thomas M. Carlson, City Atty., of Richmond, amicus curiæ.

Milton D. Sapiro, of San Francisco, amicus curiæ for California Prune & Apricot Growers' Ass'n.

Sanborn & Roehl, of San Francisco, amici curiæ for Sun-Maid Raisin Growers' Ass'n, etc.

Arthur T. George, Ira H. Rowell, Roderick B. Cassidy, and Frank B. Austin, all of San Francisco, for respondents.

Markell C. Baer, Port Atty., of Oakland, amicus curiæ.

Allen P. Matthew, John O. Moran, F. W. Mielke, and McCutchen, Olney, Mannon & Greene, all of San Francisco, amici curiæ for Encinal Terminals, Howard Terminal, and State Terminal Co., Limited.

PER CURIAM.

This is a petition to review an order of the Railroad Commission directing petitioner to cease and desist from permitting the car loading and unloading of freight without assessing and collecting the charges contained in its published tariffs.

The proceedings were initiated before the commission against petitioner, a public utility wharfinger at Richmond, Cal., by four

complainants: Encinal Terminal, Howard Terminal, State Terminal Company, and city of Oakland through its Board of Port Commissioners. The charge was that petitioner had permitted a practice which amounted to a rebate or preference, in violation of sections 17 (b) and 19 of the Public Utilities Act (2 Deering's Gen. Laws 1931, Act 6386).

Petitioner operates a public wharf at Richmond, and hence is subject to regulation under the Public Utilities Act, section 2 (z). Its principal function is unloading and storing freight brought to its pier by rail or truck, for the purpose of shipment by water. For unloading canned goods and dried fruit from railroad cars, its tariff specifies a charge of 40 cents per ton. This is the charge made at all the terminals on San Francisco Bay.

The railroads which serve this area provide in their tariffs for absorption of the cost of unloading the cars; that is, they pay to the consignee, the terminal, or the car unloader an allowance for the cost of unloading. Prior to 1932, the allowance on the above-mentioned commodities (canned goods and dried fruit) was equal to the cost of unloading, but did not exceed 40 cents per ton. On June 1, 1932, the railroads established an amended tariff providing for a flat absorption rate of 40 cents per ton for unloading, regardless of the actual cost. This change would have made no difference in the result if petitioner had continued to unload cars at its published tariff of 40 cents per ton, exactly equivalent to the allowance. But in the summer of 1932, petitioner brought into operation a plan which it had conceived many months before, and which was made possible by the said change in the railroad tariff. Three large shippers of canned goods and dried fruits, the California Prune & Apricot Growers' Association, the Sunland Sales Corporation (affiliated with Sun-Maid Raisin Growers' Association), and Hunt Bros. Packing Company, were induced to divert their tonnage from other terminals to that of petitioner, for by so doing, they were able to make substantial savings in their shipping costs.

The method devised was the introduction of a third party, the firm of McCrone & Font, professional car unloaders. Petitioner permitted the said three shippers to come onto the wharf and perform their own unloading. The shippers made private contracts with McCrone & Font to do the unloading for them. Under this arrangement McCrone & Font charged 15 cents a ton to one shipper, and 20 cents a ton to the other two. The three shippers, having paid for unloading at

these rates, collected the flat allowance of 40 cents per ton from the railroads, thus realizing a substantial net profit.

In actual operation this plan was for the benefit of the above shippers alone. Whenever petitioner itself handled the unloading, and it did so in practically every case except these three, the standard charge of 40 cents per ton was made. McCrone & Font did unload dried fruit for another concern, the Memorie Fruit Company, in one instance, but charged the 40-cent rate. After these three large shippers had transferred their tonnage to petitioner's terminal, the offer of petitioner to shippers to handle their own unloading was made public, but, as already stated, no shipper save these three took advantage of the profit thus made available.

At the conclusion of the hearing, the commission made the order to cease and desist, which petitioner seeks to review. Subsequently, while the cause was pending in this court, two important developments occurred. The first was that the railroad tariff allowance for unloading was changed again, to restore the provision in force prior to 1932, i. e., to provide for an allowance for the actual cost of unloading, not to exceed 40 cents per ton. The second was the decision of the commission that car unloaders operating at terminals on San Francisco bay were public utilities, and required to file tariffs with the commission. In re American Hawaiian Steamship Co., 38 C. R. C. 500. As a result of these changes, it would appear that the plan pursued by petitioner can no longer be effective to secure a profit to the shipper. For this reason, the commission suggests that the case is moot, and that it should be dismissed. Petitioner and amici curiæ strongly oppose this suggestion and we are not inclined to favor it. No doubt the precise plan of petitioners cannot now be pursued, but it is not sufficiently established that all possible evils in this practice are eliminated by the new railroad tariff and the regulation of car unloaders; nor is it inconceivable that changed circumstances may again present the opportunity which formerly existed. Hence we think a decision on the merits is called for, and our conclusion is that the order of the commission should be affirmed.

[1, 2] Underlying the commission's decision is the general proposition that the unloading of cars is an essential public utility function which the wharfinger may not abandon, and that it cannot therefore lawfully permit the public to use its facilities for the performance of that function without charging for it.

The record clearly shows that by its conduct, petitioner not only succeeded by indirection in giving a rebate to certain shippers, but brought about a condition under which unequal and discriminatory rates were in effect. The entire scheme originated with petitioner and was brought into operation by petitioner. Petitioner's agents sought and obtained the flat absorption rate from the railroads, proposed the private unloading method to the three large shippers whose business they were seeking, and brought McCrone & Font into negotiations with the shippers. Although it is claimed that there is no discrimination because petitioner opens its wharf to any shipper on the same terms, the fact is that either because of secrecy surrounding the early transactions, superior bargaining power, or other reasons, the three large shippers in question alone received preferential treatment. It is unnecessary to refer at length to authorities to show that this constituted a violation of the rebate and preference sections of the Public Utilities Act. Section 17 (b) prohibits a public utility from charging a greater or less compensation than specified in its schedules on file, and further provides: " * * * Nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. * * *" Section 19 provides: "No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section." Under the broad language of these provisions,

any practice which opens the door to preference and discrimination may be prohibited. Many cases decided by the federal courts under similar provisions of federal statutes illustrate this proposition. See *United States v. Union Stockyard and Transit Co.*, 226 U. S. 286, 33 S. Ct. 83, 57 L. Ed. 226; *Vandalia R. Co. v. United States (C. C. A.)* 226 F. 713; *Merchants' Warehouse Co. v. United States*, 283 U. S. 501, 51 S. Ct. 505, 75 L. Ed. 1227.

[3] Petitioner's defense, that it made no refund to shippers and did not establish any preferential charges, is easily answered. By permitting the intermediary, McCrone & Font, to perform the car unloading at a charge below the standard rate, it effectively accomplished by indirection what it admittedly could not do directly. Indeed, when it is considered that petitioner itself always charged the standard rate for unloading, but offered shippers the privilege of dickering with private unloaders for lower charges, discrimination would seem to be a necessary incident of its operations.

[4] Petitioner argues, in justification of its actions, that the same discriminatory practice prevails in certain docks on the San Francisco water front which are publicly owned and therefore beyond the regulatory power of the commission. This condition, if it existed, would not necessarily justify the acts of petitioner; but the record does not show that it did exist. All that appears in this connection is that the shipper has access to these docks, and may take care of unloading in his own way. There is no evidence that the private car unloaders operating there ever made charges less than the standard rate, or that any shipper made any special profit, as was the case under petitioner's plan of operation.

We deem it unnecessary to discuss these practices at any greater length, not only because their discriminatory character is apparent, but because also, as previously stated, the new tariffs and regulations will in all likelihood inhibit the practices, at least in their present form.

The order is affirmed.

3 Cal.2d 90

LEAVITT et al. v. GIBSON et al.
L. A. 12592.

Supreme Court of California.
April 2, 1935.

Rehearing Denied May 2, 1935.

1. Conspiracy $\hookrightarrow$ 14

Misrepresentation by one conspirator is chargeable against other conspirators.

2. Fraud $\hookrightarrow$ 58(1)

Court's fact findings in action for fraud, inducing plaintiff to accept worthless note and trust deed securing it as part consideration for transfer of realty, *held* sustained by evidence and sufficient to support judgment for plaintiff.

3. Fraud $\hookrightarrow$ 58(1)

Evidence in action for fraud, inducing plaintiffs to accept worthless note and second trust deed securing it as part consideration for transfer of realty, *held* sufficient to show that defendants were parties to conspiracy to deprive plaintiffs of property by misrepresentations.

4. Appeal and error $\hookrightarrow$ 1052(8)

Error, if any, in admitting evidence as to transactions after transfer of plaintiffs' property in action for fraud inducing it *held* not prejudicial to defendants, in view of other convincing evidence of conspiracy to deprive plaintiffs of property by misrepresentations.

5. Abatement and revival $\hookrightarrow$ 67

Trial court had power to submit cause and decide case after death of one defendant, though plaintiffs' final reply brief had not been served on date of such defendant's death, where cause was otherwise ready for submission.

6. Trial $\hookrightarrow$ 403

Trial court had right to file findings on main issues, tried during lifetime of defendant dying before actual submission of cause, *nunc pro tunc* as of date before his death, but findings covering supplemental proceedings after his death must be considered as of actual date of findings.

7. Abatement and revival $\hookrightarrow$ 64

Action for fraud, inducing plaintiffs to accept worthless note and trust deed as part consideration for transfer of their property, survived death of one defendant, though case was not action *ex delicto* in complete sense.

8. Judgment $\hookrightarrow$ 273(5)

Trial court had right to file decision for plaintiffs in action for fraud *nunc pro tunc* as of date before death of one defendant, though cause was not actually submitted before such date, where all evidence had been received

and plaintiffs' brief and defendants' reply served and delivered to judge and time allowed for plaintiffs' reply had expired and no extension of time was granted.

9. Judgment $\hookrightarrow$ 273(5)

Entry of judgment *nunc pro tunc* after death of one of defendants *held* not erroneous, though judgment included exemplary damages, where, at time of death, cause was in such condition that judgment could have been entered against defendants both for compensatory and exemplary damages (Civ. Code, $\S$ 3294).

10. Appeal and error $\hookrightarrow$ 934(1)

Judgments for exemplary damages are governed by same rules and entitled to same presumptions applicable to judgments in civil actions generally (Civ. Code, $\S$ 3294).

THOMPSON and PRESTON, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by F. A. Leavitt and others against John W. Gibson and others, in which Grace Ina Gibson and another, executrices of the last will and testament of defendant Gibson, were substituted for him as defendants after his death. From a judgment for plaintiffs, defendants appeal, and from an order denying defendant executrices' motion to vacate and set aside a judgment against decedent, they appeal.

Judgment and order affirmed.

Prior opinion, 28 P.(2d) 41.

Rehearing denied; PRESTON and THOMPSON, JJ., dissenting.

Frederick M. Kincaid, Anderson, Anderson & Sheahan, Anderson & Anderson, and W. H. Anderson, all of Los Angeles, for appellants.

Haight & Trippet, Arthur L. Syvertson, and Sam E. Gates, all of Los Angeles, for appellant Zeddy B. Barker.

Lyle Pendegast, of Los Angeles, and R. M. Wiley, of Silver City, N. M., for respondents.

PER CURIAM.

The opinion prepared by Presiding Justice Conrey, District Court of Appeal, Second Appellate District, Division 1, and adopted by that court when the above-entitled cause was before it for hearing and decision, is hereby adopted by this court as its decision in said cause, together with the authorities and observations added thereto by this court. It follows:

In March, 1927, and for a long time prior thereto, the plaintiffs were the owners of a

parcel of real property on Fair Oaks avenue in the city of Pasadena; said property being of the fair and reasonable market value of \$42,000. The transaction out of which the controversy herein arose, consisted of a conveyance of said Fair Oaks property by the plaintiffs to one Phil D. Rice, the consideration therefor being the sum of \$10,000, together with assignment and transfer to plaintiffs of a note of \$32,000 made to Rice by one John L. Hittson, secured by a second trust deed on certain property situate in Riverside county, and known in this record as the Granite Hill ranch. Soon after the above-mentioned transaction was closed, the property was sold to defendant Frederick M. Kincaid, by the trustee of the first trust deed, to pay the note secured thereby, which was a note of \$40,000 made by Rice together with the said first trust deed, before the Granite Hill ranch was conveyed by Rice to Hittson. Prior to the sale by the trustee, Gibson had transferred the \$40,000 note to Kincaid. In this action the court found, upon sufficient evidence, that the value of said ranch property was less than the sum of \$40,000. This fact, together with the fact that Hittson was financially irresponsible, made the \$32,000 note worthless. The net result was that the plaintiffs, for their Fair Oaks property, worth \$42,000, received nothing of value except the sum of \$7,000 which remained of the said \$10,000 after payment of about \$3,000 in expenses of the sale, incurred by the plaintiffs, which expenses included a commission of \$2,000 paid to the defendant George Burnham.

On or about the 31st day of March, 1927, the deed of conveyance of the Fair Oaks property by plaintiffs to Rice was delivered out of escrow, and the other elements of the transaction were completed. On April 17, 1928, the plaintiffs commenced this action, as an action to recover damages for "fraud and deceit," alleged to have been practiced upon them by the defendants, whereby the plaintiffs were induced to accept said \$32,000 note and second trust deed as part of the consideration for the transfer of their property. Upon issues presented by the pleadings, the case went to trial, beginning on December 12, 1928. On January 21, 1929, the parties had rested after presenting their evidence. Thereupon an agreement was made for argument by means of briefs, and the following order was made by the court and entered in the minutes: "Cause to stand submitted on presentation of closing brief, fifteen, ten and fifteen days allowed. Plaintiffs to open." Concerning orders of this kind, see *Franks v. Cesaena*, 192 Cal. 1, at page 3, 218 P. 437. These

time limits were exceeded, in fact, on both sides. On May 1, 1929, a time when the reply brief of plaintiffs had not yet been served or filed, defendant John W. Gibson died. Thereafter, prior to July 17, 1929, his will was admitted to probate. Grace Ina Gibson and Thelma Gibson were appointed executrices of the will. In due course the plaintiffs herein filed as a claim against the estate their demand, covering the subject of this action. Said claim failing of approval, the plaintiffs then gave notice of motion, in this action, for an order substituting the executrices as defendants in place of John W. Gibson, and for leave to proceed by "amended and supplemental complaint," etc. On July 24, 1929, said motion was presented, and was granted. An "amended and supplemental complaint" was filed. In this pleading the plaintiffs, by reference, realleged the matters contained in their former pleadings, and set forth supplementally the fact of Mr. Gibson's death and the subsequent proceedings in relation thereto. An answer having been filed, the case was again brought on for trial, on the 30th day of July, 1929, pursuant to notice duly given. The defendants, however, did not then appear. The court in its order of July 24th had provided that on July 30th "the said cause shall be reopened for the sole purpose" of receiving evidence concerning the death of Gibson and the said supplemental proceedings. At the hearing on July 30th that evidence was received, and no evidence was offered or received as to any of the issues made by the original pleadings. On July 24, 1929, the attorneys for the plaintiff delivered to the court a brief, which (says the bill of exceptions), "was and is the closing brief referred to in that portion of said order of January 21, 1929, which reads as follows: 'Cause to stand submitted on presentation of closing brief.'"

On November 8, 1929, the court filed its findings of fact and conclusions of law, directing judgment in favor of the plaintiffs. Paragraph 4 of the conclusions of law states: "In view of the circumstances of this particular case, justice requires that this decision, these findings of fact and conclusions be filed nunc pro tunc as of date January 22, 1929, the day following the time the taking of evidence was concluded." Accordingly the decision was filed "nunc pro tunc as of January 22, 1929." Nevertheless, the findings themselves do include the proceedings to which we have referred, arising out of the death of defendant Gibson. Pursuant to the findings thus made and the court's conclusions thereon, judgment was entered in favor

of the plaintiffs and against defendants John W. Gibson, Frederick M. Kincaid, and Zeddy B. Barker, as well as against other defendants who have not appealed, for damages in the sum of \$35,000, together with the sum of \$25,000 as exemplary damages. The said total sum of \$60,000 was "established and allowed" against the estate of Gibson in accordance with the supplemental complaint. Judgment was entered November 9, 1929.

There are two notices of appeal, one being by the executrices of the will of Gibson and by Kincaid and Barker, and being an appeal from the judgment, and the other is an appeal by said executrices from an order entered by the court on January 7, 1930, denying a motion of the defendant executrices whereby they asked the court to vacate and set aside the judgment rendered in said action against the said John W. Gibson, deceased.

In order to understand the situation existing at the time when plaintiffs parted with their Fair Oaks property for the considerations hereinabove stated, it is necessary to have in mind certain recent earlier history of the Granite Hill ranch. In September, 1925, that property was owned by E. Van Wickle; subject, however, to an \$18,400 mortgage in favor of the First Trust & Savings Bank of Pasadena and F. H. Gilcrist, and also subject to a trust deed (junior to the mortgage) securing \$31,500 in notes payable to the order of Herbert A. Stokes and wife. The \$31,500 note was sold and transferred to defendant Gibson. Default having been made on this note, the property was sold to defendant Barker for \$1,200. It is admitted that in this purchase and in the subsequent transfer by Barker to Rice, defendant Barker was acting as agent for Gibson. The record thus shows that in March, 1927, the record title to the Granite Hill ranch stood in the name of Barker (the real owner being Gibson), and was subject to the \$18,400 mortgage. The subsequent transfers and incumbrances were completed through several concurrent and interlocking escrows. By escrow No. 6893 at First Trust & Savings Bank of Pasadena, on or about February 3, 1927, the Van Wickle notes and mortgage were deposited in the bank, together with satisfactions thereof to be used on payment of the two notes, amounting to the principal sum of \$18,400. Under the same escrow number, Gibson deposited with the bank on February 1, 1927, his "seller's escrow instructions" offering to sell the ranch to Phil D. Rice, upon stated conditions which provided for the deposit by Rice of the sum of \$19,600 to be used in payment of the mort-

gage and for payment of stated expenses; and further provided for a note of \$40,000 to be executed by Rice in favor of Gibson and secured by trust deed on the ranch. Gibson also agreed to deposit for use in the transaction a deed by Barker and wife to Phil D. Rice, a single man. Instructions concurrent with those of Gibson were signed by the Barkers. On the same day an acceptance of the Gibson offer was signed by Rice, wherein he stated that he would hand to the bank a check for \$19,600 together with expense funds and the \$40,000 note and trust deed. Subsequently the Barker conveyance to Rice and the said notes and trust deed were in fact deposited with the escrow holder.

In escrow No. 6921 at the same bank, on February 8, 1927, instructions were deposited by Phil D. Rice as purchaser, and Hittson as vendor, for the sale of a one-half section of land in Culberson county, Tex., conveyance to be made concurrently with a conveyance of the Granite Hill ranch by Rice to Hittson; it being further agreed as part of the consideration from Hittson to Rice that Hittson would execute and deliver his note for \$32,000 secured by trust deed on said Granite Hill ranch. Stating the matter another way, it may be said that by virtue of these escrow instructions Rice was agreeing to convey to Hittson the Granite Hill ranch subject to the \$40,000 note and trust deed in favor of Gibson, on receiving from Hittson a deed to the Texas land and the \$32,000 note and trust deed.

Through escrow 52-998 (Pacific Southwest Trust & Savings Bank) the deed from the plaintiffs to Rice was delivered when the escrow agent received for the plaintiffs the sum of \$10,000 and the said second trust deed and \$32,000 note, assigned to the plaintiffs. It will be noted that in the completion of these transfers, trust deeds, mortgage release, assignments of notes, etc., Rice was to pay off the \$18,400 mortgage, and was to pay \$10,000 to the plaintiffs. In fact, he paid nothing. According to the testimony of Newby and Gibson, Rice was a tourist, from an eastern state, and he left this state before the escrows herein mentioned were closed. The record does not show anything definite about the financial status of Rice. The court was justified in concluding from all the circumstances, that Rice loaned the use of his name in these transactions, to accommodate Newby, or Newby and Gibson, and for no other purpose. Gibson, acting through Barker, paid into escrow 6893 the \$19,600 which under the terms of that escrow would have been paid by Rice. In contemplation of this arrangement, Rice,

by his attorney in fact Newby, executed to Barker a deed conveying the Fair Oaks property. This deed, bearing date March 18, 1927, was recorded on March 31, 1927, following the recording of the deed of same date by the plaintiffs to Rice. Concurrently, a \$10,000 first mortgage loan was obtained from the First Trust & Savings Bank of Pasadena, secured on the Fair Oaks property. This mortgage, executed by Barker and wife on March 23, 1927, was recorded March 31st, when the prior deeds had placed the record title in Barker's name. By these several steps Gibson, in the name of Barker, became the owner of the property of the plaintiffs, and the plaintiffs were paid \$10,000 raised by mortgage on their own property (less \$3,000 commissions, etc.), and received nothing else except the \$32,000 note and second trust deed on the Granite Hill ranch, subject to Gibson's \$40,000 first trust deed against that property. The close of these escrows left Hittson as the record owner of the ranch, for which he paid nothing except that he conveyed to Rice the Texas land and executed to Rice the \$32,000 note and second trust deed on the Granite Hill ranch. Hittson testified that the Texas land at that time was worth "approximately a dollar an acre"; and that the total value of his assets at that time was less than \$1,000.

In general effect the fraud and deceit which the plaintiffs claim was practiced upon them by the defendants may be described as follows: That defendant Gibson first acquired the Stokes notes which were secured by trust deed on the Granite Hill ranch, subject to the prior mortgage securing an indebtedness of \$18,400; that thereafter by a series of conveyances and trust deeds and manipulations thereof, a fictitious valuation of \$120,000 was built up on said ranch, whereby the \$32,000 note might be made to appear well secured, whereas, in fact, it was without value; and that all of this was done through irresponsible persons acting as "dummies" for Gibson. It is the claim of the plaintiffs that the defendants having first laid this false foundation for a successful fraud, thereafter made the false representations upon which the plaintiffs relied and whereby they lost the Fair Oaks property. The alleged false representations are numerous and may be found in the record. Among the salient statements of fact contained in the alleged false representations made to the plaintiffs are these: That the Granite Hill ranch had recently been sold for \$120,000, that is for \$48,000 in cash, together with a first mortgage for \$40,000 and said trust deed for \$32,000,

whereas, in fact, neither said sum of \$48,000 nor any part thereof had been paid by any purchaser of said property and said \$40,000 trust deed and note had been delivered without consideration; also, that it was represented to the plaintiffs that Hittson, the purchaser and present owner of the ranch, was a millionaire, personally well able to pay all of said indebtedness, whereas in fact, Hittson was financially irresponsible.

[1] The complaint alleges the existence of a conspiracy entered into among the defendants, pursuant to which the various misrepresentations and other wrongful acts by the defendants were accomplished whereby the plaintiffs were deprived of their property. The proof of conspiracy in which the appellants were co-operating parties was especially important because the direct evidence of misrepresentations made by either one of appellants is of slight weight as compared with the similar direct testimony concerning representations made by defendants Burnham and Newby. Under such circumstances it is only by establishing a conspiracy between these parties that the plaintiff could obtain the benefit of the rule whereby misrepresentation made by one conspirator is chargeable against the other conspirators although not made directly by them. Thus, for example, the testimony of the plaintiffs concerning false representations made to them by the defendants Newby and Burnham is very much more definite in its particulars than is any of their testimony involving Gibson in the making of such misrepresentations. It is only by proof of circumstances tending to show that these several defendants had conspired, and were acting together as alleged in the complaint, that appellants could be held responsible for the wrongful acts of their said codefendants.

[2] Defendant Burnham was a real estate agent in Pasadena. Frederick A. Leavitt, one of the plaintiffs, testified that in January, 1927, he met Burnham and told Burnham that he and his brother owned said Fair Oaks property and wanted to sell it at the price of \$45,000. Early in February Burnham told this witness that Mr. Newby had a trust deed of \$32,000, secured by the Granite Hill ranch; that the ranch had recently been sold for \$120,000, cash \$48,000, and there was a \$40,000 mortgage on it, and then this \$32,000 trust deed he considered just as good as money or even better. At a later conversation Burnham repeated these statements about a sale of the ranch for \$120,000, and stated that two bank appraisals on the ranch had been made, one giving a valuation of \$97.

000 and the other \$95,000. Thereafter this witness, together with Newby and Burnham, made a trip to Riverside county, where they visited the Granite Hill ranch. The three men drove together in an automobile from Pasadena. In their conversation Newby claimed that he and a partner had owned the ranch for two years, and that they had sold it to Hittson for \$120,000, \$48,000 cash, \$40,000 mortgage, and this \$32,000 trust deed. He repeated the above-mentioned statement about bank appraisals; and there were various other statements concerning water supply pumping plant, a granite hill of great value for quarrying purposes and for which a \$35,000 offer had been made. Concerning Mr. Hittson, Newby said that Hittson was a millionaire and well able to take care of all his paper; that Hittson had just bought the ranch and was coming there to subdivide it to pass away the time.

Concerning defendant Gibson this witness, F. A. Leavitt, testified that he met Gibson the next afternoon after the trip to the ranch. Mr. Burnham took the witness to Gibson's home. "Mr. Burnham introduced me to Mr. Gibson and said I wanted to see him in regard to a trust deed that we were thinking of trading for secured by the Granite Hill ranch in Riverside, that he understood he held the first mortgage on the ranch. Mr. Gibson said he held the first mortgage and that he had put in the greater part of two or three days down to the ranch investigating before he took the mortgage. He found there was two bank appraisals on the ranch by the Riverside Bank, one for \$95,000 and one for \$97,000. He says there is practically 60 acres of lemon orchard in good condition. He spoke of the water supply and their own pumping plant that cost \$20,000, about the subdivision, and that Granite Hill ranch, and he had satisfied himself that the lemon orchard would take care of his mortgage, and that left the balance of the ranch free. I asked him if he was acquainted with this Hittson that had bought the ranch, and he said that when he took the mortgage he loaned him the money, and Mr. Hittson asked the privilege of paying it on that mortgage as he wanted to subdivide some of it and sell it out in chicken ranches and wanted it released and Mr. Gibson granted him that privilege. Mr. Gibson stated at that time he understood there was a second trust deed, but he had never seen it and could not say for certainty about it, but if there was it made the first all the more secure. Burnham, he says, "This looks awfully good to me. It looks as if this paper is aw-

fully good.' And Gibson, he said it was well secured and the ranch was well worth the property and he considered the paper perfectly safe."

Without going into further details of the evidence, and without any special description of the later transactions in the course of which the defendants disposed of the Fair Oaks property, suffice it to say that we conclude therefrom that the findings are sustained by the evidence. The findings themselves unnecessarily include many evidentiary items which might better have been omitted, but these may be disregarded without affecting the merits of the case. And the findings support the judgment.

[3,4] It is claimed by appellants that the court erred in admitting evidence of the above-mentioned transactions which were subsequent to those which ended with the closing of the escrows on March 31, 1927, not only because they occurred after the transfer of plaintiffs' property had been completed, but also because there is no evidence of any conspiracy in which appellants were connected as coconspirators. But we think that the evidence is sufficient to prove that appellants were parties to the conspiracy. And as to the fact that the evidence related to transactions subsequent to March 31, 1927, appellants have failed to support their contention by reference to any authorities pertinent to that subject. There are decisions referred to by respondents, which have some persuasive force. *Exchange Bank v. Moss*, 149 F. 340, opinion by Circuit Court of Appeals, 8th Circuit. But without deciding this question, at all events we are convinced that even if this merely cumulative evidence should have been excluded, the other evidence is so convincing that the error, if any, was not prejudicial, and did not contribute to any miscarriage of justice.

[5] In our statement of the case we have referred to the death of Mr. Gibson, and the subsequent proceedings which culminated in the entry of judgment. In support of their appeal from the judgment, as well as from the order denying their motion to vacate the judgment, appellants contend that by reason of the death of Gibson at a time when the plaintiffs had not yet served or presented to the court the final brief provided for in the order of January 21, 1929, the trial court was without any "right, power, authority or jurisdiction" to render at the date of the rendition of said judgment, any judgment whatever, nunc pro tunc or otherwise, against the

said John W. Gibson, deceased. It was upon this ground that appellants made their motion, which the court denied.

On May 1, 1929, the date of Gibson's death, the reply brief of the plaintiffs had not yet been served on the defendants or delivered to the judge, and the cause had not been submitted to the court for decision. In all other respects it was ready for submission. On July 24, 1929, pursuant to notice given, the plaintiffs presented a motion in which they requested, among other things, that "the order heretofore made submitting said cause for decision" be set aside and the case reopened for the sole purpose of making the specified supplemental proof. On the same day they served, and gave to the judge, their final brief.

This motion was granted, and the case set for further trial on July 30, 1929, and the "amended and supplemental complaint" was filed, to which the executrices and Kincaid filed their answer on July 25th. The "amended and supplemental complaint" consisted wholly of supplemental matters except that it did "here repeat and reallege" the former pleadings of the plaintiff, without in fact setting them forth other than by this reference thereto. At the hearing on July 30th the additional evidence contemplated by the prior order was received, and the minutes of the hearing close with this statement: "Cause re-submitted."

Since there had been no prior submission, this order of July 30th could not be a re-submission. But it did constitute a submission of the cause, unless it can be successfully maintained that on the record thus made the court was without power to submit and under such submission thereafter to decide the case. We think that the court did have that power.

[6] But appellants particularly contend that the court did not have the right to file its decision *nunc pro tunc* as of a date prior to the death of Gibson. In support of this contention they emphasize the fact that at the time of Gibson's death the cause was not actually under submission. So far as the supplemental proceedings are concerned, covering the death of Gibson and the completion of the record in connection with that fact, it is plain that *nunc pro tunc* findings dated back to January would be an absurdity. But in this we find no insuperable objection. For if in fact justice required it, the findings upon the main issues, which were tried during the lifetime of Gibson, might be considered as entitled to be filed *nunc pro tunc* as of the January date, although the findings covering the

supplemental proceedings must be considered as of the actual date in November, 1929.

[7, 8] In support of their contention that in this case an order for the entry of the decision *nunc pro tunc* could not legally be made, appellants refer to 14 California Jurisprudence, pp. 931-933; 15 Ruling Case Law, pp. 626, 627; and 34 Corpus Juris, p. 74, and to a number of the decisions therein cited. Some of these decisions directly declare that to entitle a party to have its judgment entered *nunc pro tunc* on account of the death of one of the parties the action at the time of such death must have been ready for the rendition of final judgment. The rule is traced back to the practice in very ancient English cases and early American cases.

It appears, however, that the more modern practice, including that of California, has resulted in some modification of the rule. In *re Estate of Pillsbury*, 175 Cal. 454, 462, 166 P. 11, 15, 3 A. L. R. 1396, in the course of an extended discussion of the subject of entry of judgments *nunc pro tunc*, the Supreme Court said: "So it will be found without citing specific instances that the trend of legislation is to broaden even the common-law rule, and to provide that the right of action shall survive in cases *ex delicto* if the defendant has appeared or has been served with process while a brief consideration of the adjudged cases will show that nowhere is the principle enunciated denied application because the action is in tort." We do not lose sight of the fact that the case at bar is not in the complete sense an action *ex delicto*, such as an action to recover damages for personal injury. This is an action to recover damages for a wrong committed by fraudulent means in the course of a business transaction. The right of action in this case would survive the death of the defendant Gibson; but perhaps it would not survive to an extent which would justify that part of the judgment which granted exemplary damages. We have not examined into this question so as to form an opinion and it does not seem necessary so to do at this time. The case in its circumstances is quite sufficient to justify the broadening of the rule as mentioned by the Supreme Court in the foregoing quotation. The court in that case refers with apparent approval to the case of *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 P. 328, 329, where the subject received careful attention. In that case at the date of the death of one of the defendants the case was under submission, and the judge had announced his conclusions and directed the preparation of findings and decree, but they had not yet

been prepared at the date of the death of said defendant. Thereafter executors of his will were made parties defendant, and subsequent proceedings followed as in the present case, and findings and judgment were entered nunc pro tunc as of a date prior to the death of said defendant. Discussing the subject of nunc pro tunc judgments the court said: "The authority of a court to order its judgment to be entered nunc pro tunc is inherent in the court, and is to be exercised for the purpose of doing justice between the parties. A court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application. One class of the cases in which this authority may be exercised, says Mr. Freeman, comprises those 'actions in which no judgments have ever been rendered, but which are, so far as the suitors can make them, in condition for the rendition of final judgments.' Freeman, Judgm. § 57. 'The rule established by the general concurrence of the American and English courts is that, where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, through the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, "*actus curiæ neminem gravabit*,"—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the party shall not suffer by the delay. A nunc pro tunc order should be granted or refused as justice may require, in view of the circumstances of the particular case.' Mitchell v. Overman, 103 U. S. 62 [26 L. Ed. 369]. See, also, Blaisdell v. Harris, 52 N. H. 191. Whether the decision of the court is to be expressed in the form of findings of fact, or in the form of a judgment, or both, is immaterial. The principle upon which its action is to be sustained is that justice may be done between the parties. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission, and neither party is to be prejudiced by the delay of the court in rendering its judgment. In Campbell v.

Meslier, 4 Johns. Ch. [N. Y.] [334] 342 [8 Am. Dec. 570], the cause had been submitted to the chancellor upon proofs taken before the master, and after argument, but before decision, one of the defendants died. The chancellor ordered the decree to have relation back, and to be entered as of the date when the cause was finally heard. If, as is provided by sections 632 and 633, Code Civ. Proc., the making and filing of findings of fact is essential to its decision, the court has the same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. These various acts—the making, as well as the filing of findings, and the entry of judgment—are only parts of the decision which the court has been invoked to make upon the submission of the cause, and together constitute the final determination of the rights of the parties. The decision which the parties have invoked the court to make is not necessarily the statutory and technical 'decision' referred to in section 633, Code Civ. Proc., but is the final determination of the rights of the parties, and includes every step or act of the court which is requisite to a final judgment upon their rights. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve these rights." The Supreme Court then referred to the provisions of section 669 of the Code of Civil Procedure under which the judgment entered after the death of a defendant is not a lien upon his real property, but is payable in the course of administration of his estate, and suggested that although it was appropriate to file the findings of fact and conclusions of law as of a date prior to the death of the defendant, it was not necessary to so enter the judgment. The decision having been filed as of date prior to the death, the judgment could be entered after the death. In the case at bar the practice thus suggested was followed, and the nunc pro tunc order was made with respect to the findings only and not the judgment.

It must be conceded that the present case differs from the Fox Case, supra, in that here the cause was not actually under submission at the date of the death of defendant Gibson. But he had been fully heard. All of the evidence had been received and both sides had rested. Both the brief for the plaintiffs and the reply of the defendants had been served

and were in the hands of the judge. No reply had been presented by the plaintiffs, and the time allowed therefor had expired. On the day of Gibson's death the court was in a position to have ordered the case submitted although it had not actually made such order. The bill of exceptions does not show that any stipulation or order for extending time for such reply brief had been made. Trans. pp. 716, 717. In view of the facts thus shown by the record we have reached the conclusion that there is no substantial difference between the situation presented by this case with respect to the question now under consideration and that presented in the two California decisions to which we have referred. The delay which had occurred (at the time of Gibson's death), may well have been caused by "the intricacy of the questions involved," as by any cause attributable to the laches of the parties. So, in relation to the right of the trial court to have its decision filed as of January 22, 1929, we think that such right should be upheld, and that "the principle upon which its action is to be sustained is that justice may be done between the parties."

In view of the large record in this case, it would be quite impossible, keeping in mind a reasonable regard for a limitation upon the space which should be devoted to the questions discussed herein, to answer each one of the many assignments of error urged by appellants in their very full briefs. We are satisfied that the major questions and principles which are discussed embrace all of the material matters which vitally affect the issues involved, and that the case has been carefully considered and sufficiently covered by the decision of the District Court of Appeal. We think the weight of reason and authority supports the proposition that there should be no abatement of the trial of causes in the case of the death of one of the parties to an action in cases where the evidence has been wholly concluded, and the only act left undone in the case is the filing of an overdue reply brief, which the plaintiff had reserved the right to file at the time leave was granted by the court to file briefs at the close of the actual trial. What prejudice the defendant could possibly have suffered by the failure of the plaintiff to file a reply brief to his answer can be answered by no other word than "None." Every privilege which could in the ordinary course of events inure to the benefit or advantage of the defendant had absolutely accrued before his demise.

The law does not favor such an abortive termination of the trial of causes as would result from declaring a mistrial for the rea-

sons herein urged against the entry of a nunc pro tunc judgment. In addition to the authorities cited in the above opinion, may be added the case of *Citizens Securities and Investment Company v. Dennis*, 236 Ill. App. 307, which is singularly similar to the instant case in all its essential features. It is an appellate case, it is true, but the proposition is treated in its general sense. The question there was whether the action abated by reason of the failure of plaintiff to file a closing brief. The death of the defendant occurred July 14, 1924. On June 3, 1924, counsel for plaintiff filed his brief; on June 30, 1924, counsel for defendant filed defendant's brief; on July 7, 1924, leave was granted to the plaintiff to file its reply brief on or before August 26, 1924; on July 25, 1924, eleven days after defendant's death, plaintiff filed its reply brief. The cause was then set on the oral argument calendar to be argued October 27, 1924. No oral argument was made by either party. The motion made by defendant for abatement was opposed by plaintiff, who contended that judgment nunc pro tunc as of July 14, 1924 (the day of defendant's death), should be entered. Discussing the rule that where one of the parties dies after appeal taken, a judgment nunc pro tunc may be entered as of a date prior to the death of the party provided the court had acquired jurisdiction and rightful authority to render a judgment on that date, said court holds the appellate rule to be in substantial conformity with the general rule in regard to the power of a court to enter judgment nunc pro tunc in cases where the cause was in such condition at the date to which the judgment is to relate back that a final judgment could then have been entered immediately. 1 Black on Judgment, § 133, pp. 150, 151; 23 Cyc. p. 840; 34 C. J. § 209, p. 72. The court restates the well-recognized principle of necessity in furtherance of justice and in order to save a party from unfair prejudice through delay caused by the act of the court or through the course of judicial procedure, upon which such judgments are sustained.

The argument was made in that case as in the instant case that the record was not in shape as would justify the entry of a nunc pro tunc judgment; that the practice of entering such judgments obtained only in cases where the death of one of the parties occurred after the cause had been heard and taken under advisement. The court repudiated the contention that a nunc pro tunc judgment might only be entered after the cause had been heard and taken under advisement, and declared that there was no authority sup-

porting such a contention, and applied the test, as declared by Black, which is, Was the cause in such condition at the date to which the judgment is to relate back that a final judgment could then have been entered? There can be no doubt in the instant case that a final judgment could have been entered at the close of the evidence and surely on the date that the plaintiff's time for filing the closing brief expired. Commenting upon the case of *Danforth v. Danforth*, 111 Ill. 236, wherein it was decided that the court had full jurisdiction and rightful authority to render the decision it did, the court concludes the discussion in the following language, which is applicable generally to the subject under consideration: "Applying the principle contained in this language to the case at bar the question is whether this court 'was clothed, by the act of the parties and the law, with full jurisdiction and rightful authority to render' a judgment prior to the death of the defendant. The subject-matter of the cause was within the jurisdiction of the court, and the court acquired jurisdiction of the defendant before his death when he filed his brief. The filing of his brief by the defendant was the equivalent of a joinder in error. *Finlen v. Foster*, 211 Ill. App. 609, 620, 621. In this state of the record this court had full power to have rendered a judgment before the death of the defendant, notwithstanding the fact that the reply brief of the plaintiff was due to be filed on a date subsequent to the death of the defendant, and that the oral arguments were set for hearing on a date subsequent to the death of the defendant. The rules of court under which the reply brief of the plaintiff and the oral arguments on behalf of both the plaintiff and the defendant were permissible could have been disregarded by this court unless such action of the court would have been likely to result in injustice to the parties." (Authorities cited.)

[9, 10] Appellants seem to assume that the judgment in the instant case, because it includes exemplary damages, is not entitled to the judicial standing that it would have if it did not include such damages. The judgment in this case has the same sanctity in law as any other judgment obtained in a court of law or equity could have. The trial was had in accordance with the statutory and procedural law of the state. It is a judgment in a civil case entitled to every presumption which comes to the aid of judgments. Appellants assail it on the ground that it is punitive in character and being so the action does not survive the death of the wrongdoer. This contention is not tenable. The cause was in

a condition in which a judgment authorized by law could have been entered and should have been entered against the defendants, both for compensatory damages and exemplary damages. The Civil Code, § 3294, in defining such damages, provides in language too simple and clear to require interpretation, that: "In addition to the actual damages [the plaintiff], may recover damages *for the sake of example and by way of punishing the defendant.*" (Italics ours.) The object of the statute is plainly twofold. Such damages enter into and become a part of the judgment in a civil action. They are payable to the person wronged and when legally obtained they are governed by the same rule as governs a judgment in any other kind of civil action. There is no reason why a different rule should be formulated in such cases, than there would be for a different rule in cases of tort, or a simple action upon contract.

The judgment and the order are, and each of them hereby is, affirmed.

THOMPSON, Justice.

I dissent. I entertain no doubt concerning the power of the trial court to enter a judgment *nunc pro tunc* in so far as it provides for compensatory damages, but it must be remembered that exemplary damages are imposed for the purpose of punishment. In 8 California Jurisprudence, § 106, it is said: "Punitive damages have no compensatory character. They amount only to a punishment or fine which the law says ought to be imposed in certain cases, and which it has been observed, is somewhat in analogy to the action of *qui tam*, goes to the party who has been injured and has brought the suit." To the same effect is the definition of this court in the case of *Pacific, etc., Co. v. Alaska Packers' Ass'n*, 138 Cal. 632, 72 P. 161, 164 as follows: " * * * [P]unitive damages are given as punishment beyond what a plaintiff has actually suffered. * * * " It follows that the court should not have included in the judgment any sum by way of exemplary damages because it was not proper or just to attempt to punish the defendant after his demise.

It is not solely a question of jurisdiction or whether the court had the power to enter a judgment *nunc pro tunc*, but also a question of whether it was just and right after the defendant Gibson's death to assess a fine against him. We have held that punitive damages may not be recovered against personal representatives, but by sustaining the inclusion within the judgment of punitive damages we are doing indirectly that which

we refuse to permit directly. Such does not comport with my idea of justice. It would be a different question had the decision been announced before the death of the defendant, but after his death was made to appear of record the fine should not have been levied. The judgment should be modified accordingly.

I concur: PRESTON, J.



3 Cal.2d 305

HUTTON v. ORMANDO.

S. F. 15023.

Supreme Court of California.

April 19, 1935.

Rehearing Denied May 17, 1935.

1. Easements ⇨61(9)

In action to enjoin obstruction of easement over roadway, evidence held to support finding that plaintiff had acquired easement by hostile use thereof for more than eight years prior to commencement of action.

2. Appeal and error ⇨1071(1)

Alleged indefinite description of right of way in complaint to enjoin obstruction of easement and trial court's finding did not require reversal of judgment for plaintiff where map and deed showed exact location of roadway, since location of right of way could be definitely ascertained from evidence.

3. Appeal and error ⇨1149

In action to enjoin obstruction of easement, judgment for plaintiff would not be reversed on ground that location of right of way was inadequately described in complaint and court's finding, since Supreme Court would more particularly describe location of right of way where evidence justified such additional description (Code Civ. Proc. § 956a).

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Suit by Hiram C. Hutton against Vincenzo Ormando to enjoin obstruction of an easement. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellant.

Bohnett, Hill & Cottrell, of San Jose, for respondent.

PER CURIAM.

The plaintiff sued to have the defendant enjoined from obstructing a certain roadway or right of way on the defendant's land over which the plaintiff claimed the right to pass, and to abate the obstruction erected by the defendant. The plaintiff declared upon a prescriptive right based upon sixty years' adverse user. The court found in accord with the plaintiff's declaration to the extent that such prescriptive and hostile use had begun more than eight years prior to the commencement of the action. From a judgment for the plaintiff as prayed, the defendant appeals.

The plaintiff is the owner of a tract of land lying northerly of the defendant's 12.99 acre tract. A railway right of way, running in a northwesterly and southeasterly direction, forms the southwesterly and northeasterly boundaries respectively of the plaintiff's and the defendant's lands. Formerly the tract owned by the defendant, the land owned by the plaintiff, and land lying south of the defendant's and the plaintiff's said lands, all belonged to members of the Hutton family. On November 23, 1928, the defendant's land was deeded to him by Alfaratta Schuyler and George Schuyler, the daughter and son-in-law of the plaintiff, who had received it from Laura K. Keith, a sister of the plaintiff. It was in evidence that in 1870 a roadway had been opened leading from the tract now owned by the plaintiff, southerly across the railway right of way and over the southeast corner of the defendant's land, continuing southerly along the westerly boundary of the land of Laura Keith for a distance of some 350 feet, and then easterly about 1,120 feet to the Quito road, which is a county highway. The portion of this roadway which thus crosses the extreme southeasterly corner of the defendant's tract is twenty feet wide, twenty feet along its westerly boundary and nine and a half feet along its easterly boundary line. The plaintiff also owns a tract south of the Keith property which is reached by said roadway.

It was established that this roadway had been in almost constant use by the owners of these various tracts and their predecessors for many years. The description in the grant deed from the Schuylers to the defendant included the portion of the roadway in dispute. On January 23, 1929, the Schuylers, the Keiths, and the plaintiff and his wife deed-

ed to the defendant a "right of way for road purposes, over the existing rights of way, now in use, from that certain 12.99 acre tract conveyed by George Schuyler and Alfaratta Schuyler, his wife, to Vincenzo Ormando by deed dated November 20, 1928—to the Quito Road—a county highway." The instrument particularly described the right of way as all of the private roadway from the southerly line of the railway right of way through the twenty-foot portion included in the grant deed to the defendant, and continuing southerly and easterly to the Quito road. The instrument conveying this right to the defendant also contained the following language: "Said grant not to impair, curtail or infringe in anyway whatsoever the title, rights or privileges now held or acquired by others in above mentioned Rights of Way and private land." The instrument was recorded in February, 1929.

The present action was commenced in June, 1933. The defendant shortly prior to the commencement of the action had constructed a fence across the roadway so as to prevent the plaintiff's access thereto.

[1] The main contention on the appeal is that there is no support for the trial court's finding that the plaintiff and his predecessors in interest have acquired a prescriptive right to the use of the roadway over the defendant's land. The defendant relies on *Storrow v. Green*, 39 Cal. App. 123, 178 P. 339; *Tarpey v. Veith*, 22 Cal. App. 289, 134 P. 367; *Pinheiro v. Bettencourt*, 17 Cal. App. 111, 118 P. 941; *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174, and 1 Cal. Jur. 539, 599, to support his contention that the facts in the present case indicate only that the use of the roadway was nothing more than a neighborly accommodation and a family convenience, which it is claimed the cases cited hold is insufficient to support a prescriptive right.

We cannot agree with the defendant that the record shows that the facts must be resolved in accordance with his contention. The question whether the right was established by adverse user was a question for the trial court under the facts presented. (*Clarke v. Clarke*, 133 Cal. 667, 670, 66 P. 10; *Abbott v. Pond*, 142 Cal. 393, 399, 76 P. 60; 1 Cal. Jur. p. 635.) The finding of the trial court has sufficient support in the evidence.

[2, 3] The defendant also contends that the description in the complaint and in the findings of the location of the right of way is

so indefinite as to require a reversal of the judgment under such authorities as *Matthiesen v. Grand*, 92 Cal. App. 504, 268 P. 675. Assuming the description to be deficient as contended, nevertheless on the record presented in this case a reversal is not necessary in order to make it certain. The proof showed the exact location of the roadway, the existence of which was not disputed. Its location was shown by a map received in evidence, the Plaintiff's Exhibit A. Also its location was described in the deed of the right of way in the entire roadway, from the Schuylers, Keiths, and the plaintiff and his wife to the defendant. Inasmuch as the description in the pleadings and the findings is one that may be made certain from the evidence received by the court, the defect is not one which necessarily calls for a reversal of the judgment. *Poole v. Greer*, 6 Pennewill, 220, 65 A. 767; *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799. This court, exercising the power vested in it by section 956a of the Code of Civil Procedure, will make its finding of a more particular description of the location of the portion of the roadway which traverses the defendant's land. Based on the map and other evidence in the record, this court finds that the location of the roadway is as set forth in the following modification of the judgment.

The judgment is modified by adding thereto at the end of the second paragraph thereof, after the words "and described in plaintiff's complaint herein," the following: "and more particularly described as follows: Beginning at the southeast corner of lands of Vincenzo Ormando, as said lands of Ormando are described in that certain deed of George Schuyler and Alfaratta Schuyler, his wife, to Vincenzo Ormando, dated November 23, 1928, and recorded in volume 445 of Official Records, page 401, Santa Clara County records, said corner also being common to lands of Warner Hutton and Mrs. Laura Keith, and marked by a 2" iron pipe standing in the northerly line of lands of Mrs. Laura Keith; thence westerly 20 feet to the westerly line of the Warner Hutton Private roadway; thence northerly along the westerly line of said roadway about 20 feet to the southerly line of the railway right of way; thence southeasterly along said southerly line of the railway right of way to a 1" iron pipe standing in the easterly line of said Warner Hutton Private roadway; thence southerly along said roadway line 9.50 feet to the place of beginning."

As so modified, the judgment is affirmed.

3 Cal.2d 151

AMERICAN TRUST CO. v. CORYELL et al.

S. F. 15066.

Supreme Court of California.

April 9, 1935.

1. Contracts Ⓒ322(3)

In trustee's proceeding to foreclose owner's rights in improved property under contract between owner and contractor which provided that engineer's certificate of satisfactory completion of work should be binding on all parties, evidence *held* insufficient to sustain owner's contention that engineer's certificate was fraudulently issued, so as to relieve owner from liability to contractor for cost of improvement.

2. Contracts Ⓒ292

Where contract between owner and contractor provided that paying should be performed in accordance with plans and specifications of engineer, who was to supervise work, engineer could properly delegate some of work supervision to qualified subordinates without being guilty of fraud against owner, especially where engineer frequently was present at place of work.

3. Contracts Ⓒ287(2)

In absence of fraud, stipulation in contract between owner and contractor that engineer's certificate of satisfactory completion of paying should be binding on all parties was complete defense to owner's claim that work was not completed in satisfactory manner.

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action for declaratory relief by the American Trust Company against Mabel L. Coryell, Ralph R. Strange, and others. From an adverse judgment, named defendants appeal.

Affirmed.

Robert R. Moody, of San Francisco, for appellants Mabel L. and J. B. Coryell.

Young, Hudson & Rabinowitz and Roy Hudson, all of San Francisco, for appellants Ralph R. and Edith Strange.

Albert Mansfield, of Redwood City, and Joseph Farry, of San Francisco, for respondent Peninsula Paving Co.

Brobeck, Phleger & Harrison and Howard Finn, all of San Francisco, for respondent Trust Co.

LANGDON, Justice.

This is an action for declaratory relief with respect to a trust agreement.

Defendant Mabel L. Coryell owned a tract of land which she desired to subdivide, improve, and sell. Defendant Ralph R. Strange advanced certain sums of money to her for this purpose. George A. Kneese, an engineer, was employed by defendant Coryell to prepare plans and specifications for the development, including construction of streets, sidewalks, sewers, etc. Kneese then took bids for the work, and on March 21, 1928, the defendant Peninsula Paving Company entered into a contract with defendant Coryell to do the work. On the same day the trust agreement involved herein was made. By its terms title to the land was conveyed to plaintiff as trustee; work was to be performed in accordance with the plans and specifications of Kneese; all sums due under the construction contract were to be payable within two years after completion of the work; upon completion, Kneese was to certify to the trustee the amount payable to the construction company, and Kneese's certificate was to be binding on all parties; proceeds of the sale of lots were to be applied to payment for the work, but in any event defendant Coryell agreed to make full payment on or before two years after completion; in case of default by said defendant for ten days after notice thereof by registered mail, the trustee had power to foreclose all her right, title, and interest in the property. This agreement was executed by defendant Coryell, plaintiff, defendant Peninsula Paving Company, and defendant Strange.

Performance was commenced, and the work completed in September, 1930. Notice thereof was given to the plaintiff in May, 1931, and in June of that year the paving company served notice on the trustee to proceed to sell the property for nonpayment. Defendant Coryell objected, claiming that she was not in default. Defendant Ralph Strange claimed preferential rights under the agreement, and defendant Edith Strange claimed certain rights by assignment from Ralph Strange. The trustee then brought this proceeding, seeking to determine whether foreclosure should be had, and, in such event, what were the interests of the respective parties. The cause was tried in April, 1933, and the court decreed that the sum of \$107,217.90 was due the paving company from defendant Coryell; that the property should be sold by the trustee; that the claim of the paving company should first be paid, then that of Ralph R. Strange, and any

surplus should go to defendant Coryell; and that, if the property failed to realize the sum owed, a deficiency judgment should be entered against defendant Coryell. Said defendant brought this appeal. Defendant Strange also appealed. Both appellants make the same point; namely, that the evidence does not support the essential findings of the trial court.

The position of defendants is that the paving company never became entitled to the money because it never completed the work in accordance with the contract; and they point chiefly to the fact that the pavement has since settled and cracked, and is in poor condition. Although the agreement provides that the engineer's certificate of satisfactory completion shall be conclusive on all parties, and Kneese gave such certificate, the defendants contend that the provision is not binding because of the fraud of Kneese.

[1] The evidence produced by defendants fails to support their position. There is no direct showing of fraud on the part of Kneese. Instead, defendants point to the present bad condition of the paving, and assert that a certificate of satisfactory completion in such case must necessarily have been given with fraudulent intent, or by such culpable negligence as to amount to constructive fraud. This contention is manifestly unsound. It is entirely possible, for example, that the work was done in full compliance with the plans and specifications, and that the resulting pavement cracks and settlement was due to adverse soil conditions. This was, indeed, the purport of the testimony of a number of witnesses called by the paving company, who were familiar with the job from its inception. The witnesses for defendant Coryell, who testified that the cause of the defective paving was improper performance, were giving opinions based upon observation long after the job was completed. It might be possible, also, that the defective condition which was conceded to exist at the time of trial was in part a result of the complete lack of maintenance or care during the several years which followed the completion of the work. There is thus disclosed a substantial conflict in the evidence and several possible causes for the present defective pavement, and in this state of the record we cannot draw the inference of fraud which the trial court has refused to do.

[2] Appellants predicate fraud upon the additional ground that Kneese failed properly to supervise the job in that he delegated his

duties to assistants. It is, of course, perfectly proper to delegate some of the work of supervision to qualified subordinates, and the evidence also shows that Kneese was at the job himself on numerous occasions.

[3] There being no other evidence suggestive of fraud on the part of Kneese, the contract provision making his certificate conclusive is a complete defense against defendant Coryell's claim that the work was never completed in a satisfactory manner. *Brown v. Aguilar*, 202 Cal. 143, 259 P. 735; *Rialto Construction Co. v. Reed*, 17 Cal. App. 29, 118 P. 473; *City Street Improvement Co. v. Marysville*, 155 Cal. 419, 101 P. 303, 23 L. R. A. (N. S.) 317.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.



3 Cal.2d 154

Ex parte SINGER.
Cr. 3863.

Supreme Court of California.
April 15, 1935.

Insane persons ☞ 86

Accused who was committed to state hospital on jury's finding of insanity at time offense was committed could not, after subsequent adjudication of his sanity, be further retained in custody (Pen. Code, § 1016 et seq.: § 1026).

In Bank.

Original application for habeas corpus by William Singer.

Petitioner discharged.

Gerald J. Kenny, Public Defender, and Charles R. Boden, Chief Asst. Public Defender, both of San Francisco, for petitioner.

Lilburn Gibson, Dist. Atty., of Ukiah, for respondent.

WASTE, Chief Justice.

Application for release on habeas corpus from Mendocino State Hospital. The peti-

tioner, William Singer, on September 21, 1933, was arraigned in the superior court of the city and county of San Francisco on a charge of assault with a deadly weapon. His plea on arraignment, and the only plea he entered, was "not guilty by reason of insanity." At the trial before a jury, he was found insane at the time the offense was committed, and, it appearing that he had not fully regained his sanity, he was committed to the Mendocino State Hospital for the Insane. After more than one year had elapsed, he was examined and declared to be sane, and it was his contention, thereupon made in an action in the superior court in and for the county of Mendocino under the provisions of section 1026 of the Penal Code, that he should be released from confinement. His contention was supported by expert medical testimony; but the writ was discharged, after a hearing, and the court made an order reciting that, although the petitioner was then sane, he should be remanded to the custody of the sheriff of the city and county of San Francisco, to be held by him until he should be brought to trial or legally discharged. The sheriff held the petitioner for a time, but, because the superior court of San Francisco could not retake jurisdiction of the cause, and no action being taken in the matter, the petitioner was returned to the state hospital, where he is now held pending this application. All the authorities and others concerned in the matter agree that petitioner is now sane, and is entitled to his discharge.

The application presents a situation not covered by the law relating to the interposition in criminal cases of a plea of "not guilty by reason of insanity" and the procedure to be followed thereafter. Unless other sections of the Penal Code solve the problem, the applicant must be dismissed. A suggestion has been made here that the petitioner was brought to a trial while he was insane, and that consequently the purported trial was no trial at all, and therefore a nullity. It rests on the well-known rule of the common law, declared in our own Code, that "a person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Pen. Code, § 1367. The trial court in this instance applied to the case this section and the succeeding sections prescribing the procedure to be followed when, at any time during the pendency of a criminal action, a doubt arises as to the sanity of the defendant. We question this application. The provisions of the Code (Pen. Code, § 1016 et seq.),

under which this petitioner tendered the issue whether or not he was insane at the time he is alleged to have committed the unlawful act with which he was charged, relate to an entirely different situation than that created by doubt arising during the pendency of an action relating to the then state of mind of the defendant.

We cannot write into the sections (section 1016 et seq., *supra*) something palpably not there. We find no provision in the law which brings the case within the application of the law relating to the other situation here referred to. That being the case, the petitioner is entitled to his discharge from custody, and it is so ordered.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.; LANGDON, J.



6 Cal.App.2d 270

CREIGHTON v. CREIGHTON et al.

Civ. 8818.

District Court of Appeal, Second District,
Division 1, California.

April 18, 1935.

1. Evidence ☞382

Whether account book sought to be introduced in evidence is mere private memorandum, or is admissible as account book kept in due course of business, is question of fact for trial court's determination.

2. Appeal and error ☞992

Trial court's determination, on objection to introduction in evidence of account book, that book is mere private memorandum and inadmissible, if supported by substantial evidence, is conclusive on appeal.

3. Evidence ☞382

Ruling excluding account book as mere private memorandum held justified under evidence, where plaintiff did not testify that book, relied on to show loan, contained accounts of all of plaintiff's loans or other business and there was no evidence that book contained all items of accounts shown therein.

4. Pleading ☞236(7)

In action on book account, refusal to permit amendment of complaint after close of

evidence by substituting cause of action on check issued by plaintiff to defendant as payee held not abuse of discretion.

5. Pleading $\Rightarrow$ 236(4)

Allowance of amendment to complaint after close of evidence is within trial court's discretion.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by Hugh M. Creighton against Ned Creighton and another. From a judgment of nonsuit in favor of defendants, plaintiff appeals.

Affirmed.

H. A. I. Wolch, of Los Angeles, for appellant.

Leo V. Youngworth and J. Harold Decker, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal by the plaintiff from a judgment of nonsuit in favor of the defendants in an action upon a book account involving a sum of money loaned to one of the defendants.

The only question presented relates to the admissibility of an account contained in a book produced by plaintiff and which the court refused to admit in evidence. The account was offered in support of a cause of action as to which the limitation for the commencement of the action is four years. The money was loaned more than two years before the action was commenced, and therefore, if the account was inadmissible, plaintiff's proof fails and any action on the debt is barred by the statute.

[1-3] The evidence offered by plaintiff showed a loan of money to defendant Carmela Creighton, made on an automobile trip to Arizona, and plaintiff testified that upon returning to Los Angeles he made the entry in question in the book. It consisted of a single entry purporting to charge defendant "Mrs. Ned Creighton" with the sum of \$3,150. The entry was contained in a book which upon the cover was styled a ledger. In this book were entries concerning six other accounts of loans by plaintiff to various people and comprising, with a single exception, both debit and credit items. There was also an account consisting of a single item of \$5,000 evidencing a loan to plaintiff. Plaintiff also testified that he was not regularly engaged in business and that he was occupied only in loaning and

handling his own money; that the book was in his handwriting and contained entries of some of the loans that he had made. This is substantially all of the foundation that was laid for the introduction in evidence of the account book. It was excluded upon the ground that it was a private memorandum and not such an account book as was admissible in evidence. This was a question of fact to be decided by the trial court, and if the ruling of the court is supported by substantial evidence it cannot be set aside on appeal and is just as conclusive upon this court as the trial court's determination of any other question of fact. There is ample evidence to support the court's ruling, to which we will briefly refer. Plaintiff did not testify that the book contained accounts of all of his loans or other business that he transacted, nor was there any evidence that the book contained all of the items of the accounts shown therein or that the accounts were full, true, and accurate as to the transactions they purported to record. It appears further that defendants' counsel on two separate occasions called the attention of the court to the fact that the words "Ned Creighton" appeared in ink of a bluish color and the prefix "Mrs." in ink of a decidedly different and darker color. This discrepancy was not explained by plaintiff. It also appears that the account in question was entered as of date December 14, 1928, on page 22 of the account book; that following this was an index consisting of a number of pages, which was followed by entries of other accounts, the next one being dated November 16, 1928, and the one following that, September 12, 1928. In these respects, there was a deficiency in the necessary proof to establish a foundation for the admission in evidence of a private book of account. *Yick Wo v. Underhill*, 5 Cal. App. 519, 521, 90 P. 967; *Estate of Wilson*, 97 Cal. App. 529, 275 P. 977; *Tipps v. Landers*, 182 Cal. 774, 190 P. 173; *Colburn v. Parrett*, 27 Cal. App. 541, 150 P. 786; *Watrous v. Cunningham*, 71 Cal. 30, 31, 11 P. 811. The court, therefore, very properly held that the book was no more than a private memorandum.

[4, 5] After his evidence was closed, plaintiff sought to amend his complaint by substituting a cause of action for the recovery of money on a written instrument, namely, a check for \$3,150 which he issued in making the loan, in the place of the cause of action upon a book account. This application was denied. We are not able to see how the check could be made the basis of an action brought

by the maker against the payee for money loaned, and for that reason we quite agree with the court's ruling. Moreover, the allowance of the amendment was within the discretion of the court and that discretion seems to have been very properly exercised.

The judgment is affirmed.

We concur: **HOUSER, Acting P. J.; YORK, J.**



6 Cal.App.2d 46

**LANGENDORF UNITED BAKERIES, Inc., v.
INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 9750.**

District Court of Appeal, First District,
Division 2, California.
April 9, 1935.

Master and servant ☞375(1)

Where automobile mechanic, employed to work in Santa Rosa and Petaluma on alternate week days beginning at 3:30 o'clock p. m., and required to furnish own transportation, was injured at about 12:30 o'clock p. m. in Petaluma on day he was to work in Santa Rosa while working on his own automobile in employer's garage where he was permitted to keep it, injury *held* not compensable as "arising out of and in the course of the employment" (Gen. Laws 1931, Act 4749, § 6).

[Ed. Note.—For other definitions of "Arising out of Employment," and "Course of Employment," see Words & Phrases.]

Certiorari by the Langendorf United Bakeries, Inc., employer, to review an award of compensation to William Kemper, claimant, made by Industrial Accident Commission in proceeding brought under Workmen's Compensation Act.

Award annulled.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Certiorari to review an award of compensation to one Kemper, an employee of the pe-

titioner. The petitioner founds its case on the ground that the injury did not arise "out of and in the course of the employment" within the meaning of section 6 of the Compensation Act (Deering's Gen. Laws 1931, Act. No. 4749). This contention must be sustained.

The only dispute as to the terms of the employment arises from the failure to distinguish between the original employment and the terms under which Kemper was employed at the time of his injury. The petitioner operated a number of trucks used in the delivery of bakery supplies and, for some time prior to the injury, had employed Kemper, who was an auto mechanic, to keep these trucks in repair. All these trucks were garaged in Santa Rosa where the repair work was done, and, at the time of the original employment, Kemper was told that he could charge the petitioner for the cost of gas and oil used by him in going in his own car from his home in Petaluma to Santa Rosa, and also when called out on the road when any of the trucks was in need of repair. Before the injury, this contract was changed in particulars important to this inquiry. The petitioner leased a garage in Petaluma and garaged some of its trucks in that city and some in Santa Rosa. Kemper was then employed at a new wage to work three days a week in Santa Rosa and three in Petaluma, and was relieved of all repairs to trucks on the road. These trucks did not begin to enter either garage until about 3:30 or 4 p. m. of each day, and Kemper's employment began at that time. He was free to do as he pleased during the forepart of each day. He was not restricted in his means of transportation, but was free to go from one city to the other by train, bus, or in any other manner he chose. However, he was definitely told that no allowance would be made for gas or oil in the use of his own car. As a matter of convenience to him alone he was permitted to keep his car in petitioner's garage in Petaluma. On a day when he was employed to work in Santa Rosa alone he was working on his own car in Petaluma and was injured at about 12:30 p. m. His employment did not begin in Santa Rosa until about 3:30 of that day. The distance between the two cities is about 20 miles.

Upon these facts the case is controlled by the recent decision in Post. Tel. Cable Co. v. I. A. C., 1 Cal.(2d) 730, 37 P.(2d) 441, 442. It can be said here, as was said in that case, that at the time of the injury the employee "was on no special errand for petitioner, and he had not yet reached his place of employ-

ment where his duties were to begin." The following language of that opinion is also applicable here: "The contract here did not require of [the employee] any particular means of travel to and from his place of service. Whether he used the motorcycle to transport himself from his home to his place of employment and return was of no concern to his employer under said contract." Numerous cases are cited in the opinion distinguishing between the rules relating to injuries when going and coming through means of transportation furnished by the employer and means voluntarily assumed and supplied by the employee. Every factor upon which the opinion in the Postal Case is founded is present here, with the additional element that the motor vehicle on which Kemper was injured was not incidental to his employment as the motorcycle was in that case.

In support of the award, the respondents advance three theories:

First, that the injury occurred "upon his employer's premises," and is therefore compensable under the rule of Judson Mfg. Co. v. I. A. O., 181 Cal. 300, 302, 184 P. 1, and similar cases. The theory is based upon a false premise. The place where the injury occurred was leased by the employer, but it was not the place of employment at that time. The contract required the employee to work in Santa Rosa on every Monday, Wednesday, and Friday, and to work in Petaluma on every Tuesday, Thursday, and Saturday. On the days he was employed at Santa Rosa he had no duties to perform in Petaluma. The injury occurred on Monday. He had been permitted to keep his car in the garage at Petaluma as a matter of convenience to himself alone. He was therefore on the employer's premises at his own volition and for his own convenience, but his presence there was in no sense incidental to his employment.

Secondly, the respondents argue that, while the employee was working on his own car, he was merely making a slight "deviation from the strict course of his duty." Kruse v. White Bros., 81 Cal. App. 86, 253 P. 178, and cases from the reports of the commission are cited. Here again we have a false premise—that Kemper was employed in Petaluma at the time. Mention is made of the fact that before the injury he had swept the garage floor. It is not claimed that this was part of his duty—all the evidence is to the contrary. Since this act was for the benefit of the employer, Kemper might have been entitled to compensation if he had been injured in the performance of that act under the rule of the

cases cited. But this was not the fact, and the "deviation" rule cannot be extended to cover an injury incurred in the performance of a voluntary act for the sole convenience of the employee and which is not incidental to the employment.

Thirdly, it is argued that Kemper's car was in fact the employer's car because (1) the employer required him to use it in going and coming to and from work; (2) the employer offered to defray the expenses of gas and oil; and (3) Kemper used the car to go to repair trucks wrecked upon the road. This theory is based upon three false premises. The undisputed and only evidence shows that the employee was given free choice of transportation to and from work; that long prior to the injury the offer to defray expenses of gas and oil was withdrawn when the new contract of employment was made; that at the same time he was relieved of all duties to make repairs on the road another man was employed to make such repairs, and Kemper's salary was reduced from twenty-five to eighteen dollars a week for the services limited to the late afternoons in the two garages.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.



6 Cal.App.2d 88

PEOPLE v. WATSON.
Cr. 309.

District Court of Appeal, Fourth District,
California.
April 10, 1935.

Criminal law 1182

Where no appearance was made in behalf of defendant on appeal in criminal case, motion of Attorney General to affirm judgment was granted (Pen. Code, § 1253).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Eugene Watson was convicted on a charge of assault by means of force likely to do great bodily harm, and he appeals. On motion by the Attorney General to affirm the judgment.

Motion granted, and judgment affirmed.

Ohn N. Mackay, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant appealed from a judgment following his conviction on a charge of assault by means and force likely to do great bodily harm. The clerk's transcript and the reporter's transcript were filed in this court on February 28, 1935, and the cause was regularly placed on the calendar for April 9, 1935. No appearance has been made on behalf of the appellant either at the time set for oral argument or by brief. The Attorney General has moved to affirm the judgment under section 1253 of the Penal Code.

The motion is granted, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 273

CHASE v. SOUTHERN PAC. CO. et al.

Civ. 9044.

District Court of Appeal, Second District,
Division 1, California.

April 18, 1935.

Hearing Denied by Supreme Court
June 17, 1935.

1. Master and servant ☞389

Employer, who has paid or becomes obligated to pay workmen's compensation to, or to make expenditures for, employee for disability suffered in course of employment as result of negligence of third party, has rights of subrogation to amount of expenditures for compensation (St. 1927, p. 1213, § 26).

2. Master and servant ☞389

Employer having paid workmen's compensation to injured employee may exercise right of subrogation to employee's rights against third party causing injury by bringing independent suit, joining in action with injured employee, or applying to have allowed, as first lien against entire amount of any judgment for damages recovered by employee, the amount of employer's expenditures for compensation (St. 1927, p. 1213, § 26).

3. Master and servant ☞389

Employer having paid workmen's compensation to employee injured by negligence of third person does not have to sue or intervene in employee's suit against such third person to protect his right of subrogation, but it is sufficient if he files application for lien against judgment recovered by servant (St. 1927, p. 1213, § 26).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Hal Chase against Southern Pacific Company, in which Pacific Indemnity Company filed an application for a lien against any judgment which plaintiff might recover. Judgment for plaintiff, and, from an order denying a motion by Pacific Indemnity Company that its lien be allowed against the judgment, Pacific Indemnity Company appeals.

Reversed, with directions.

George L. Greer, of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

YORK, Justice.

On July 28, 1928, plaintiff and respondent filed complaint for damages for personal injuries against the defendant Southern Pacific Company. On November 16, 1928, defendant having theretofore answered, the Pacific Indemnity Company, appellant herein, filed an application in the action for a lien against any judgment, which respondent might recover, for sums already paid and expended and to be paid and expended by appellant to and for the benefit of respondent, pursuant to provisions of section 26 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213). Respondent at the time of his injury was employed by the Pioneer Paper Company, and appellant was the insurance carrier of respondent's employer. The action was tried in March, 1929, and judgment was entered in favor of respondent. Thereafter, on motion for new trial made by Southern Pacific Company, the said motion was denied on condition that respondent consent to a reduction of the judgment. Consent was given and the judgment was reduced.

During the trial of the action, appellant's application for a lien was offered in evidence, and respondent offered evidence of loss of time, past and future, as well as evidence of

special damages. The amount of the application for lien at the time of the trial was less than the total finally claimed, although the application recited that sums were to be paid and expended in the future, and appellant actually continued to pay and expend money to and for the benefit of respondent until April 15, 1929.

The judgment was appealed from by the Southern Pacific Company, and on February 24, 1932, the remittitur was received in the trial court affirming the judgment. On February 29, 1932, upon an ex parte application and order, appellant was allowed a lien against the judgment in the amount of \$856.03, being the full amount expended by appellant, pursuant to section 26 of the Workmen's Compensation, Insurance and Safety Act. On March 5, 1932, another department of the superior court ordered the Southern Pacific Company to pay to the clerk of the court the full amount of such judgment, and ordered the clerk to enter a satisfaction thereof. On March 29, the court ordered the clerk to hold the sum of \$856.03 for a period of three weeks pending a determination of the rights of appellant. Thereafter another order and stipulation were entered into, the effect of which was that the clerk should hold said sum of \$856.03 pending the determination by the court of a motion made by appellant that its lien be allowed. The motion subsequently was heard, and on July 30, 1932, it was denied. This appeal is from the order denying said motion.

It will be noted from the recitation of the facts that appellant filed its original application for a lien before trial; that it was received in evidence during the trial; and that after the appeal had been taken and the remittitur transmitted affirming the judgment had been filed in the trial court, and before satisfaction thereof, appellant, pursuant to ex parte application and order, was allowed its lien for the full amount thereof.

It is true, as respondent contends, that in the case of *Lidberg v. Leiter & Son*, 116 Cal. App. 312, 316, 2 P.(2d) 526, 528, the court says: "The law thus gives to the employer and to his insurance carrier a simple means of protection and, because of the necessity of segregating the lienable portion of the judgment or verdict from the unlienable, the proper time to assert such a lien is before the judgment or verdict is entered." The holding of the court in the *Lidberg* Case is contrary to that announced in the cases of *Jacobsen v. Ind. Acc. Com.*, 212 Cal. 440, 448, 299 P. 66, and *Ansbach v. Department of Ind. Relations*,

99 Cal. App. 677, 279 P. 224. Both the latter cases hold that the application may be filed at any time prior to satisfaction of judgment. This discrepancy was disposed of in the recent case of *Dighton v. Martin* (Cal. App.) 41 P.(2d) 197, 199, where we say:

"That confusion existed prior to the 1931 amendment as to the manner in which the rights of employer and employee were to be protected, and particularly as to the manner of subjecting a judgment recovered by an employee to the lien of an employer, is indicated by the court in the *Jacobsen* Case, where it is said: 'It is, indeed, unfortunate that the statute does not in more detail provide the procedure for such segregation, but the lack of procedure does not necessarily defeat the power of the court to exercise its functions thereunder.' *Jacobsen v. Industrial Accident Com.*, supra, 212 Cal. 440, page 449, 299 P. 66, 69.

"Whereas the *Jacobsen* and the *Ansbach* Cases hold that an application for a lien may be made at any time before satisfaction of judgment, the court in the case of *Lidberg v. E. T. Leiter & Son*, 116 Cal. App. 312, p. 316, 2 P.(2d) 526, 528, says: 'It will be noted that the rights of the employer as to past expenditures were fully protected in the *Jacobsen* Case by its assertion of a lien for that purpose prior to judgment. The law thus gives to the employer and to his insurance carrier a simple means of protection and because of the necessity of segregating the lienable portion of the judgment or verdict from the unlienable, the proper time to assert such a lien is before the judgment or verdict is entered.'"

[1, 2] Furthermore, the application in this case was filed before entry of the judgment. The fact that such application was not complete because of liability on the part of appellant for future payments and expenditures does not mean that it cannot be completed subsequently, or, if still incomplete at the time judgment is about to be satisfied, that a court cannot estimate and allow for future payments and expenditures. As stated in the *Dighton* Case, supra, 41 P.(2d) 197, 198:

"Under the provisions of section 26 of the Workmen's Compensation Act, as amended in 1931 [St. 1931, p. 2370], an employer, who has paid, or become obligated to pay, compensation to, or to make expenditures for, an employee for disability suffered in the course of employment as a result of the negligence of a third party, has rights of subrogation to the 'amount of the employer's expenditures for compensation,' which the employer may exercise in any one of three ways. He may

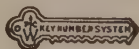
bring an independent suit, he may join in an action with the injured employee, or, 'if the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court shall, on application of the employer, allow as a first lien against the entire amount of any judgment for any damages recovered by the employee the amount of the employer's expenditures for compensation. * * *

"The act does not specifically indicate when an application for a lien against the judgment must be filed in the event that method of subrogation is elected, although the language of section 26, immediately succeeding that which has been quoted, suggests that such an application may be filed at any time before satisfaction of judgment, and it has been so held. *Jacobsen v. Industrial Acc. Com.*, 212 Cal. 440, 448, 299 P. 66."

[3] The employer had the same remedies prior to the 1931 amendment, and he did not have to sue or intervene in the suit to protect his lien, as respondent urges. It was and is sufficient if such employer files an application for a lien. No complaint is made that the items claimed and which make up the total of \$856.03 were not paid and expended in accordance with and pursuant to section 26 of the Workmen's Compensation Act.

The order is reversed, with directions to the trial court to grant appellant's motion for a lien against the judgment to the amount of \$856.03.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 83

SKIDMORE v. DAMBACHER.

Civ. 5177.

District Court of Appeal, Third District,
California.

April 10, 1935.

1. Counties ☞113(6)

Contracts with third person to furnish county with information as to tax delinquencies held valid as against objection that requirement that third person search tax records and report sales of property for delinquent taxes and redemption therefrom includ-

ed duties imposed by statute upon county officers.

2. Counties ☞122(1)

Contracts with third person to furnish county with report as to tax delinquencies held not void for failure to fix third person's compensation, where contracts provided he should receive 50 per cent. of money received by county from redemption of sales of properties included in report (Pol. Code, § 4041c).

3. Counties ☞122(1)

Contracts with third person to furnish county with report as to tax delinquencies held not void for failure to specify time within which contracts were to be performed, where contracts did not provide for continuous employment but for performance of the job as a whole, and time employed in completing job would not affect third person's compensation (Pol. Code § 4041c).

4. Contracts ☞212(2)

Where contract to perform specified job as a whole does not specify time within which job is to be performed, and compensation for job is not affected by time employed thereon, reasonable time is allowed for performance (Pol. Code, § 4041c).

5. Counties ☞126

Under contracts fixing compensation of person furnishing county with report on tax delinquencies at 50 per cent. of money received by county from and after date of contracts from redemption of sales of properties included in report, person furnishing report held entitled to compensation, although some of information contained in report might have been previously known to county officers.

Petition by C. E. Skidmore against C. A. Dambacher, substituted for Edward L. Gorgas, as County Auditor of the County of Tuolumne, for writ of mandate to compel the County Auditor to audit a claim and issue his warrant therefor.

Writ granted.

Frank L. Guereña, of San Francisco, for petitioner.

C. H. Grayson, Dist. Atty., of Sonora, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Upon rehearing of this proceeding a stipulation of facts was filed, which was therefore inadvertently omitted from the record. By consent a second stipulation of facts was also filed upon rehearing. The

agreed facts which are conceded by these stipulations necessarily change the former determination of this court, which was based chiefly on the lack of proof that the county of Tuolumne possessed the funds with which to satisfy the claim of the petitioner.

This is a petition for a writ of mandamus to compel the auditor of Tuolumne county to audit a claim and issue his warrant therefor in payment of services which were performed pursuant to two written contracts with the board of supervisors of that county.

The petitioner alleges that on December 7, 1931, he entered into an agreement with the county of Tuolumne upon the terms and conditions expressed in a resolution which was duly passed by the board of supervisors as follows:

"Be It Resolved, that C. E. Skidmore be and he is hereby authorized to check the tax records of Tuolumne County, California, of property on which the taxes were first delinquent for the fiscal year 1925-1926 or are delinquent for prior years, which do not show redemption, cancellation, or sale by the state, on deeds or certificates of sale; said party shall also submit reports covering all such delinquencies, together with recommendation as to further disposition of the same and shall submit lists upon which requests for authorization from the State Comptroller may be made to advertise and sell as provided for by Section 3897 of the Political Code of the State of California.

"Said County of Tuolumne will pay said C. E. Skidmore for such services an amount equal to fifty per cent (50%) of the County of Tuolumne's portion of all moneys received by the said County of Tuolumne from and after this date for redemption or sale of said property above referred to, payments thereof to be made at the regular monthly meeting of the board for the allowance of claims upon the statement of the County Auditor showing the amount paid in on redemptions and sales of property covered by this contract, subsequent to the last payment thereon; the final payment thereof to be made to said C. E. Skidmore when he has furnished an affidavit setting forth that he has checked, or caused to be checked, the records of the United States Land Office, the State Surveyor's office, the State Controller's Office, County Auditor's office and County Recorder's office of the County of Tuolumne to the extent necessary for a complete performance of the things required to be done and performed by him under this resolution, and has also submitted to the Board of Supervisors

of Tuolumne County his report and recommendations as hereinabove provided.

"Dated: December 7, 1931."

On May 6, 1930, the petitioner entered into a similar contract with Tuolumne county, evidenced by a resolution of the board of supervisors in substantially the same language which is employed in the preceding quoted resolution.

The petition alleges that pursuant to these contracts the stipulated services were fully performed by checking the tax records of that county, together with the records of the United States Land Office, the state surveyor's office, and the state controller's office, for the years specified, and by reporting to the board of supervisors the dates and amounts of all delinquent taxes, together with descriptions of the properties involved, the dates of redemptions from sales, and the amounts of taxes subsequently paid thereon.

Paragraph VII of the petition alleges that on January 12, 1933, a verified claim for the sum of \$4,667.31, for services performed pursuant to the contracts heretofore mentioned, was presented to and allowed by the board of supervisors, but that the respondent refuses to audit or draw his warrant upon the county funds in payment of the claim. Paragraph IX of the petition alleges that "said county has moneys available for the payment of said claim and demand with which said warrant may be paid."

The answer admits the material allegations of the petition, but denies that the county of Tuolumne has money available with which to pay the claim.

The issue thus raised by the pleadings with respect to the ability of the county of Tuolumne to pay the claim of petitioner is settled by both stipulations of facts which were filed upon the rehearing of this proceeding. The original stipulation is in the following language: "It is hereby stipulated by and between the parties to the above entitled proceeding that all of the facts alleged in the petition for the peremptory writ of mandate on file herein are true, and that only issues of law involving those facts are presented and submitted to the above entitled court by the parties thereto."

It must therefore be assumed from the preceding stipulation of facts that the alleged contracts were duly executed; that the services were performed in the exact manner and form related; that the claim for services was duly presented and allowed by

the board of supervisors; and that the county has ample funds with which to pay the demand of petitioner.

[1] The respondent contends that the supervisors were without authority to make the contracts in question for the reason that the services of petitioner to search the records and report the sales of property for delinquent taxes and the redemption therefrom are duties which are imposed by statute upon the county officers. In a similar proceeding for a writ of mandamus involving the construction of a contract for like services under almost the same circumstances which are contained in this case it was held that "it cannot be doubted that the board of supervisors had the power to obtain such information as was reasonably essential to a proper discharge of these functions, even to the extent of contracting for the furnishing thereof at the expense of the county," and that the statutes do not "enjoin upon certain county officers the duty to make reports which would furnish some of the required information." *Skidmore v. West*, 186 Cal. 212, 218, 199 P. 497, 500. The court there said in regard to the last proposition mentioned: "It seems to us an undue strain of any of the sections to which reference is made * * * to find therein authority for the proposition that in contracting for the work called for, the supervisors included work within the scope of the lawful duty of any county officer to perform."

We find nothing in the cases of *Jones v. Sturzenberg*, 59 Cal. App. 350, 210 P. 835, and *Laist v. Nichols*, 139 Cal. App. 202, 33 P.(2d) 866, upon which the respondent in this case relies, in conflict with the decision of the *Skidmore Case*, supra, except the reference in the *Jones Case*, supra, to the *Skidmore Case*, in which the court inadvertently quoted from the original opinion of the Supreme Court in the last-mentioned case (59 Cal. Dec. 494), which decision was subsequently reversed upon rehearing in that court. Upon the authority of *Skidmore v. West*, 186 Cal. 212, 199 P. 497, we are of the opinion the contracts which are involved in this proceeding are valid and binding, and that they do not include the due performance of services on the part of the petitioner which the statute imposes upon the county officer.

[2-4] The respondent asserts that the contracts in question are void for the reasons that they violate the provisions of section 4041c of the Political Code as it then existed in failing to "fix the amount of compensation"

of the petitioner, and because "the period of time for which assistance is allowed" was not limited by the terms of the agreements. These contentions are without merit. The compensation is adequately fixed by the contracts at 50 per cent. of the money received by the county of Tuolumne from the redemption of sales of properties included within the report of the petitioner as required by the terms of the contracts. We are of the opinion the contracts are not void for failure to specify the time within which the contracts are to be performed for the reason that the petitioner was not employed on a salary, but, on the contrary, he was hired to secure specific information. The time employed in fulfilling the contracts does not affect the amount of his compensation. This case depends upon contracts to perform a specified job as a whole, and not upon continuous employment. Under the circumstances of this case, where the contracts do not specify the time within which the services are to be performed, the law allows a reasonable time in which to do so. 6 Cal. Jur. p. 346, § 207. There is no contention in this case that the services were not performed within a reasonable time. Time was not of the essence of the contracts.

[5] Finally the respondent asserts that the contracts do not contemplate the payment to petitioner of compensation for services which merely furnished information of delinquencies which existed prior to the execution of the contracts, which knowledge the county auditor would be deemed to have already possessed. We are of the opinion the contracts may not be reasonably so construed. The contracts clearly state that the petitioner is to be paid 50 per cent. of the county's share of "all moneys received by the said County of Tuolumne from and after this date for redemption or sale of said property." The contracts contain no limitation of liability to original information not possessed by any of the county officers. Moreover, the contracts call for services to be performed other than the mere information that delinquencies have occurred. The petitioner is required to check the tax records of the county, and also the records of the United States Land Office, the state controller's office, the county auditor's office, the county recorder's office, and "submit to the Board of Supervisors of Tuolumne County his report and recommendations" regarding the procedure and advisability of collecting the money. We are therefore of the opinion the petitioner is entitled to his compensation for

services performed even though some of the information which he secures may have been previously known to the county officers.

The petition is granted. Let the peremptory writ of mandamus issue as prayed for.

We concur: **PULLEN, P. J.; PLUMMER, J.**



6 Cal.App.2d 264

FAIRBAIRN v. EATON et al.

Civ. 1708.

District Court of Appeal, Fourth District,
California.

April 17, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Courts ⇨188(7)

Recorded assignments of parts of lessee's oil royalty, if valid, conveyed interest in "real property," and would remain cloud on title if assignees, claiming fraud, recovered judgment against assignors for money only, as regards necessity of equitable relief by way of rescission within jurisdiction of superior court rather than municipal court.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

2. Action ⇨38(1)

Complaint seeking to rescind assignments of parts of oil royalty because of assignors' fraud, and alleging that royalty assignments were issued without authority and contrary to permit of Commissioner of Corporations held to disclose erroneous attempt to commingle separate causes of action in single count (St. 1917, p. 673, as amended).

3. Courts ⇨188(3)

Complaint seeking to rescind assignments of parts of oil royalty because of assignors' fraud held not to state cause of action for recovery of money only, and hence was within jurisdiction of superior court rather than municipal court, and therefore general demurrer should have been overruled, since superior court was not divested of jurisdiction by erroneous inclusion within each count of allegations setting up separate cause of action which might or might not have been within superior court's jurisdiction.

4. Pleading ⇨236(1)

Amendments to pleading should be allowed with great liberality, so that meritorious cause of action or defense may not be defeated by technicalities.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmunds, Judge.

Action by F. C. Fairbairn against Claude S. Eaton and another, individually and as partners in trade and doing business as such under the fictitious firm name and style of the Eaton-Ford Oil Securities Company. From a judgment of dismissal, plaintiff appeals.

Reversed, with instructions.

Avery M. Blount, of Los Angeles, for appellant.

R. Dechter, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment of dismissal after a demurrer to the second amended complaint was sustained without leave to amend. The demurrer raised two objections to the sufficiency of this pleading, which we will hereafter refer to as the complaint, that neither it nor its several counts stated facts sufficient to constitute a cause of action against Claude S. Eaton, the demurring defendant, and that the court had no jurisdiction of the subject-matter attempted to be stated in the complaint or its counts. The trial court sustained the demurrer on the second ground and refused the request of plaintiff for leave to further amend the pleading.

This case was first appealed to the District Court of Appeal of the Second Appellate District. It was transferred to the Supreme Court because of the belief that jurisdiction of the appeal rested there. The Supreme Court transferred the case to this court for decision for "good cause."

We have examined the pleading, and while it is obvious that it is open to attack on various grounds of special demurrer, we have reached the conclusion that it is not so wholly lacking in its allegations of facts that a general demurrer should be sustained without leave to amend some of its carelessly drawn paragraphs. We will, therefore, devote ourselves to a consideration of whether the superior court of Los Angeles county, or the municipal court of the city of Los Angeles, had jurisdiction of the subject-matter of the action. This will involve a determination of the question of whether the action was one for the rescission of contracts and the recovery of money paid under them and within the equity jurisdiction of the superior court, or one at law for the recovery of \$1,250, paid by plaintiff and his assignors to defendants,

and within the jurisdiction of the municipal court of Los Angeles. The judgment of dismissal was entered before the effective date of the recent amendment to section 89 of the Code of Civil Procedure under which the municipal court would have had jurisdiction of the action in either event. St. 1933, c. 743 (page 1811, § 13, adding section 89).

The complaint contains five separate causes of action which, for the purposes of this appeal, may be considered identical in their material allegations. We will confine ourselves to a summary of the allegations of the first cause of action. It is there alleged that Claude S. Eaton and Robert Lee Ford were partners doing business under the firm name of Eaton-Ford Oil Securities Company; that on or about October 20, 1930, defendants entered into an oral contract to sell to plaintiff and Mary Fairbairn, his wife and assignor, one-half of 1 per cent. of all oil, gas, and other hydrocarbon substances produced, saved, and sold under an oil lease on certain described property, subject to a charge of \$4 per month for maintenance and operating expenses; that plaintiff and his wife paid defendants \$500, and received a written "royalty assignment" purporting to convey to them such interest in the petroleum and its products; that the royalty assignment was duly recorded in the official records of Los Angeles county; that the royalty assignment was a security within the meaning of that term as used in the Corporate Securities Act (St. 1917, p. 673, as amended), and was issued and sold without permission of the Commissioner of Corporations and contrary to the terms of a permit issued by him; that Eaton made various false and fraudulent representations which were believed and relied upon by plaintiff and his assignor and which induced them to purchase the royalty interest and pay defendants \$500; that promptly upon learning of the fraud plaintiff offered to rescind the contract, and notified defendants in writing of such desire to rescind, and demanded a return of the money paid them; that the offer and demand were refused; that plaintiff is willing to reassign the royalty assigned under the royalty assignment and "do and perform such other acts as may be required of plaintiff in order to place the said defendants and each of them in status quo." The prayer of the complaint asked for the following relief: A rescission of all of the contracts of sale and a decree requiring defendants to accept a return of the oil interests and royalty assignments; judgments for the various amounts paid defend-

ants by plaintiff and his assignor, which total the sum of \$1,250 and accrued interest; that the court restore the parties "to their respective positions of status quo by returning to the defendants all of the said pretended royalty assignments herein set forth and described and to require the defendants to pay to the plaintiff the consideration paid therefor. * * *

Respondents suggest there is a sharp conflict of authorities in California on the question presented by this appeal. Among others they cite *Jensen v. Harry H. Culver & Co.*, 127 Cal. App. (Supp.) 783, 15 P.(2d) 907, 908; *Culver & Co. v. Superior Court*, 129 Cal. App. 589, 19 P.(2d) 43, and *Philpott v. Superior Court*, 1 Cal. (2d) 512, 36 P.(2d) 635, 95 A. L. R. 990, as supporting their position, and *Ingalls v. Superior Court*, 121 Cal. App. 453, 9 P.(2d) 266; *Fair View Farms v. Superior Court*, 123 Cal. App. 9, 10 P.(2d) 1011, 1012, and *Stone v. Superior Court*, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743, as supporting the position of plaintiff. (Petitions for hearings by the Supreme Court were denied in the *Ingalls* and *Fair View Farms* Cases.)

We have studied these and other cases and have examined the Supreme Court record in the *Philpott* Case and can find no material and necessary conflict in the decisions. Their distinction lies in the relief sought. In the first three cases the plaintiffs simply sought recovery of the money out of which they had been defrauded. The courts deciding them were agreed that as no relief was sought other than money judgments the actions were at law and within the jurisdiction of the municipal courts. In the *Ingalls* and *Fair View Farms* Company Cases the plaintiffs sought rescission of contracts on the grounds of fraud and deceit, sought decrees canceling and rescinding the contracts and judgments for a return of the money paid. It was held that the actions were for rescissions of contracts which invoked the aid of equity, and that jurisdiction of the cases lay in the superior court and not in the municipal court.

The distinction we have just made is recognized in the case of *Jensen v. Harry H. Culver & Co.*, supra, where it is said: "There can be no doubt that one having a right to rescind need not turn to the courts to have the rescission accomplished; he may effect it by his own action. *Prewitt v. Sunnymead Orchard Co.* (1922) 189 Cal. 723, 209 P. 995; *McNeese v. McNeese* (1923) 190 Cal. 402, 213 P. 36; *Maxwell v. Jimeno* (1928) 89 Cal. App. 612, 265 P. 885, and *Ito v. Watanabe* (1931) 213 Cal. 487, 2 P.(2d) 799. The reluctant re-

sponse of him as to whom the contract was rescinded may require the help of a court to secure to him, who rescinded, the relief to which he has become entitled. This relief may be such that only a court of equity can furnish it. For examples, see *Mesenburg v. Dunn* (1899) 125 Cal. 222, 57 P. 887, and *Rocha v. Rocha* (1925) 197 Cal. 396, 240 P. 1010."

[1] In the instant case, the plaintiff and his assignors received written assignments of fractional parts of the lessee's oil royalty. These assignments were recorded. If valid, they conveyed an interest in real property to the assignees. *Callahan v. Martin* (Cal. Sup.) 43 P.(2d) 788. It is obvious that a judgment for money only would not restore the parties to the positions they occupied before the assignments were executed, as there would remain a cloud on the title to the leased property.

In the case of *Fair View Farms v. Superior Court*, supra, the precise question we are considering was before the court. In reaching the conclusion that the action was equitable and within the jurisdiction of the superior court, it was said: "Petitioners' position here is that rescission is complete upon the giving of notice, and that there then arises an obligation implied by law to return the money paid under the rescinded contract; that this implied obligation to return the money is enforceable in an action at law, as contradistinguished from equity. That the complaint in the action here involved states a cause of action for rescission and seeks equitable relief there can be no question. The granting of a money judgment alone, without the cancellation of the outstanding contract, would have afforded plaintiff but an incomplete and inadequate remedy, under the circumstances."

[2] Defendants urge that as the complaint alleges that the royalty assignments were issued without the authority and contrary to the permit of the Commissioner of Corporations the entire transactions were void, rescissions could not be had, and the actions must be only for a return of the money paid. It is true that the complaint does contain such allegations in each count. We construe them as an erroneous attempt to commingle two separate causes of action in a single count. No demurrer was interposed to reach this defect.

[3] It has been held that defendants may not demur generally to part of a cause of ac-

tion. *Reed v. Drafs*, 67 Cal. 491, 8 P. 20. It has also been held that where a portion of a complaint states a cause of action a general demurrer should be overruled. *Jones v. Iverson*, 131 Cal. 101, 63 P. 135. The same should be true where the question of jurisdiction is raised by demurrer. We are of the opinion that as each count of the complaint pleads a cause of action for rescission which fell within the jurisdiction of the superior court at the time the judgment was rendered, that court was not divested of jurisdiction by the erroneous inclusion within each count of the complaint of allegations which might set up another cause of action which might or might not have been within the jurisdiction of that court. It is not necessary to decide this last question.

[4] Amendments to pleadings should be allowed with great liberality so that justice may be done and a meritorious cause of action or defense be not defeated by the technicalities of the law. *Burns v. Scooffy*, 98 Cal. 271, 33 P. 86.

The judgment is reversed, with instructions to the trial court to overrule the demurrer and permit plaintiff to amend his complaint and allow defendants time within which to plead to the amended pleading.

We concur: BARNARD, P. J.; JENNINGS, J.



6 Cal.App.2d Supp. 763
PEOPLE v. SACKETT et al.

Cr. 1169.

Appellate Department, Superior Court, Los Angeles County. California.

April 13, 1935.

I. Automobiles 59

Ordinance requiring permit for operation of interurban motor carriers of persons and property and requiring permittees to obtain public liability insurance and file bond for prompt payment of collections on C. O. D. shipments held invalid as attempting to regulate matters which are not local or municipal, and which have been placed by statute within control of Railroad Commission (General Laws 1931, Act 5129, § 4; Act 6386, §§ 2 (dd), 2¼, 50¼; Const. art. 12, § 23).

2. Municipal corporations Ⓒ590

Constitution reserving in municipalities powers of control over public utilities regarding local, police, sanitary, and other regulations vested in municipalities *held* to create no powers greater than those previously possessed by municipalities concerning control of public utilities (Const. art. 12, § 23).

3. Automobiles Ⓒ73

Ordinance requiring permits as to motor carriers which operate between points, one or more of which are within and one or more of which are without city, and which do not on same continuous run receive and discharge passengers or freight within city, *held void* as unreasonably discriminatory (Const. art. 1, § 21).

Appeal from Municipal Court, Los Angeles County; Arthur Crum, Judge.

J. P. Sackett and others were convicted of violating a city ordinance requiring permits for the operation of interurban stages, and they appeal.

Reversed and remanded, with direction.

C. P. Von Herzen, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and W. Jos. McFarland and Albert E. Forster, Deputy City Attys., all of Los Angeles, for the People.

SCHAUER, Judge pro tem.

Defendants severally appeal from judgments of conviction of violation of section 2 of Ordinance No. 71,485 of the city of Los Angeles, contending, among other things, that such ordinance is violative of constitutional limitations and beyond the power of a municipality to make or enforce.

[1] Such ordinance declares it to "be unlawful for any owner to operate or cause to be operated, any interurban stage without first having obtained (from the Board of Public Utilities and Transportation of the City of Los Angeles) a permit in writing * * * so to do." The term "interurban stage" is so defined as to include motor carriers of either persons or property who use the streets of Los Angeles in carrying on a public transportation business between points one or more of which are within, and one or more without, the limits of said city. Before a permit is issued it requires that the owner file with the board, and thereafter keep in full force and effect, "a bond or policy of in-

surance in such form as said board may deem proper * * * Insuring the public against loss by reason of damage that may result to any person or property from the operation of" his interurban vehicles and a further bond in the sum of \$2,500 "payable to the Board * * * for the use and benefit of any interested person * * *," conditioned upon the prompt payment to the shipper of collections made on C. O. D. shipments.

We think that such matters so attempted to be regulated by the ordinance are not local or municipal. The regulations imposed are not upon the use of the city streets as is contended, but upon the conduct of a business irrespective of the use of streets, except as such use is incidental to entry into or departure from the city in the carrying on of the business sought to be regulated; the bonds required are not limited for the protection of pedestrians, property owners, or shippers within, or shipments or collections originating or terminating within the corporate limits of the city of Los Angeles. The bonds so required would apply alike to business of the carrier throughout the state or elsewhere. "While the use of the streets may be regulated, the city has no power to convert them into toll roads, and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways." In re Smith, 33 Cal. App. 161, 164, 164 P. 618, 619.

[2] The provision in section 23, art. 12 of the Constitution for the reservation in municipal councils, until a vote to the contrary by the electors, of "such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city * * * as, at an election to be held pursuant to law, a majority of the qualified electors of such city, * * * voting thereon, shall vote to retain" is obviously not creative in the governing boards of municipalities of powers any greater than those theretofore possessed by them relative to the control of public utilities. Said section 23 provides generally that: "The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, * * * as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.

From and after the passage by the Legislature of laws conferring powers upon the railroad commission, respecting public utilities, all powers respecting such public utilities vested in * * * municipal councils, or other governing bodies of the several * * * cities * * * shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; provided, however, that this section shall not affect" the reservation hereinabove noted, to wit, "powers of control" of a "local" nature which were then and had been theretofore "vested in any city and county or incorporated city or town."

By the enactment of the so-called Auto Stage and Truck Transportation Act (Stats. 1917, p. 330, as amended; Deering's Gen. Laws 1931, vol. 2, p. 2534, Act 5129), the Railroad Commission was expressly "vested with power and authority to supervise and regulate every transportation company in this state; * * * to regulate the accounts, service and safety of operations of each such transportation company; * * * and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public." Section 4, above cited act. The term "transportation company" as used therein is defined to include public carriers of property by autotruck over regular routes not exclusively within a single city. The defendant comes within this definition. It may be remarked, however, that our conclusions would be the same if the defendant were a public carrier of passengers as by section 21½ of the Public Utilities Act (Act 6386, Deering's Gen. Laws, 1931, vol. 2, p. 3523) public carriers of passengers, for compensation, over regular routes, are declared to be common carriers and by subdivision (dd), § 2, every common carrier is included within the definition of "public utility" and hence made subject to the powers of the commission as stated generally throughout

that act and with particularity as to "passenger stage corporations" in section 50¼ thereof.

Thus, it appears that the Legislature has acted pursuant to the right given it by said section 23 of article 12, Const., and has conferred upon the Railroad Commission full jurisdiction over common carriers of passengers and property. The city of Los Angeles therefore had no right to pass, and has no power to enforce, the ordinance in question, unless the "regulation" thereof be "local" and the power thereunto be "vested." As heretofore suggested, we think that the subject of the legislation in this case was not local, and that the city never possessed the power of statewide regulation of a transportation business whose use of the streets of the city of Los Angeles, like those of every municipality through which its vehicles passed, was merely incidental to the carrying on of a business which by definition of the ordinance itself is exclusively nonlocal.

[3] It might also be mentioned that even if this ordinance could be otherwise sustained it apparently would have to fall as obnoxious to the provisions of section 21, art. 1, Const. Its regulatory provisions are made applicable only to those transportation companies "which operate between points, stations or depots, one or more of which are within and one or more of which are without said city; and which do not, on the same continuous run, receive and discharge passengers or freight within said city." For the type of regulation attempted by this ordinance we see no reasonable ground for such discrimination. The ordinance therefore is void for reasons similar to those expressed in *Re Blois*, 179 Cal. 291, 176 P. 449.

The judgments are reversed, and the causes united in this appeal are remanded to the municipal court, which is directed to dismiss the actions.

We concur: SHAW, P. J.; FOX, J.



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3 Cal.2d 167

BOWRING v. DOMINGUEZ, City Clerk, et al.
S. F. 15413.

Supreme Court of California.

April 16, 1935.

Elections ⚡126(7)**Judges** ⚡4

Nominee for office of municipal judge who had not been admitted to practice for five years preceding date of election held ineligible, and person who received next highest vote in primary was candidate, notwithstanding fact that nominee's five-year period of practice expired before commencement of his term, in view of constitutional provision making five years' practice immediately preceding election condition to eligibility (Const. art. 6, § 23).

In Bank.

Original proceedings in mandate by Lynden Bowring against Robert Dominguez, as City Clerk of the City of Los Angeles, and others.

Peremptory writ issued.

Rush & Beirne, Bernard Potter, Jarvis R. Wilder, and Lynden Bowring, all of Los Angeles, for petitioner.

W. C. Dalzell, of Los Angeles, for respondent D. F. McCloskey.

Ray L. Chesebro, City Atty., and Leon T. David, Asst. City Atty., both of Los Angeles, for respondents.

CURTIS, Justice.

Proceedings in mandate against the city council and city clerk of the city of Los Angeles. The practical effect of granting the petition would be to declare that the petitioner was nominated at the recent primary election as a candidate for the office of municipal judge of said city, being office No. 10, instead of the respondent Delamere Francis McCloskey. Said respondent and petitioner, together with Joseph Marchetti and four others, were candidates for said office No. 10, with the result that Joseph Marchetti received the highest number of votes cast for said office, said Delamere Francis McCloskey received the next highest number of votes cast for said office, and petitioner received the third highest number of votes cast for said office. There is practically no dispute as to the material facts involved in this proceeding. The primary election at which said parties were candidates for nomination to said office No. 10 was held on the 2d day of

April, 1935. The municipal election to elect an incumbent for said office No. 10 will be held on May 7, 1935. The term of the successful candidate at said election will commence on July 1, 1935. Respondent McCloskey was admitted to practice before the Supreme Court of this state on the 3d day of June, 1930, and not before. McCloskey on the day of said election will not have been admitted to practice before the Supreme Court of this state for a period of five years immediately preceding said day of election. The Constitution of the state provides that no person shall be eligible to the office of "a judge of * * * a municipal court, unless he shall have been admitted to practice before the supreme court of the State for a period of at least five years immediately preceding his election or appointment to such office." Section 23, art. 6, of the Constitution.

Petitioner therefore contends that respondent McCloskey is ineligible to said office and that under the city charter of said city, section 333, petitioner, having received the next highest number of votes cast for said office is the legally nominated candidate for said office in the place of McCloskey. Said section reads as follows: "In the event of the death, resignation or other disqualification of any candidate nominated at a primary nominating election for any office, such resignation being duly sworn to and filed with the City Clerk, the person who received the highest vote of those who were candidates for such office, other than the candidates who were nominated therefor at the primary nominating election, shall be deemed a candidate and, if practicable, his name shall be printed upon the ballot to be used at the general municipal election, with the same force and effect as if such person had been nominated therefor as hereinbefore provided."

There can be no question under the provisions of this section of the charter that petitioner was nominated at said primary election for said office, and that he is entitled to have his name printed upon the ballots to be used at said general election if respondent McCloskey is ineligible to said office.

His eligibility to said office depends entirely upon the construction and meaning to be given to section 23 of article 6 of the Constitution referred to above. In clear and explicit terms this section provides that no person shall be eligible to the office of judge of the municipal court unless he shall have been admitted to practice before the Supreme

Court of the state for a period of at least five years immediately preceding his election. There can be no mistaking the meaning of the language of this section. It expressly requires that a candidate for the office of municipal judge shall have been admitted to practice law at least five years immediately preceding his election to said office. Under the plain and clear meaning of this section of the Constitution, we are compelled to hold that respondent McCloskey is ineligible to said office and would be disqualified from holding said office if elected thereto at the general election to be held on May 7th next.

Respondent McCloskey, however, contends that under this section of the Constitution, it is sufficient if the elected candidate has been admitted to practice for the required five years before the commencement of the term of office to which he is elected. A number of authorities are cited in support of this contention. Most of these are from foreign jurisdictions, but even they, when carefully analyzed, fail to support the position of respondent McCloskey. *Ward v. Crowell*, 142 Cal. 587, 76 P. 491, is the sole California case cited by said respondent. It involved the right of the defendant therein to hold the office of county surveyor of San Diego county. It was contended that he was ineligible to hold the office because he did not at the time of his election hold a licensed land surveyor's certificate, although he received such a certificate before his term of office commenced. In discussing defendant's right to the office the court said (142 Cal. page 589, 76 P. 491, 492): "However, in section 135 of the county government act (page 489) it is provided that 'the county surveyor must be a licensed land surveyor of the state, and must make any survey that may be required by the court,' etc., and upon this provision the contention is based that appellant could not legally hold the office, because at the time of his election he was not a licensed land surveyor. It will be observed that in this provision there is no reference to the time of the election of the county surveyor in office, or to his qualifications at that time, as there is in the provision above quoted relating to a district attorney, and as there is to other officers in other provisions of the law. It refers merely to a county surveyor, and means only that one not having the certificate cannot hold the office. There is a great deal of discussion in the briefs about the meaning of the word 'eligible,' but that word is not used at all in the provision in question." It is apparent from this statement in that case that there was no requirement that a person

before his election to the office of county surveyor should hold the certificate in question. The court therefore held that it was sufficient in order for him to legally hold the office after his election that he receive such a certificate before his term of office commenced. In the instant proceeding, the requirement of the Constitution is that at the time of his election, a person to be eligible to the office of a municipal judge shall have been admitted to practice for a period of five years. The cited cases from foreign jurisdictions are no more in point than the case of *Ward v. Crowell*, supra. None of these authorities justifies us in departing from the plain and explicit language of the Constitution as set forth in section 23 of article 6 thereof.

In the leading case of *Searcy v. Grow*, 15 Cal. 117, the right of the defendant therein to hold the office of sheriff to which he had been elected was involved. At the time of his election he held the position of postmaster of the city of Yreka, and the Constitution provided that: "No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit, under this State." Const. 1849, art. 4, § 21. At the time of his qualification as sheriff said defendant resigned as postmaster. In holding that defendant was ineligible to hold said office the court said (15 Cal. page 120): "The counsel for the appellant contends that the true meaning of the Constitution, is that the person holding the Federal office described in the twenty-first section is forbidden to take a civil State office while so holding the other; but that he is capable of receiving votes cast for him, so as to give him a right to take the State office upon or after resigning the Federal office. But we think the plain meaning of the words quoted is the opposite of this construction. The language is not that the Federal officer shall not hold a State office while he is such Federal officer, but that he shall not, while in such Federal office, be eligible to the State office. We understand the word eligible to mean capable of being chosen--the subject of selection or choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from their designation of him as Sheriff. But they could not designate or choose a man not eligible, i. e., not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give. We do not see how the fact

that he became capable of taking the office, after they had exhausted their power, can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed." The case of *Searcy v. Grow*, supra, is cited with approval by this court in *Sheehan v. Scott*, 145 Cal. 684, 686, 79 P. 350; *Ward v. Crowell*, 142 Cal. 587, 589, 76 P. 491, and *Walther v. Rabolt*, 30 Cal. 185.

We are, therefore, unable to agree with respondent McCloskey that under the provisions of section 23 of article 6 of the Constitution a person is eligible to the office of municipal judge if admitted to practice five years before the commencement of the term of office to which he was elected, although he has not been admitted to practice for a period of five years before his election. This section of the Constitution says nothing about the beginning of the term of office, but explicitly makes the time of his election the time when he must possess the qualifications necessary to make him eligible to the office.

A number of other questions are raised by respondent McCloskey, but in our opinion they are without any substantial merit, and a discussion of them would not serve any useful purpose.

From the foregoing, we conclude that respondent McCloskey is ineligible to the office of municipal judge No. 10 of the city of Los Angeles, and was so disqualified at the date of said primary election. We further conclude that petitioner, under the charter of said city and under the facts recited herein, was legally nominated for said office and is entitled to have his name printed on the sample and official ballots to be used in connection with the general municipal election to be held on May 7, 1935.

The respondents other than respondent McCloskey filed an answer and return to the alternative writ. The respondent filed a motion to strike out portions of the petition and a demurrer and an answer to the petition. The answers raise no issue of fact material to the rights of any of the parties to this proceeding. The motion to strike is denied, and the demurrer of respondent McCloskey is overruled.

Let the peremptory writ issue as prayed for immediately upon the filing of this decision.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

PRESTON, Justice.

I concur in the judgment but doubt the soundness of the doctrine of the case of *Searcy v. Grow*, 15 Cal. 117.



3 Cal.2d 269

PEOPLE v. RAMOS.
Cr. 3817.

Supreme Court of California.
April 19, 1935.

1. Criminal law ⇨400(3)

Admission of parol testimony of police officers from memory as to statements made by accused shortly after arrest and some days later held not error, where transcript of statement was in existence and could have been produced on demand by defense to inspect or controvert testimony.

2. Criminal law ⇨1166½(12)

Impatient and hostile attitude of trial judge toward accused's cause, and remarks that defense was taking unreasonable amount of time in presenting case, held not to require reversal, where remarks did not contribute to jury's verdict.

3. Criminal law ⇨1039, 1129(1), 1163(1)

Where jury was brought back into court and sought information regarding penalty if accused was given life imprisonment, that court gave information sought and added, in response to juror's question, penalty second-degree murder was subject to, held not reversible error, where accused did not object to question, did not assign such action as misconduct, and there was nothing to show that action induced jury to arrive at verdict.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Augustin Ramos was convicted of murder, and he appeals.

Affirmed.

Geo. D. Pollock, Lloyd C. White, and Bertram Young, all of Salinas, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Harry L. Noland, Dist. Atty., and R. W. Shellooe, Deputy Dist. Atty., both of Salinas, for the People.

WASTE, Chief Justice.

The appellant was charged with the murder of Carmen de la Pena, a seventeen year old girl, with whom he was desperately in love. The jury found him guilty, and imposed the death penalty.

The appellant had asked the girl to marry him. She refused, and complained to her parents that he was "bothering her." Her father asked him to leave his daughter alone. The girl's parents conducted a restaurant and poolroom in Salinas patronized by young Filipinos. On the evening of the murder Ramos went to the place and spent some hours there, interesting himself in working puzzles and talking with acquaintances. Near midnight, several Filipinos, young men who were frequent visitors at the place and with whom the deceased was acquainted, went to the restaurant for a meal. While they were eating, the deceased joined them in one of the booths, and partook of some of the food. About 12:30 o'clock, all parties prepared to leave the place. Some were already on the street, when, without any conversation being overheard between the appellant and the deceased, who were still in the restaurant, the appellant shot the girl twice, killing her instantly. In a struggle for the possession of the pistol, and apparently to prevent the appellant from shooting himself in the head, the girl's father was also shot. The claim of the defense was that the appellant, as a friend, had assisted in supporting the family of the deceased; that she had agreed to marry him, but the father and mother had "double-crossed" the appellant and prevented the marriage.

There is no necessity for reciting other facts. In his statement to the jury, counsel for the defense said: "We will want you to hear these facts that go with the facts the prosecution will give, in order that you may bring in a judgment of manslaughter. We are not asking for an acquittal. We are asking for punishment, but we will ask that verdict on the facts of the case." The jury was not convinced that the defendant was guilty of only the lesser crime. There is ample evidence to support the theory of the prosecution that the appellant had premeditatedly formed an intent to kill the girl, and that this intent flared into action when the appellant saw the friendly and familiar conduct of the deceased with the young Filipinos on whom she waited and with whom she dined that night. The question of the intent to kill in this case is well within the rule stated in *People v. Donnelly*, 190 Cal. 57, 210 P. 523.

[1] Over the objection of the defense, the court permitted police officers to testify from memory as to statements alleged to have been made by the defendant in their presence, some of them shortly after the arrest, and taken down in shorthand by a stenographer, and others three days later when the defendant was being interrogated by the police officers. The witnesses did not refer to the transcript, and did not request that they be allowed to refresh their memories by reference to it, and the writing was not one made by the defendant. Its authenticity was not an issue in the matter. One being in existence, it could have been produced, had the defense demanded it, for purposes of inspection or controverting the testimony of the officers. Hence the trial court did not commit error in permitting the officers to testify without reference to or production of the transcript. Parol evidence of the statements of the defendant was, of course, admissible. *People v. Luis*, 158 Cal. 185, 193, 110 P. 580.

[2] Another contention of the appellant is that the trial judge "displayed an impatient and hostile attitude toward the cause of the defendant" throughout the entire trial, which conveyed to the jury an impression "that the defense being interposed was weak." The remarks of the judge may be construed as evidencing a feeling on his part that the defense was "consuming an unreasonable amount of the court's time in presenting [the] defense," as is argued by counsel. We have examined each of the instances cited by appellant, and agree that the argument noted has substantial foundation. Whether or not the court was right in this particular respect, we will not attempt to say. Counsel for the defense were earnest and sincere in their efforts to protect the rights of the defendant, and in their zeal may have led the court to remark about the length of time consumed. We have read the transcript, and do not believe the court's remarks contributed to the just verdict of the jury.

[3] While deliberating on the verdict, the jurors were brought into court and sought information "in regard to the penalty if a man is given life imprisonment." The court should have answered that the matter of punishment, in the event they should find the defendant guilty, was one with which they [the jurors] had nothing to do. *People v. Bruno*, 49 Cal. App. 372, 379, 193 P. 511. However, defendant offered no objection to the question; and the court gave the information sought and, in response to a question from a juror, added information as to the "penalty

or term of years that second degree murder is subject to." The action of the court was an irregularity that has been many times condemned by this court. As said in the case cited, the question pertained to matters concerning which the jury had no business. It had already been told in the instructions that if it convicted the defendant of murder in the first degree, the law permitted it to award the penalty, which might be death or imprisonment for life in the state prison; and that should the verdict be "murder in the first degree without affixing the penalty the law [would] adjudge the penalty and the penalty is death." Information on the subject should have stopped there.

The defendant, not having made objection to the question in the court below, and not having assigned the action of the court as misconduct, cannot urge the point for the first time on appeal. Furthermore, from our examination of the record, we find nothing in the court's action that can be held to have amounted to an inducement or promise which caused the jury to arrive at the verdict. It follows, therefore, that no reversible error was committed. See *People v. Bruno*, supra.

The judgment, order refusing to modify the judgment, and the order denying a new trial are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

parties held not erroneous, where court prior to judgment ordered dismissal of new parties and no new issue was raised by amendment.

3. Dismissal and nonsuit — 60(1)

In respect to duty of court to dismiss action not brought to trial within five years after answer, running of five-year period started anew on filing of amended pleadings (Code Civ. Proc. § 583).

In Bank.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action of interpleader by T. G. McCreary and another against Mary E. Falconer, sometimes known as May Bland Falconer, Harry J. Bias, Michael Frey, and others, wherein the last two named defendants filed answers, and the second-named defendant file a cross-complaint; cause being subsequently dismissed as to all defendants except said answering defendants. From the judgment, plaintiff's appeal.

Affirmed.

Rittenhouse & Snyder, of Santa Cruz, for appellants.

Paul F. Fratessa and Stanislaus A. Riley, both of San Francisco, and Harry J. Bias, of Santa Cruz, for respondents.

PRESTON, Justice.

Plaintiffs appeal from judgment rendered against them in an action in interpleader.

On November 26, 1919, defendant May Bland Falconer executed to City Savings Bank of Santa Cruz, her \$6,000 promissory note, secured by trust deed, wherein these plaintiffs were named as trustees. Plaintiffs were at said time officials of the bank, being respectively treasurer and president thereof. It appears that their service in the capacity of trustees was purely nominal. All matters of every kind connected with the transaction were handled by the bank's then attorney, Ralph H. Smith. In the name of the trustees he instituted and carried on the proceedings next hereinafter described:

On demand of the bank, after default of the debtor, upon notice and all legal steps duly taken, and on April 27, 1922, he caused the property covered by the trust deed to be sold to satisfy said indebtedness. This property was purchased by one Jansen for \$12,250, which sum was turned over to Smith on behalf of said trustees. After applying it to satisfy the indebtedness, costs of sale and



3 Cal.2d 335

McCREARY et al. v. FALCONER et al.
S. F. 14999.

Supreme Court of California.
April 22, 1935.

Rehearing Denied May 20, 1935.

1. Interpleader — 21

Affirmative judgment held properly rendered against plaintiffs in action of interpleader for amount of surplus held by them as trustees under mortgage, through their agent and attorney, where attorney, instead of depositing fund in court to await decision, merely deposited his personal check, which thereafter became worthless because of attorney's death before check was cashed.

2. Judgment — 194

Judgment solely on evidence prior to filing of amended pleadings bringing in new

other expenses, there remained in the hands of Smith \$3,328.62, in the distribution of which amount various persons claimed a right to participate. Therefore, on March 16, 1923, this action in interpleader was instituted. A complaint was prepared and filed by Smith wherein the trustees were named as plaintiffs and said debtor and other persons claiming an interest in said residue were named as defendants. After setting forth the facts relative to foreclosure of the trust deed and plaintiffs' inability to determine the respective interests of the defendants, if any, to said residue, said pleading alleged: "Plaintiffs herewith pay into court * * * \$3328.62 which * * * shall be subject to payment to the parties entitled thereto according to the order of court herein to be made," and it was prayed that defendants be required to litigate among themselves their several respective claims to the fund and that it then be distributed pursuant to order and judgment of the court.

According to testimony later given by the county clerk at the time Mr. Smith filed said complaint, he handed the clerk his personal check for \$3,328.62 but failed to explain its connection with the filing of the action. The clerk placed the check in the money drawer, where it remained until the death of Smith, hereafter referred to, awaiting Smith's explanation of its purpose.

On July 3, 1923, defendant Frey filed an answer, asserting his claim to said sum. On January 7, 1925, defendant Bias filed an answer and cross-complaint, asserting his claim thereto. On March 28, 1928, Smith died. In November or December of that year the attention of the county clerk was again called to the check, which had then become valueless by reason of Smith's death. Finally, on October 20, 1930, this cause was called for trial. On November 17, 1930, the court permitted plaintiffs to file an amendment to their complaint, alleging that neither of them had ever received said sum of money and that it had never been deposited in court. On said date, also, plaintiffs moved to be dismissed from the action on the ground that the court had lost jurisdiction because of the lapse of more than five years after filing of the last answer. Section 583, Code Civ. Proc. This motion was never decided and the trial was never completed by reason of resignation of the trial judge.

The cause next came on for hearing on October 21, 1931. The amendment to the complaint of November 17, 1930, was withdrawn and the action was dismissed as to all de-

fendants save said answering defendants, Bias and Frey, who stipulated that defendant Bias was entitled to \$1,828.62 of said sum and defendant Frey to the other \$1,500 thereof, each to receive half the interest due on the alleged court deposit and each to pay his own costs. Evidence was then taken. Among other testimony was that of plaintiffs to the effect that at all times until after Smith's death they believed that said money was actually paid into court. They also renewed their motion for dismissal (section 583, Code Civ. Proc.) and it was denied. Some time after close of the trial, to wit, on January 15, 1932, the court ordered that the executrix of the estate of said Smith, deceased, be made an additional party to the action (section 389, Code Civ. Proc.) and that the complaint be amended to set forth the interest of said estate therein. Thereafter, and on February 29, 1932, plaintiffs filed a second and supplemental complaint setting forth the part played by Smith in this transaction and his failure to make the court deposit, by reason of which said sum came into the possession of his estate, further alleging that on February 6, 1929, plaintiffs caused to be filed in said estate a claim to establish said sum as a trust fund to be deposited in court or distributed to the persons shown by this action to be properly entitled thereto. So far as the record shows this claim has not been acted upon in said estate, being neither accepted nor rejected. The prayer of said supplemental complaint was that plaintiffs be dismissed from the action and that proper award be made to defendants on said estate claim.

To this supplemental pleading defendants Frey and Bias filed separate answers alleging that Smith had received said residue as attorney and agent for plaintiffs and hence they were personally accountable to defendants therefor, without regard to their ability to collect from said estate. No hearing was had on the issues tendered by these supplemental pleadings. The court made an order dismissing the action as to said executrix of the Smith estate and thereafter, on October 6, 1932, made findings in accord with the allegations of said supplemental answers, followed by judgment awarding said \$3,328.62 to said answering defendants in the respective proportions to which their stipulation entitled them. The trial court had theretofore, on August 15, 1932, filed a written memorandum stating his conclusion that defendants were not in privity, either of contract or otherwise, with said Smith, and his tortious act in failing to make said deposit could

in nowise prejudice their right to receive said fund from plaintiffs; that this situation, so far as plaintiffs are concerned, is deplorable but Smith was selected by them as their attorney and agent and they must look exclusively to his estate for such relief as may be available.

From said judgment plaintiffs appealed, urging three grounds for relief: (1) That an affirmative judgment cannot be given against a plaintiff in an action in interpleader; (2) that upon the filing of said amended pleadings, bringing in new parties, the court erred in giving judgment solely on evidence adduced prior thereto, without taking of new testimony or resubmission of the cause; and (3) that under mandatory provisions of section 583 of the Code of Civil Procedure, prior to 1933 amendment (St. 1933, p. 853), it was incumbent upon the court to dismiss the action because not brought to trial within five years after answer filed. These contentions will be disposed of in the order named.

[1] 1. This claim falls before the fact that the fund disposed of by the judgment was held by appellants through their agent and attorney Smith. In this behalf the above-mentioned analysis of the case by the trial court is correct. Appellants cannot avoid the consequences of their conduct in delegating all their duties as trustees to their said agent and attorney. Had he followed the customary procedure of depositing the fund in court to await decision in the case, appellants would have been exempt from a personal judgment. The act of said agent in holding the fund became the act of appellants and the situation is the same as if they themselves had possession thereof. The judgment is not rightly denominated an affirmative judgment against appellants as it goes merely to distribution of the fund held by them, in which they have disclaimed any interest. It is a proper judgment in an equitable action in interpleader, according appellants the relief prayed for, to wit, litigation by defendants of their several claims to said fund and order for its proper distribution. Furthermore, appellants are not prejudiced by this holding 'as, having no right to the fund themselves, they would in any event be liable therefor were the claimants relegated to separate actions against them for money had and received.

[2] 2. Effect of amended pleadings ordering new party brought in. Although the court permitted the filing of these amended

pleadings, prior to judgment it ordered dismissal of the new party thereby brought in to the action, to wit, the executrix of said Smith estate. No new issue was raised by the amendments and there was no necessity for further hearing or resubmission of the cause. Likewise there was no failure to find upon all material issues.

[3] 3. Dismissal of action under section 583 of the Code of Civil Procedure. It was not incumbent upon the court to dismiss the action as the running of the five-year period started anew upon the filing of the several amended pleadings. *Mercantile Investment Co. v. Superior Court*, 218 Cal. 770, 25 P.(2d) 12.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



3 Cal.2d 184

CITY OF LONG BEACH v. PAYNE,
County Auditor.
L. A. 15089.

Supreme Court of California.
April 17, 1935.

I. Highways §99¼

Statute authorizing county boards of supervisors to expend money received by them from the motor vehicle fund in the construction, maintenance, improvement, and repair of "streets * * *, highways * * *" held to authorize, by the term "highways," the use of money from such fund for repair and maintenance of canals located in a city subdivision (St. 1911, p. 730, as amended; St. 1933, p. 2625, § 159).

"Highway" is defined as a main road or thoroughfare; hence a road or way open to use of public, including in broadest sense of term ways upon water as well as upon land; "highway" is generic term for all kinds of public ways, whether it be carriageways, brideways, footways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers, and includes county and township roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every thoroughfare is a "highway."

[Ed. Note.—For other definitions of "Highway," see Words & Phrases.]

2. Statutes $\Rightarrow$ 212

After courts have construed meaning of any particular word or expression and Legislature subsequently undertakes to use these exact words in same connection, presumption is that Legislature used them in precise and technical sense which had been placed upon them by courts.

3. Highways $\Rightarrow$ 99 1/4

Where within four years after Supreme Court had held that term highway was sufficiently broad to include canals, Legislature had broadened scope of section of Motor Vehicle Act so as to permit expenditures from motor vehicle fund by cities on highways and streets as well as upon roads, bridges, and culverts to which such expenditures were formerly limited, presumption was that term highway was used advisedly and in sense that it included canals (St. 1923, p. 563, § 159 (c); St. 1933, p. 2625, § 159 (c)).

In Bank.

Petition by the City of Long Beach for a writ of mandate to be directed to H. A. Payne, as County Auditor of Los Angeles County, to compel him to pay over to petitioner certain money in compliance with an order and resolution of the Board of Supervisors of petitioner.

Peremptory writ issued.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Henry D. Lawrence, Deputy City Atty., all of Long Beach, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Deputy Co. Counsel, both of Los Angeles, and Allard, Stead & Whyte, of Pomona, for respondent.

CURTIS, Justice.

The question involved in this proceeding is whether the county of Los Angeles can legally apply a portion of the money allocated to it from the "Motor Vehicle Fund" to the improvement and repair of certain canals in that certain tract or subdivision known as "Naples" and located within the city of Long Beach in said county of Los Angeles. No question is raised as to the right of said county to expend money allocated to it from the motor vehicle fund in the repair and maintenance of an ordinary street or highway within the corporate limits of a city, but the contention of respondent is that money from the motor vehicle fund cannot be expended upon canals, as they do not constitute highways in the sense in which said term is usually un-

derstood and as it is used in the California Vehicle Act (St. 1923, p. 517, as amended).

The canals in said tract were dedicated to public use by the owner thereof at least as early as the year 1909, and ever since said dedication have been open to the public and have been continuously used by the general public. There are two canals involved herein designated on the official map of said subdivision and known as "Rivo Alto Canal" and "Naples Canal." The first named is circular in form. Its diameter is some 1,600 feet, and it empties into Alamitos Bay. At the point where said canal empties into Alamitos Bay, Naples canal takes its beginning and extends westerly through said subdivision, and it also empties into Alamitos Bay. The two canals, therefore, communicate with Alamitos Bay and with each other. They are approximately 80 feet in width, and on each side of these canals is a sidewalk and parkway area some 15 feet in width extending from the concrete retaining walls of the canals back to private property lines. Cement sidewalks have been built adjacent to the retaining walls of the canals, and this sidewalk and parkway area furnishes pedestrian ingress and egress to the residences in this tract whose property abuts on the two canals. These canals have fallen into disrepair, the retaining walls on either side of each canal have become cracked, and portions thereof have fallen into the canals. The ebb and flow of the waters of the canals have worked under portions of these broken retaining walls and have seriously undermined the adjacent sidewalks and parkways, causing the sidewalks to cave in and in many places causing injury to adjacent private property. The cracked and broken condition of the retaining walls along the sides of the canals seriously impairs the privilege of boating and swimming and other uses to which said canals are put by the public, and the broken condition of the sidewalks along this area is a constant menace to all persons residing in the community and to the general public using said walks.

On April 10, 1934, the city council of the city of Long Beach, pursuant to the provisions of the Improvement Act of 1911 (Stats. 1911, p. 730), and acts amendatory thereof, duly adopted a resolution and ordinance of intention to repair and improve said canals by rebuilding the retaining walls on either side thereof and making such other changes in their construction as will render them serviceable to the public. The changes proposed to be made would result not only in rebuilding

the retaining walls on either side of the canals, but by such change the width of the canals would be diminished to 70 feet with a corresponding widening of the sidewalk and parkway area, making the latter 20 feet in width instead of the present width of 15 feet.

The federal government, under its employment relief program carried forward by the Public Works Administration, has agreed to contribute toward said improvement not to exceed the sum of \$88,700. The county of Los Angeles, by a four-fifths vote of its board of supervisors on November 19, 1934, ordered that an appropriation of \$100,000 be made toward the payment of the cost of improving and rebuilding said canals, payable quarterly to the city of Long Beach from the "Good Roads Fund, 1934-35, Supervisorial District No. 1, Undistributed." Pursuant to this resolution the city of Long Beach on November 23, 1934, duly made demand on respondent H. A. Payne, county auditor of the county of Los Angeles, for the first quarterly payment of said appropriation, to wit, the sum of \$25,000. At the time of making said demand there was and now is in said fund an unexpended and unappropriated balance in excess of \$25,000, and no such amount was on hand or on deposit in any other fund out of which said sum of \$25,000 could have been paid. All moneys in said fund are moneys appropriated by the state of California to the county of Los Angeles from the "Motor Vehicle Fund," pursuant to the provisions of section 159 of the California Vehicle Act (St. 1923, p. 568, as amended by St. 1933, p. 2625), and were collected by the state pursuant to said act. Said respondent refused to pay over or cause to be paid over unto the city of Long Beach said last-named sum of \$25,000, or any sum whatever. Thereupon, this proceeding was instituted in this court to compel said respondent auditor to comply with said order and resolution of the board of supervisors. The respondent has filed his answer, and the matter is now before us upon the petition and answer thereto and an agreed statement of facts.

[1] Section 159 of the California Vehicle Act provides, in part, as follows:

"There is hereby created in the State treasury a fund which shall be known as the 'Motor vehicle fund.' The State Treasurer shall deposit all money received by him from the division or otherwise under the provisions of this act into the motor vehicle fund. * * *

"One-half of such 'net receipts' is hereby appropriated and shall be paid from the motor vehicle fund to the counties of this State

in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued. All amounts paid under this section to the counties shall be deposited in the road funds of the several counties receiving the same and shall be expended by such counties exclusively in the construction, maintenance, improvement or repair of streets, roads, highways, bridges or culverts therein; provided, that the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance, improvement or repair of streets, roads, highways, bridges or culverts within those incorporated cities wherein the legislative bodies of which by ordinance or resolution authorize such work of construction, maintenance, improvement or repair." Stats. 1933, pp. 2624, 2625.

It will be noted that the section provides that boards of supervisors may expend money received by them from the motor vehicle fund "in the construction, maintenance, improvement or repair of streets, roads, highways, bridges or culverts within those incorporated cities wherein the legislative bodies of which by ordinance or resolution authorize such work of construction, maintenance, improvement or repair." Is this language of the section sufficiently broad to include "canals"? It is obvious that the terms "streets," "roads," "bridges," and "culverts" cannot reasonably be construed or extended so as to include or apply to "canals." Can the same be said as to the term "highways"?

We find no definition of "highway" given in the California Vehicle Act. As near as that act comes to defining a highway is to be found in the definition of a "public highway," which is defined to mean, "Every highway, road, street, etc." In other words, the act defines public highway as a highway, but makes no attempt to define "highway." Webster's New International Dictionary (2d Ed.), recently issued by G. & C. Merriam Co., publishers, defines a highway as follows: "A main road or thoroughfare; hence a road or way open to the use of the public, including in the broadest sense of the term ways upon water as well as upon land." The definition given by Bouvier's Law Dictionary conveys the same meaning. It is in the following words: "The term highway is the generic term for all kinds of public ways, whether it be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." In 4 Words and Phrases,

First Series, 3292, among numerous definitions of the same general tenor, we find the following: "The term 'highway' is a generic term for all kinds of public ways, including county and township roads, * * * railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway"—citing *Southern Kansas Railway Co. v. Oklahoma City*, 12 Okl. 82, 69 P. 1050, 1054; *Union Pacific R. R. v. Colfax County Com'rs*, 4 Neb. 450, 456; *Board of Shelby County Com'rs v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687.

The principle announced in these authorities has been approved by this court in its recent decision involving the canals within a subdivision or tract known as "Venice of America," thereafter incorporated as the city of Venice and subsequently made a part of the city of Los Angeles. *Watson v. Eldridge*, 207 Cal. 314, 320, 321, 278 P. 236, 239. The canals in the Venice of America were laid out in much the same manner and for the same purpose as were those laid out in the Naples subdivision, although in the deed by the owner of the tract conveying to the city of Venice the canals and strips of land along each side of the several canals there was a reservation that "the premises herein conveyed shall be used by said second party and its successors solely and only for permanent waterways, and canals free to the public forever." No such reservation is contained in the certificate attached to the map of Naples in which said canals were dedicated to public use. After the city of Venice became a part of the city of Los Angeles, the authorities of the latter city proposed to fill in these canals and convert them into public streets or highways. In passing upon the questioned right of the city of Los Angeles to make such a change, and in declaring the status of said canals, this court held as follows: "While the several intercommunicating canals constructed in and through 'Venice of America' were used as well for recreational purposes, they must of necessity, and because of the peculiar plan and construction of said city, be held to have been intended by the builder of that city to serve primarily as highways over which persons resident therein and the public generally might pass. In *Chicago, etc., Ry. v. [City of] Minneapolis*, 232 U. S. 430, 442, 34 S. Ct. 400, 403, 58 L. Ed. 671, the court concludes that an artificial waterway or canal 'is none the less a public highway, established to afford an appropriate place of public passage,' and further along in its opinion

quotes with approval the following: "'The way sought to be established,' * * * 'a canal or waterway, with walks along each side' was 'clearly a public way, subject to the rules governing public ways.'" There cannot, therefore, be any question but that a canal is a highway of a peculiar kind. 9 Cor. Jur. 1125, § 1. The dedication of a highway to public use authorizes any ordinary use for highway purposes."

Counsel for respondent have cited decisions from other jurisdictions holding that in certain instances the term highway does not include a canal, but these authorities are out of line with the general trend of decisions upon the subject, and are in direct conflict with the decision of this court in the case of *Watson v. Eldridge*, supra. We are therefore of the opinion that the term "highway" as generally used and understood is sufficiently comprehensive to include canals as an integral part of a highway system.

[2, 3] Respondent, however, contends that as used in the California Vehicle Act the term highway is to be limited to a more restricted sense, and that, as so construed, it is limited to ways of travel upon which motor vehicles may be used and operated. Numerous instances are cited where the term is used in the act which, if construed to mean a canal, would render the context of doubtful meaning, if not ludicrous. It may be conceded that the general purpose and scheme of the California Vehicle Act is concerned primarily with highways upon which motor vehicles can be operated, which would, of course, exclude canals or waterways. But we find nothing in the act which compels the strict construction of the term highways contended for by respondent. It is a significant fact that originally section 159, subd. c (St. 1923, p. 568), giving boards of supervisors the authority to expend money apportioned to the counties from the motor vehicle fund for improvements within incorporated cities, limited such expenditures to the improvement of "roads, bridges or culverts," but after our decision in 1929 of the case of *Watson v. Eldridge*, supra, in which we held that the term, highway, was sufficiently broad to include canals, the Legislature in 1933 (St. 1933, p. 2624) broadened the scope of the act so as to permit such expenditures to be made on "highways and streets," as well as upon, "roads, bridges and culverts." It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the Legislature subsequently undertakes to use these

exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts. In *re Nowak*, 184 Cal. 701, 705, 195 P. 402. Applying this rule in the instant case, we think it but reasonable to assume that the Legislature, when it enlarged the powers of boards of supervisors in the expenditure of money received from the Motor Vehicle Fund in incorporated cities, and expressly provided that such funds could be used in the improvement of highways therein, that it used the term advisedly and in the sense which had been given it by the decision of this court.

Respondent relies upon certain language to be found in the case of *Old Homestead Bakery, Inc., v. Marsh*, 75 Cal. App. 247, 253, 255, 242 P. 749, upholding the constitutionality of that provision of the California Vehicle Act of 1923 (page 536, § 77(b) authorizing the imposition of a fee of \$50 for the registration of electric motor vehicles intended for use in the transportation of passengers or property for hire upon the public highways of the state. While it was there held that the purposes of the Legislature in exacting such a registration fee, as well as other license taxes on motor vehicles, was to raise funds with which the highways of the state may be improved and kept in repair, no question was raised in that action as to the proper expenditure of that fund when raised. We find no intimation in that opinion that the funds raised under the California Vehicle Act must be used exclusively upon highways upon which motor vehicles may be operated. This is especially true since the act has been amended and in its present form, in our opinion, expressly authorizes the expenditures here involved. It follows from what we have said that the respondent auditor was not legally justified in refusing to draw his warrant in favor of the city of Long Beach, as requested and demanded by said city.

These views render it unnecessary for us to pass upon the applicability to the facts in this case of that certain act, often cited as the "Aid to Cities Act," and entitled, "An act authorizing counties to improve or assist in the improvement of streets lying in municipalities." Stats. 1923, p. 123. We are satisfied the board of supervisors of the county of Los Angeles have the authority under the California Vehicle Act to make the expenditures involved herein. It is therefore a matter of no consequence as to their authority under the "Aid to Cities Act."

Let the peremptory writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.



3 Cal.2d 220

**CITY OF OAKLAND v. AMERICAN
DREDGING CO. OF CALIFOR-**

NIA et al.

S. F. 15003.

Supreme Court of California.

April 18, 1935.

As Modified on Denial of Rehearing

May 17, 1935.

1. Municipal corporations ⇨719(4)

Finding that spur track leading from city-owned wharf to belt line railroad was within reservation of right to construct belt line railroad contained in city's lease of tidelands *held* sustained by evidence (St. 1911, p. 1254).

2. Municipal corporations ⇨719(4)

Spur track from city-owned wharf to belt line railroad *held* within general reservation for "public and municipal purposes" deemed necessary by city, within city's lease of tidelands (St. 1911, p. 1254).

In Bank.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by the City of Oakland against the American Dredging Company of California and others. From an adverse judgment, named defendant appeals.

Affirmed.

Ira Abraham and Brown, Ledwich & Rosson, all of Oakland, for appellants.

Markell C. Baer, Port Atty., and Robert M. Ford, Asst. Port Atty., both of Oakland (C. Stanley Wood, City Atty., Hilton J. Melby, Chief Deputy, and F. B. Fernhoff, City Atty., all of Oakland, of counsel), for respondent.

PER CURIAM.

This is an action to quiet title to a right of way.

Prior to 1911, a number of persons, including defendant American Dredging Company, were in possession of certain tidelands in the city of Oakland, fronting on the San Antonio estuary, claiming title thereto under a patent granted in 1889 to one James T. Stratton. This title was disputed by the city, mainly on the theory that the grant of tide lands to Stratton was illegal and void. The dispute led to the following compromise: The Legislature passed the "Tideland Act" (Stats. 1911, p. 1254) transferring to the city of Oakland all its interest in these lands, subject to specified trusts. These were, briefly, that the land should be used for harbor purposes, and for the promotion and accommodation of commerce and navigation; that the city could not convey the property, but might give franchises or leases for limited periods; that it might lease them for 25 years and might provide for a right to renew for 25 years, subject to certain reservations. The statute also provided that the persons in possession of the above-mentioned lands should have a right to obtain such a lease for 25 years with privilege of renewal for a like period, subject to the right of the city to terminate the lease at the end of the first period or refuse to renew the same; and that upon obtaining the lease, they should quitclaim to the city any rights they claimed in the lands. After the passage of this act, the Oakland city council passed an ordinance authorizing the board of public works to enter into such leases, and on June 30, 1911, a lease was made and delivered to appellant, which contemporaneously delivered a quitclaim of its asserted interests. Thereafter, appellant continued in possession under the lease, using its premises for dredging operations, storing dredge pipe, mooring dredges, etc. The validity of the act and the leases entered into thereunder was established by the decision of this court in *Oakland v. Larue Wharf, etc., Co.*, 179 Cal. 207, 176 P. 361.

In 1927, a port commission was created for the city of Oakland, and in 1928, the city acquired a tract of land adjacent to and west of appellant's leasehold. On this land the city constructed a wharf known as "Ninth Avenue Pier," a substantial, modern structure with a steel and concrete transit shed and warehouse. Railroad tracks were constructed both on the side of the pier fronting on the estuary, and in the rear. Pending construction of the pier, however, the city, realizing the need of connecting the tracks with the outside railroad lines, entered into negotia-

tions with four leaseholders, including appellant, with the object of securing a right of way for such connecting tracks. The negotiations failed to end in agreement, and on November 29, 1929, the city commenced this action to quiet title. On July 12, 1930, it also brought an action to condemn a right of way over the land of appellant alone. By order of court it was placed in immediate possession and has since completed the connecting tracks. On November 12, 1930, the present action was dismissed as to all lessees save appellant.

[1] The provision for the reservations in the statute of 1911 is copied in substantially similar form in the lease as follows: "This lease is subject, however, to a reservation of a street, or to such other reservation as the said City may determine for a belt line railroad where the same may be deemed necessary by the said City, and such other reservation as the City may require including reservations for sewer outlets, and for gas and oil mains, and for hydrants, and for electric cables and wires, and for such other conduits for municipal purposes, and for such public and municipal purposes and uses as may be deemed necessary by said City." The contention of appellant is that under these reservations the city could only construct a "belt line railroad"; that the general provision for "such public and municipal purposes and uses as may be deemed necessary by said City" did not, in view of the rule of "*ejusdem generis*," enlarge the city's right so as to include the type of connecting or spur track actually constructed. The position of plaintiff city is that the track in question is in fact part of a belt line system, and therefore comes within the express language of that reservation; but that the city may likewise claim the right to construct the particular trackage under the broader general reservation in the lease.

The trial court found that the Southern Pacific Company maintained a track several miles in length which is operated and used "to serve the purposes of a belt line railroad, and is in fact a belt line railroad"; that the operation of the Ninth avenue pier as a harbor facility in connection with the promotion and accommodation of commerce and navigation necessitated track connections with this line; that the right of way awarded the city over appellant's land was a reasonable and practical one which did not unduly burden the premises or interfere with their development; and that the trucks constructed by the city "are and constitute an integral

part of the said track system hereinabove referred to * * * and constitute a portion of a belt line railroad."

The appeal presents the question whether the findings of the court are supported by the evidence. Appellant suggests that a belt line railroad is one whose function is to take up freight from different industries along its route and transfer such freight to the main line railroad; and that "connecting," "drill," "lead," or "spur" tracks connect the industries with the belt line, but are not themselves part of the belt line railroad. Several witnesses testified that the tracks in question were lead tracks or spur tracks, connecting with the belt line. Expert witnesses called by the city, however, were of the opinion that though the particular tracks by themselves could not be considered a belt line, yet they were part of a belt line system. These latter experts included Harry Gernreich, assistant superintendent of the Southern Pacific Railway Company, in charge of train operation on their Western division; R. M. Bryant, assistant engineer of the Southern Pacific Company; O. R. West, division engineer of the terminal division of the Santa Fé Company, which comprised its holdings around the bay; and Colonel E. W. Mason, vice president and general manager of the Western Pacific Company. Mr. Bryant declared that: "In railroad circles there is little or no difference or distinction between a drill track such as this drill track that we are talking about and a belt line track. It means about the same thing. It simply is a track upon which there is switching done leading from one point of the city's waterfront to another point." Colonel Mason testified that he would consider the city's tracks "as industrial trackage connecting with a belt line as a part of a belt line system." The others were equally in agreement that the belt line included the city's tracks. This testimony supports the trial court's findings, and, in the face of it, appellant's attempt to give the term "belt line railroad" a technical and greatly restricted meaning cannot be sustained. So far as this record goes, it does not seem to be a subject of precise definition, but the preponderance of the opinion of the qualified experts who testified in the lower court was that the trackage in question came within the meaning of the term.

[2] We are further of the opinion that it is not possible to ignore the broad language of

the general reservation for "public and municipal purposes" deemed necessary by the city. Certainly the connection of its valuable pier development with some outside railroad line was essential, and carried out the basic purposes of the trusts upon which the tidelands were granted; the furtherance of commerce and navigation.

The right of way, as finally located, preserved to appellant almost its entire water frontage, and cut across the upper part of its land without separating any of its buildings from the waterfront. The court found that the tracks "are placed flush with the ground and are constructed in such manner as not to constitute a barrier to the movement of persons, material and property" across the right of way. The conclusion of the trial court that this was a reasonable method of location and construction is not successfully attacked by appellant.

No other points require discussion.

The judgment is affirmed.



3 Cal.2d 249

GILLIS et al. v. PAN AMERICAN WESTERN
PETROLEUM CO. et al.

L. A. 14975.

Supreme Court of California.

April 19, 1935.

Rehearing Denied May 17, 1935.

1. Licenses $\Rightarrow$ 18 1/2

State may for protection of its residents and citizens regulate issuance and sale within its borders of stock of foreign corporation, and may declare void acts done in contravention of regulatory statute.

2. Licenses $\Rightarrow$ 39

In action against incorporators and directors of foreign corporation to recover back amount paid for stock, complaint alleging that defendants failed to comply with provisions of Securities Act and knowingly issued stock without applying for permit, that plaintiffs were ignorant of noncompliance, and that certificates issued were void and worthless *held* sufficient to state cause of action for fraud (St. 1917, p. 673, as amended).

3. Licenses $\Rightarrow$ 39

Incorporators and directors of foreign corporation who valued stock issued, took necessary preliminary steps, and had corporation issue stock within state, in effect, represented that they had secured permit under Corporate Securities Act (St. 1917, p. 673, as amended).

4. Limitation of actions $\Rightarrow$ 180(5)

Statute of limitations is not available on demurrer to complaint unless asserted in demurrer as reason for failure of complaint to state cause of action.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Hector Gillis and another against the Pan American Western Petroleum Company and others. From a judgment of dismissal, plaintiffs appeal.

Reversed.

Prior opinion, 34 P.(2d) 802.

W. A. Alderson, L. Frank Ottofy, G. C. De Garmo, W. M. Crane, Mott, Vallee & Grant, John G. Mott, and Paul Vallee, all of Los Angeles, for appellants.

Latham, Watkins & Bouchard, Dana Latham, and Paul R. Watkins, all of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., and Ralph O. Marston, Deputy Atty. Gen., amici curiæ for Edwin M. Dougherty, Commissioner of Corporations.

Wellborn & Wellborn and Frank J. Hogan, all of Los Angeles, for respondents.

Laurence W. Beilenson, O'Melveny, Tuller & Myers, Louis W. Myers, and Jackson W. Chance, all of Los Angeles, amici curiæ.

THOMPSON, Justice.

The plaintiffs commenced this action against the defendant corporation and its directors to recover from them the amounts paid by them for capital stock of the corporation; it being alleged that no permit had been issued authorizing issuance of stock in California. Demurrers to the complaint and amended complaint having been sustained, with leave to amend, plaintiffs filed their second amended complaint, to which the individual defendants interposed a demurrer, which was sustained without leave to amend. This appeal is from the judgment of dismissal in favor of the demurring defendants rendered pursuant to the foregoing order.

The allegations of the second amended complaint, to which we shall refer hereafter as the complaint, may be briefly summarized as follows: The individual defendants were the incorporators and at all the times mentioned the directors of the defendant corporation. They organized it under the laws of Delaware for the purpose and with the plan of taking title to certain California property, and of conducting its business and maintaining its principal place of business at Los Angeles, Cal., and since its incorporation the company has maintained its principal place of business at Los Angeles, and has transacted all of its business there, including the holding of its meetings of directors. It is alleged that the plan of incorporating under the laws of Delaware was designedly and purposely followed for the purpose of evading the Corporate Securities Act of this state (St. 1917, p. 673, as amended). It is then set forth that subsequent to the establishment of its principal place of business the individual defendants as directors and at meetings of the board in California, ordered issued certain of its capital stock, including that sold to appellants, and did order issued and did issue to appellants in California 2,200 shares, for which appellants paid the sum of \$63,357.50. Allegations then follow to the effect that the defendant corporation had not applied for a permit authorizing it to issue its capital stock, and had wholly failed to comply with the provisions of the Corporate Securities Act; that the certificates issued to appellants were void and worthless; that all of the defendants knowingly directed and aided and assisted in the issuance of the stock; that appellants, although they commenced their purchases on December 16, 1925, and ended them on April 3, 1928, did not nor did either of them know that the corporation had not complied with the provisions of the Corporate Securities Act until the 10th of October, 1930, at which time an article was published in a Los Angeles newspaper to the effect that the corporation had sold its stock without a permit; that plaintiffs relied implicitly upon the genuineness of the stock issued to them and believing that the corporation had complied with all the provisions of the Corporate Securities Act; and finally that appellants were damaged in the sum paid for the stock which has been lost to them by the issuance of said stock.

[!] We are concerned, of course, with whether the demurrer was properly sustained and must of necessity examine the conten-

tions of respondents to determine the question. They assert that the issuance of capital stock is an internal affair of a corporation governed by the law of the state where it was incorporated, and rely upon such authorities as *Southern Sierras Power Co. v. Railroad Commission*, 205 Cal. 479, 271 P. 747, 748; *In re Fryeburg Water Co.*, 79 N. H. 123, 106 A. 225, 226, 18 A. L. R. 1373, and *Mau v. Montana Pacific Oil Co.*, 16 Del. Ch. 114, 141 A. 828. An examination of the cited authorities demonstrates that they are not persuasive of the point that the state lacks the power to declare void the issuance of stock in this state by a foreign corporation. The *Southern Sierras Case* was one where a Wyoming corporation, engaged in this state in the generation and sale of electrical energy, sought to compel the Railroad Commission to grant it permission to issue \$2,000,000 of its preferred stock for the purpose of refunding or paying its outstanding obligations. The court held that the commission was without jurisdiction, for the reason that it was never intended by the Public Utilities Act of this state (St. 1911, Ex. Sess., p. 18, as amended) "to subject foreign corporations to regulation concerning the exercise of the inherent corporate powers conferred upon them by the legislative power of the incorporating state." It was largely grounded upon the *Fryeburg Case*, which was very similar in character. The *Fryeburg Water Company* was a Maine corporation doing business in both Maine and New Hampshire. It sought to compel the public service commission to approve that portion of a stock dividend which was represented by its capital investment in New Hampshire. The court refused the writ upon the statement that while the language of the act conferring authority upon the commission was quite broad it would not be "presumed that the Legislature intended to give the commission power to regulate the internal affairs of such corporations." We have no criticism of these authorities. Indeed, in *Commonwealth Acceptance Corp. v. Jordan*, 198 Cal. 618, 246 P. 796, this court called attention to the well-known fact that the laws of the several states authorize different capital stock structures for corporations, and under the doctrine of comity they are allowed, in the absence of express constitutional or statutory inhibitions, to enter other states for the purpose of doing business, regardless of whether a corporation with like structure is permitted to be formed in the latter states. However, these authorities are far from holding that the issuance and sale of the stock in a state other than that in which the cor-

poration is formed is not a proper subject for legislative action. A number of authorities by their conclusions confirm the right of the state to protect its citizens, by legislative interposition, against the issuance or sale of stock in the state. Among these we cite *Hohn v. Peters*, 216 Cal. 406, 14 P.(2d) 519; *Hayden Plan Co. v. Friedlander*, 97 Cal. App. 1, 12, 275 P. 243, 253; *In re Flesher*, 81 Cal. App. 128, 252 P. 1057. In the case of *London, Paris & American Bank v. Aronstein (C. O. A.)* 117 F. 601-609, it is said: "It is true that the courts in California cannot control the internal affairs of any foreign corporation. Such matters are to be conducted in pursuance of and in compliance with the provisions of the charter of the foreign corporation, and the laws of the country where it was created; but in the management and method of its business affairs in California with the citizens and residents thereof, *in the sale or disposition or transfer of the shares of stock*, it must conform to the laws of California in relation to such matters, and is bound thereby. In the recent case of *Williams v. Gaylord*, supra [186 U. S. 157, 22 S. Ct. 798, 46 L. Ed. 1102], the supreme court of the United States said: 'When a corporation sells or incumbers its property, incurs debts, or gives securities, it does business; and a statute regulating such transactions does not regulate the internal affairs of the corporation.'" (Italics ours.) In *Hall v. Geiger-Jones Co.*, 242 U. S. 539-550, 37 S. Ct. 217, 220, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, we find a similar statement of the purpose of legislation similar to that we are considering which is helpful in arriving at a sound conclusion. It is as follows: "It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures." To like effect is *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498. The case of *Biddle v. Smith*, 143 Tenn. 489-494, 256 S. W. 453, 454, is authority for the proposition that in order "to protect residents of the state against the imposition of worthless investments offered by domestic and foreign investment companies under whatsoever guise presented," the Legislature is empowered to restrict valid issues to those which are in

accordance with a permit therefor and to declare void other issues. To the same effect is *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620, 15 A. L. R. 256. Conceding therefore the premise of respondents' argument that ordinarily speaking the issuance of capital stock or the stock structure of a corporation is an internal affair, yet the issuance and sale of stock within a state other than that of its organization may be regulated in order to protect the residents and citizens of the former state. And in order to render such regulation effective it is undoubtedly within the legislative power to declare that acts done in contravention of the statute shall be void. From the foregoing observations it becomes apparent that the element which takes the forbidden acts beyond the realm of the corporation's internal affairs, is that of dealing with the stock in this state in such a manner that residents of this state may not be defrauded by dishonest corporations. Corporations conducted in good faith must submit to its regulation in order to prevent the operation of those which are not so run.

We are not convinced by the reasoning in *Mau v. Montana Pacific Oil Co.*, supra. What is there said to the contrary of our conclusions was not necessary to a decision of the case, and appears to have entirely overlooked the protective factor which we have assigned as the justification for such legislation. This may possibly be explained by the fact that the state wherein it was rendered is one of two where similar legislation has not been adopted.

[2,3] It is next asserted by respondents that the complaint is not grounded in fraud, but upon contract. Their argument in this particular is to the effect that while the sale of stock may be void, the issuance thereof is not, hence the purchasers received valid stock, or, as phrased in the brief, "got just what he bargained for, to wit: validly issued stock." Assuming that it is necessary to do more than point out the circuitous route of the argument, we think the conclusion reached upon the first contention effectually disposes of this suggestion. However, respondents say, assuming the invalidity of the issuance of stock, yet the plaintiffs have elected to disaffirm the contract and sue in contract, or have disaffirmed the contract because of lack of consideration and are seeking the recovery of the moneys paid out thereunder. With this argument we may also consider the assertion, separately stated by respondents, that plaintiffs have pleaded no actionable fraud. In substance, as already

observed, the plaintiffs alleged that these respondents ordered the stock to be issued and sold in California; that the defendant corporation had no permit; and that plaintiffs were unaware of this noncompliance with the law when they purchased the stock so ordered to be issued; that plaintiffs relied upon the genuineness of the stock; that all of respondents knowingly aided and assisted in the issuance of the stock; and that the plan of organization was designed by respondents to evade the laws of California. We think respondents misconceive the purpose of these allegations. In *Green v. Caribou Oil Mining Co.*, 179 Cal. 787, 178 P. 950, 952, involving a certificate of stock illegally issued, this court in referring to fraud said: "It comes from the false issue itself, which is the act of the corporation officers within the apparent scope of their authority, which, in effect, is a representation by the corporation itself to the purchaser from the original holder that the false stock is genuine." So, here, when respondents valued the stock issued and took all the necessary preliminary steps, and had the corporation issue the stock to appellants, they, in effect, represented that they had complied with the Corporate Securities Act and had obtained a permit without which the stock could not be issued or sold. Such is the effect of *Boss v. Silent Drama Syndicate*, 82 Cal. App. 109, 255 P. 225, where the court said that the purchaser had the right to rely upon a similar representation. And in *MacDonald v. Reich & Lievre, Inc.*, 100 Cal. App. 736-742, 281 P. 106, 108, we read: "When a corporation issues to the public certificates of stock, regular on their face, it amounts substantially to a representation that the certificates are regular and valid. Certificates of stock so issued by a corporation, but which were irregular or void for reasons not participated in by the stockholder, have been held to amount to a misrepresentation and fraud upon the part of the corporation officials for which the corporation is answerable." (Citing cases.) To the same effect reference may be had to *Walker v. Harbor Realty & Development Corp.*, 214 Cal. 46, 3 P.(2d) 557; *Randall v. Calif. L. B. Syndicate*, 217 Cal. 594, 20 P.(2d) 331; *Mannion v. Baldwin*, 217 Cal. 600, 20 P.(2d) 678, and *Holmquist v. Kent*, 219 Cal. 231, 25 P.(2d) 977. The allegations of the present case bring it within the rule announced; and we are not called upon to consider an assumed situation where the information of the purchasers is sufficient to remove it from the operations of the rule.

An argument is advanced to the effect that inasmuch as the issue is void and cannot be

affirmed we must as a matter of logic hold, since contracts induced by fraud may be ratified, that fraud cannot be made the foundation of the action. This contention overlooks the fact that the contract is void irrespective of the fraud and not by reason of it. The fraud induced a void contract, it is true, but assuming that there had been no fraud the contract would still have been void, even though in certain circumstances under the rule of *pari delicto* the courts would render no relief to the purchaser.

[4] Respondents further contend that the action is barred by the statute of limitations, the basis of their argument being that appellants have failed to allege the reason why they did not discover the fraud sooner than October 10, 1930. A sufficient answer to this contention is found in the fact that the demurrer does not set up the statute as a reason for the failure of the complaint to state a cause of action, nor did it refer to any section of the Code which it is claimed bars the action. The authorities are unanimous to the effect that in order to raise the applicability of a statute of limitations this ground must be stated in the demurrer. See *McFarland v. Holcomb*, 123 Cal. 84, 55 P. 761; *Salveter v. Salveter*, 135 Cal. App. 238, 26 P.(2d) 836.

Other claims are made, which when analyzed are found to be restatements of points already sufficiently discussed. We believe that no useful purpose would be served by extending this opinion. From what has already been said it is obvious that the complaint stated a cause of action, and that the demurrer should have been overruled.

Judgment reversed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.



3 Cal.2d 266

SWORD v. SWORD.
S. F. 15067.

Supreme Court of California.
April 19, 1935.

1. Divorce $\hookrightarrow$ 236

Evidence that plaintiff's attorney and defendant in wife's suit for divorce attempted

to determine approximate value of defendant's assets before his marriage and his income after marriage in negotiations for property settlement, but found that practically all such income was expended to maintain spouses, and thereupon agreed on reasonable sum to be paid plaintiff by defendant, without resort to fraud or other artifice, *held* to warrant court's refusal to set aside settlement agreement and grant wife further monetary relief (Civ. Code, § 139).

2. Divorce $\hookrightarrow$ 229

Refusal to make additional allowance of costs and attorney's fees to wife, suing for divorce, after allowing her \$90, which defendant paid, to defray her costs to date of order denying her motion to require defendant to pay such fees and costs incidental to her motions to stay entry of final divorce decree, set aside property settlement, and require defendant to make suitable allowance for her support, *held* not improper or abuse of discretion (Civ. Code, § 139).

3. Divorce $\hookrightarrow$ 286

Supreme Court cannot upset trial court's conclusion from conflicting evidence on hearing of wife's motion to stay entry of final divorce decree that spouses did not effect reconciliation or cohabit after entry of interlocutory decree.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Suit by Gladys N. Sword against Walter C. Sword. From orders denying plaintiff's motions to stay the entry of a final divorce decree, set aside a property settlement agreement, and require defendant to make a suitable allowance for plaintiff's support and pay her attorney's fees and costs, and a final decree of divorce, plaintiff appeals.

Affirmed.

Roy Daily, of San Francisco, for appellant.

Fred A. Watkins, of Long Beach, for respondent.

WASTE, Chief Justice.

On April 29, 1931, the plaintiff procured an interlocutory decree of divorce from the defendant on the ground of extreme cruelty. A property settlement agreement, theretofore entered into by the parties, was expressly referred to and approved in the decree, which decree has since become final. On October 1, 1932, the plaintiff filed a notice of motion to stay the entry of the final decree

on the grounds that the interlocutory decree had been procured by fraud and undue influence, and that the parties had become reconciled and had cohabited shortly after the entry of such interlocutory decree. Thereafter, and in fairly rapid succession, plaintiff also filed three other notices of motion, one to set aside the property settlement agreement on the ground that it had been procured by fraud and while plaintiff was sick and without independent counsel to advise her; another to require the defendant, under the provisions of section 139 of the Civil Code, to make suitable allowance for her support because of her asserted destitution and her failure to ask for alimony at the time of the entry of the interlocutory decree, this omission being charged to her then attorney who, she claims, was in league with the defendant when purporting to represent her; and the third, to require defendant to pay her attorney's fees and costs incidental to the three antecedent requests for relief.

Following a hearing, at which much evidence was adduced by both parties, the court below denied the several requests for relief, and, upon motion of the defendant, entered a final decree of divorce. This appeal followed.

[1, 2] We do not propose to state in detail the evidence which, in our opinion, supports the lower court's disposition of the matters presented to it for consideration. There is ample evidence in the record supporting the conclusion that neither the plaintiff's attorney, who was a friend of long standing of both parties, nor the defendant, individually or collectively, had resorted to fraud or other artifice in procuring the interlocutory decree or in arriving at the terms of the property settlement agreement theretofore executed by the parties. It appears that in their negotiations plaintiff's attorney and the defendant attempted to arrive at the approximate value of defendant's assets prior to his marriage with plaintiff; that they then undertook to determine the defendant's income subsequent to marriage and found that practically all of such income had been expended to maintain the spouses and their household; and they thereupon sought to arrive at a reasonable sum of money to be paid to plaintiff by way of property settlement, which sum was fixed at \$7,200.

After that sum had been paid to plaintiff, the several motions above mentioned were filed by her. We cannot say under the evidence that the court erred in refusing to set

aside the property settlement agreement, or in refusing plaintiff further monetary relief by way of alimony or otherwise. During the course of the hearing on the several motions, the court allowed plaintiff \$90 to defray her costs to the date of the order, which sum was paid to her by defendant. We cannot say, under the state of the record, that the court acted improperly or abused its discretion in refusing to make an additional allowance of costs and attorney's fees.

[3] The evidence upon the issue of reconciliation and cohabitation following the entry of the interlocutory decree is flatly contradictory. The defendant denied any such reconciliation or cohabitation. This conflict was resolved against plaintiff by the court below, and it is not our function to upset its conclusion in this particular.

The several forms of requested relief having been properly denied, there can be no question as to the propriety of the entry of the final decree of divorce.

The final decree of divorce and the several orders appealed from are, and each is, affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.



3 Cal.2d 371

HOUSER et al. v. HOUSER et al.
S. F. 15079.

Supreme Court of California.
April 25, 1935.

Rehearing Denied May 24, 1935.

1. Quieting title ☞52

Judgment quieting plaintiffs' title and requiring plaintiffs to make certain monthly payments *held* intended to make monthly sums payable only from income of property and not to make plaintiffs personally liable, when read in connection with stipulation on which judgment was rendered.

2. Quieting title ☞52

Judgment quieting plaintiffs' title subject to life interest in another and requiring plaintiffs to make certain monthly payments to third person from net rentals of property, and authorizing plaintiffs to mortgage property for benefit of life tenant, who was bound to pay mortgage principal and interest, *held*

not to justify plaintiffs in deducting mortgage interest from rentals before making monthly payments to such third person.

3. Quieting title ☞52

Under judgment quieting plaintiffs' title to hotel and requiring plaintiffs to make certain monthly payments to third person from net rentals, cost of installing new heating plant *held* deductible in ascertaining net rentals.

4. Quieting title ☞52

Under judgment quieting plaintiffs' title to hotel and requiring plaintiffs to make certain monthly payments to third person from net rentals, such person *held* entitled to full monthly payments before participation in rentals by other beneficiaries of judgment, and hence neither principal nor interest on cost of installing new heating plant should be charged against third person, in absence of showing that cost could not have been paid from rentals remaining after making monthly payments involved.

5. Quieting title ☞52

Under judgment quieting plaintiffs' title and requiring plaintiffs to make certain monthly payments to third person from net rentals or income of property, plaintiffs *held* not bound to hold excess rentals in reserve to make full monthly payments when net monthly rentals became insufficient.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Lionel Houser and another, minors, by their guardian ad litem, George Stockfleth, against Nathan L. Houser, Jennie V. Houser, and others. From an order directing execution to issue in favor of the last-named defendant and against plaintiffs, plaintiffs appeal.

Modified and affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellants.

J. J. Posner and Samuel M. Samter, both of San Francisco, for respondent.

CURTIS, Justice.

Appeal from an order directing execution to issue in favor of defendant Jennie V. Houser and against the plaintiffs, Lionel Houser and Mervin Houser, in the sum of \$316.

This action involves two judgments rendered in said action, one on May 3, 1926, and

the other on October 13, 1927, and the rights of the parties under said judgments.

The first of said judgments quieted plaintiffs' title to certain real property, and further provided that plaintiffs should make monthly payments of \$300 to said Jennie V. Houser during her lifetime. Nathan L. Houser was a defendant in said action, and the judgment quieting plaintiffs' title was rendered against him as well as against Jennie V. Houser. Some time after the rendition of this judgment said Nathan L. Houser moved to have said judgment set aside on the ground that he had been adjudged incompetent prior to the time summons in said action was served on him. The motion was granted. No notice of this motion was given to Jennie V. Houser, and the record before us does not show any appearance by said Jennie V. Houser in any of the proceedings brought to set aside said judgment or that she had any notice or knowledge of the pendency of said motion. However, after said motion had been granted, said action was set for trial and notice thereof was given to Jennie V. Houser. She made no appearance at said trial. On the retrial, judgment was rendered as before quieting plaintiffs' title to said real property, but subject to a life interest therein to Nathan L. Houser. The same monthly payments were directed to be made to Jennie V. Houser, but by Nathan L. Houser during his lifetime, and after his death by plaintiffs. It was further decreed in said judgment that appellants might borrow the sum of \$12,500 and secure the payment of the same by a mortgage on said real property. Said judgment also provided that said sum was to be paid to said Nathan L. Houser, who assumed and agreed to pay the same and all interest to accrue thereon. Notice of the entry of said judgment was served upon Jennie V. Houser. She took no steps to move for a new trial or to appeal from said judgment, but during the lifetime of said Nathan L. Houser she received from him said monthly payments, and after his death they were paid to her by the plaintiffs up to and through the month of December, 1932. During the months of January, February, and March, 1933, appellants paid to respondent the sum of \$584 only, leaving a balance unpaid for said three-month period of \$316, for which sum an execution was ordered issued in her favor.

Each judgment was rendered upon a written stipulation of the parties. Jennie V. Houser was a party to the stipulation upon

which the first judgment was based, but not to the second stipulation. The first of said judgments provided in effect that "said sum of three hundred dollars (\$300) per month shall be paid out of the net income derived from said real property." The second judgment provided that these payments should be made from "the net rentals of said real property." The only substantial difference between the two judgments, except that just noted, in so far as the interest of Jennie V. Houser is concerned, is that in the second judgment permission was given to borrow \$12,500, which sum was to be paid to Nathan L. Houser, and its repayment was to be secured by a mortgage upon said real property. This amount was borrowed and paid to Nathan L. Houser, and the mortgage given in pursuance of the judgment. Subsequently this mortgage was paid off, and a second loan was made for \$14,000, \$12,500 of which was used to pay off the first loan, and the sum of \$1,500 was expended in the installation of a new heating plant in the building located on said real property. This second loan was secured by a lien on said real property and bore interest at the rate of 6 per cent. per annum. The interest amounted to \$70 per month, which amount the appellants have deducted from the rentals from said real property, and the balance of said rentals, as the "net rentals from said real property," was paid to Jennie V. Houser, on account of the monthly payments due her in pursuance of said judgments. For the months of January, February, and March, 1933, after deducting said interest payments, there remained only the sum of \$534, which amount was paid to Jennie V. Houser.

[1] It is first contended by Jennie V. Houser, the respondent herein, that the judgment of May, 1926, created a personal and absolute obligation upon the plaintiffs, the appellants herein, to pay her the monthly sum of \$300. While said judgment, standing alone, is susceptible of such construction, yet, when read in connection with the stipulation upon which it was predicated, such a construction does not accord with the intention of the parties as expressed in said stipulation. Reading the stipulation and judgment together, we think there can be no doubt that the intention of the parties was that said monthly sum of \$300 was to be paid only from the income of said real property and that appellants incurred no personal obligation to make said payments beyond the net income from said real property. Respondent argues that the trial court construed the judgment as one creating a personal obligation against the

appellants and that a reviewing tribunal will not substitute its interpretation for that of the trial court. A number of authorities are cited in support of this contention. These authorities state the rule as follows: "Where the language of an instrument is ambiguous and either of two interpretations may reasonably be sustained, that of the trial court will not be disturbed, even though another interpretation may seem equally tenable." *Serviss v. Jones*, 133 Cal. App. 640, 643, 24 P. (2d) 881, 882. The facts of the case will not permit the application of this rule in the present instance. In view of the express agreement by respondent that the monthly payments to her "shall be paid out of the net income derived from said real property," the obligation of the appellants to make said payment did not extend beyond said net income.

[2] Respondent further contends that she is not bound by the judgment of October, 1927. The only substantial difference between the two judgments which adversely affects respondent is that by the second judgment Nathan L. Houser was given a life interest in said real property, and permission was given appellants to borrow \$12,500 to be paid to Nathan L. Houser to be secured by a mortgage on said real property. With the provision of the judgment giving Nathan L. Houser a life interest in said real property, respondent is not concerned. That provision only affected the rights of the appellants. Besides, Nathan L. Houser died before respondent made her motion for said writ of execution, and whatever interest he was given in said real property ceased at his death, and appellants then became the absolute owners of the whole of said real property, subject only to respondent's interest therein. The right, however, given to appellants to borrow said sum of \$12,500 on said real property did, however, materially affect respondent's rights under the judgment of May, 1926, if it carried with it the further right to deduct the interest due on said loan before full payment was made to respondent of her \$300 per month. However, as we construe the judgment of October, 1927, we find nothing therein which would justify a deduction of said interest from the net rentals of said real property before the full amount of the monthly payments of \$300 is paid to respondent. As we have seen by the terms of said judgment, Nathan L. Houser was given a life interest in said estate, and the loan of \$12,500 was made for his benefit upon the express agreement that he personally should pay the same and all interest thereon from

his own funds. It is clear, therefore, that during the lifetime of Nathan L. Houser he was not authorized to make any deduction from respondent's monthly payments on account of interest paid by him on said loan. After his death, the appellants succeeded to the enjoyment of a present interest in said real property, and the judgment of October, 1927, provided that they, instead of Nathan L. Houser, should pay to Jennie V. Houser from the net rentals of said real property \$300 per month during the term of her natural life. Nathan L. Houser failed to discharge said loan during his lifetime, and appellants succeeded to his interest in said property burdened with the debt against it. They had not only expressly consented to the creation of this debt, but, as we have seen, they were primarily and personally liable for its payment. Under this state of facts, appellants had no authority to deduct said interest from the gross rentals received in order to determine the net rentals from said real property. Under this understanding of the terms of the judgment of October, 1927, the question as to whether the respondent is bound by said judgment becomes immaterial, for neither under the first nor the second judgment is the interest charge given priority over the monthly payments to be made to Jennie V. Houser.

[3, 4] It will be noted that this loan of \$12,500 was paid off by a subsequent loan of \$14,000; the additional amount of \$1,500 having been borrowed for the purpose of installing a new heating plant in the building located upon said real property. This building is used as a hotel and produces the entire income received from said property. The installation of a new heating plant in the hotel would be an expense of maintaining the building, and its cost would properly be deducted from the rentals in order to arrive at the net rental of the building. However, as we construe the several compromise agreements and judgments involved herein. Jennie V. Houser was entitled to receive her monthly payments before any of the other parties mentioned herein was to share in the rentals of said building. The record shows that the net income from said property exceeded for a time the sum of \$600 per month. During this time \$300 per month only was paid respondent and the balance paid to Nathan L. Houser and later to appellants. There is nothing before us to show that the cost of said heating plant could not have been paid out of the rentals of said property after the respondent had been paid

her monthly allowance. In that case neither the principal nor the interest on said sum of \$1,500 should be a charge against respondent or against her right to receive the net rentals of said real property to the full extent of the monthly payments due her.

[5] Respondent makes the further claim that the excess rentals, during the time they exceeded the monthly payments due respondent, should have been held in reserve and applied in payment of her monthly allowance after the net monthly rentals became insufficient to pay said monthly allowance. We find nothing in the record to indicate that the parties to this transaction intended that any part of the so-called excess rentals should be held in reserve to meet the future payments due respondent. In fact, we think the contrary plainly appears. At the time the judgment of May, 1926, was rendered, the net income from said real property was in excess of \$600 per month. This judgment provided that respondent should have a lien upon one-half of the net rents after collection, and not before, to the extent of \$300 per month during her natural life. It is quite obvious, when this whole matter is considered together, that it was the intention of the parties that respondent should have the first claim on the net income to the extent of her monthly allowance, but that, after respondent had received this payment, the balance of the net income belonged to appellants, except that during the lifetime of Nathan L. Houser, said balance was to be paid to him.

The other points raised by appellants are not vital to the determination of the issues herein, and their discussion would not add anything to the legal question involved in this cause.

Our conclusions from the foregoing are as follows:

(1) Respondent is entitled, before appellants are paid anything, to receive from said net rentals the sum of \$300 per month.

(2) If the net rentals fall below said sum of \$300 per month, respondent has no claim for any difference against the appellants.

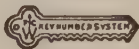
(3) If the net rentals exceed said sum of \$300 per month, said excess belongs to appellants.

(4) Appellants are not entitled to deduct from said rentals any part of the interest on said \$14,000 indebtedness.

From the foregoing conclusions, it follows that respondent has been paid the full amount of the net rentals for the months of January, February, and March, 1933, except

the sum of \$210, which appellants claimed they were entitled to retain by reason of their payment of this amount as interest on said loan of \$14,000. The order appealed from is therefore modified by striking therefrom the words "three hundred sixteen (\$316.00) dollars" wherever they appear in said order and by inserting in their place the words, "Two hundred ten (\$210.00) dollars." As so modified, the order is affirmed. Each party is to pay its own costs.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.; PRES-
TON, J.



3 Cal.2d 260

**GONZALES v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

L. A. 15019.

Supreme Court of California.

April 19, 1935.

1. Statutes ☞231

In interpreting sections of Code, chapter and section headings should be given effect according to their import to same extent as though they were included in body of law.

2. Criminal law ☞1104(6)

Defendant attempting to appeal from conviction and filing notice within time and requesting transcript, but failing to comply with rule requiring statement of grounds of appeal and portions of reporter's notes to be transcribed to present points relied on, held not entitled to move under section of Code of Civil Procedure for relief from default, since section applied only to civil cases (Code Civ. Proc. §§ 24, 31, 473; Penal Code, § 681 et seq., §§ 1046, 1102, 1239; Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7).

In Bank.

Petition by Pedro Gonzales against the Superior Court of the state of California in and for Los Angeles County and another for a writ of mandate to compel respondent court to hear an application under the Code of Civil Procedure, § 473, for relief from default in failing to comply with rules of court on an appeal in a criminal case.

Alternative writ discharged and petition denied.

Prior opinion, 35 P.(2d) 556.

F. Paul Hornaday and H. Huntington, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

SEAWELL, Justice.

The sole question presented by this petition for a writ of mandate is whether the curative provisions of section 473 of the Code of Civil Procedure are applicable to criminal proceedings. The specific problem here involved arises under the following circumstances:

Petitioner was convicted of a felony and sentence was pronounced. Within due time, and acting under section 1239 of the Penal Code, he filed his notice of appeal. He failed, however, to comply with rule 2, section 7, of the Rules of the Supreme Court and District Courts of Appeal, which provides in part as follows:

"Upon an appeal by the defendant from a judgment of conviction * * * the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent." Although petitioner failed to file the statement of the grounds of his appeal and failed to designate in the manner required in the above rule the portions of the transcript he desired to have transcribed, he did, in due time, request a complete transcript. The transcript has been duly prepared and is now on file in the appellate court. Thereafter the petitioner discovered his error and promptly petitioned the trial court to be allowed to show, pursuant to section 473 of the Code of Civil Procedure, that the omission to file the documents required by the rule was due to the clerical error, inadvertence, and excusable neglect of counsel. The trial court denied the relief requested, on the

ground that it did not have jurisdiction to hear the motion, whereupon petitioner applied for this writ of mandate to compel the trial court to entertain the motion and to decide it upon its merits.

[1, 2] Under the express provisions of the rule, as above quoted, failure to comply with the provisions thereof is ground for dismissal of the appeal. Many appeals have been dismissed for like reason. *People v. Lewis*, 219 Cal. 410, 27 P.(2d) 73; *People v. Vincent*, 116 Cal. App. 211, 2 P.(2d) 460, and others. The petition herein alleges that the Attorney General of the state has already moved in the very appeal here involved to dismiss the same. The motion to dismiss is now pending in the appellate court.

On behalf of petitioner it is urged that the law contemplates the right of review of felony cases and abhors its deprivation; that the beneficent provisions of section 473 of the Code of Civil Procedure are of far greater import in criminal matters than in civil matters. These arguments can be of no avail, however, if, in fact, section 473 of the Code of Civil Procedure does not apply in criminal matters. That such a remedial section should exist may be conceded, but arguments based on such a premise are more properly addressed to the Legislature than to the courts.

Upon an analysis of section 473, we are forced to the conclusion that its curative provisions are not applicable to criminal cases. This conclusion necessarily and inevitably follows from an analysis of the following sections of the Codes:

Section 24 of the Code of Civil Procedure provides: "Actions are of two kinds: 1. Civil; and, 2. Criminal."

Section 31 of the same Code provides: "The Penal Code defines and provides for the prosecution of a criminal action." The procedure in criminal actions is provided for by part 2 of the Penal Code (section 681 et seq.), which is entitled "Criminal Procedure." By the express provisions of the Penal Code, certain portions of the Code of Civil Procedure are made applicable to criminal actions. See sections 1046 and 1102 of the Penal Code. Section 473 of the Code of Civil Procedure is not so incorporated.

44 P.(2d)—21

Section 473 of the Code of Civil Procedure is to be found in part 2 of that Code, which is entitled "Civil Actions." It appears in title 6, entitled "Pleadings in Civil Actions," and is to be found in chapter 8 of that title, which is entitled "Variance. Mistakes in Pleadings and Amendments," obviously referring to civil actions. It is an elementary rule of construction that chapter and section headings in the Codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law. 23 Cal. Jur., p. 772, § 147.

It should also be mentioned that in the annotations by two of the Code commissioners who framed our original Codes in 1872, although many cases are cited as indicative of their interpretation of the section, not one criminal case is cited. There is nothing in those annotations to indicate an intent that the section should apply to criminal cases, the reference being to the contrary. Moreover, a reading of section 473 clearly indicates that it was intended to apply only to civil proceedings.

Petitioner relies on three cases: *People v. Southern*, 118 Cal. 359, 50 P. 545, *People v. Soto*, 8 Cal. App. 322, 96 P. 913, and *People v. Everett*, 8 Cal. App. 430, 97 P. 175. In each of those cases, the appellate courts acquiesced in the trial court's granting relief in connection with the filing of bills of exception under section 473 in criminal cases. Nowhere in the opinions filed in those three cases did the court pass on the applicability of section 473 to criminal actions. An examination of the records in the three cases indicates that the question of the applicability of the section was not raised. Its application was apparently conceded by the parties and assumed by the court. Under such circumstances, the three cases relied upon cannot be deemed to be authority for the point in question. *Oakland Paving Company v. Whittell Realty Co.*, 185 Cal. 113, 195 P. 1058.

For the foregoing reasons, the alternative writ is discharged and the petition denied.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

3 Cal.2d 146

WIGHT v. STREET.
S. F. 15099.Supreme Court of California.
April 8, 1935.**1. Trusts ⇨25(1)**

No particular terminology is required to create a trust.

2. Trusts ⇨21(1)

Trust instrument for conveyance of property held not void because instrument did not fix time for transfer of legal title to beneficiary, where beneficiary on reaching majority could have procured such transfer on theory that such was approximate time set for conveyance, or that beneficiary was sui juris and entitled to have trust terminated and corpus given to beneficiary.

3. Fraudulent conveyances ⇨49(1)

Instrument executed informally by grantor, creating trust for benefit of grantor's adopted daughter, held to create valid express trust, and hence transfer of property by deed to beneficiary at time of insolvency of grantor who subsequently became bankrupt could not be invalidated as conveyance in fraud of creditors (Civ. Code, § 857, subd. 5; § 3442; Bankr. Act § 67e, 11 USCA § 107 (e)).

Grantor's instrument provided in effect that grantor promised not to sell, mortgage, or transfer the real property or let it pass out of grantor's name to any one excepting grantor's adopted daughter; that in case of adopted daughter's death before she reached age of twenty-one, or transfer was made, property should revert to grantor and go to grantor's heirs; that if grantor should die before grantee, and in case grantee should not be of legal age, then grantor designated a certain bank as trustee; and that property conveyed was for sole benefit of grantor's adopted daughter.

—♦—

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Florence A. Wight against E. C. Street, as trustee in bankruptcy of the estates of George M. Frisbie and another doing business as the Nottingham Heating & Ventilating Company, bankrupts. From a judgment for plaintiff, defendant trustee appeals.

Affirmed.

Charles H. Patterson, and M. Harris Calum, both of Oakland, for appellant.

Charles H. Sooy, J. H. Sapiro, and A. A. Heer, all of San Francisco, for respondent.

LANGDON, Justice.

This is an action to quiet title to a parcel of real property in the city of Oakland, Cal.

The plaintiff, Florence A. Wight, was abandoned by her parents in her infancy, and was adopted by Mintie E. Frisbie (then Mintie Christian). Mintie Christian was divorced from her husband, Fred H. Christian, in 1913, and as a property settlement received the land involved herein, which had on it a three-story frame residence, with two stores on the lower floor. Soon after acquiring it, she executed the following document in her own handwriting:

"Aug. 15, 1913.

"Oakland, Calif. (1423 Grove St.)

"I hereby solemnly promise and pledge myself to neither sell, mortgage or transfer the said property situated or located on Market St., Oakland, Calif., between 15th and 16th street, known as 1528-32 Market St.; or let it pass out of my name with my consent to any one excepting my daughter Florence A. Christian; it being held in trust by me for her until she and I agree on a time for the transfer to her. In case of her death before she reaches the age of 21 years or a transfer is made, the property shall revert to me and in turn go to my heirs. In case I shall die first or before she does and in case she be not of legal age; then I desire that the Central Bank of Oakland, Calif., shall carry on the trust until the time arrives when the property shall be turned over to her; at no time do I want Hettie White (also known as Mrs. M. T. White) or any of her family to handle this trust; this property is for the sole benefit of my daughter, Florence A. Christian. Hettie White above mentioned cancelled all her rights to said Florence A. Christian at the time she was 8 mos. and 23 days old—by my adoption rights. My divorced husband (Fred H. Christian) I understand has made in writing a satisfactory settlement for our daughter's benefit and given it to Hettie White to keep; he also states he will join his settlement to this one of mine for the benefit of Florence A. Christian.

"I give as a mother to her child.

"Mintie Christian

"(August 15th) 1423 Grove Street,
"(1913) Oakland, Calif."

The above instrument was sent by Mintie Christian to her divorced husband assertedly for the purpose of his making additional provision for plaintiff. None appears to have been made, and the instrument was returned to Mintie Christian. It seems to have re-

mained among her papers thereafter, although she was not always sure where it was, and it was eventually found in an old trunk.

Some years after her divorce, Mrs. Christian married her present husband, George M. Frisbie. They engaged in a business which did not prosper, and on May 21, 1930, while insolvent, Mrs. Frisbie executed a deed of the property to plaintiff, who at this time was of the age of majority and married. On August 8, 1930, Mrs. Frisbie and George Frisbie were adjudged bankrupt, and on September 25, 1930, defendant E. C. Street was appointed trustee in bankruptcy of their estates. He claimed the Oakland property as part of the bankrupt estate of Mrs. Frisbie, contending that the deed to plaintiff was in fraud of creditors and therefore void. He brought a summary proceeding in the federal District Court to recover it from the plaintiff, and the Circuit Court of Appeals held that the bankruptcy court was without jurisdiction of the merits in such a summary proceeding against a stranger. *Wight v. Street*, 63 F.(2d) 80. Thereafter plaintiff brought this action to quiet title, and the trustee in bankruptcy set up the defense that the deed to her was a fraudulent conveyance, in violation of our statute (Civ. Code, § 3442) and also section 67e of the National Bankruptcy Act (11 USCA § 107(e)). The lower court gave judgment for plaintiff, quieting her title to the property, and the defendant trustee appealed.

The undisputed facts show that at the time of the deed to plaintiff Mrs. Frisbie was insolvent, and that no consideration was given for the transfer. If that were the only transaction involved, the conveyance would undoubtedly be fraudulent, regardless of intent of the grantor. Civ. Code, § 3442; *Wright v. Salzberger*, 121 Cal. App. 639, 9 P.(2d) 860. But the instrument of 1913 was executed at a time when Mrs. Frisbie was solvent, and if by that instrument a valid express trust was created, the subsequent conveyance of the property in accordance with the terms of the trust instrument cannot be deemed a fraudulent transfer.

The important question is, then, whether there was a valid trust. Appellant argues that it is too indefinite to be enforceable in that it fails to specify the duration of the trust, or the time when the property is to go to the beneficiary; and that it is likewise uncertain as to the nature of the beneficiary's interest, the manner of execution of the trust, the management and use of the property, and the disposition of the income. It is further argued that Mrs. Frisbie, the alleged trustor,

never intended to part with the beneficial interest in the property. Defendant points out that she used it in her own business for years without paying or accounting for rent to plaintiff; that she listed it as an asset of her own in financial statements given to the Central National Bank of Oakland on two occasions; and that the property stood of record in her own name during all the years prior to the 1930 deed.

[1] The above evidence is no doubt entitled to weight on the issue of the trust intent, but there is substantial evidence to establish a genuine intent on the part of Mrs. Frisbie to hold the property as trustee for the plaintiff. That intent is clearly stated in the document itself; it is testified to by Mrs. Frisbie in the court below; and plaintiff also produced two witnesses who testified to oral declarations by Mrs. Frisbie in 1922 or 1923, to the effect that the property was not hers but belonged to her adopted daughter. These declarations went in over objection of the defendant, but they seem proper as admissions. Similar declarations were admitted in the case of *McRae v. McRae*, 67 Cal. App. 480, 227 P. 933. See, also, *Stoebr v. Miller* (C. C. A.) 296 F. 414, 423. But irrespective of these declarations and the testimony, the instrument itself sufficiently discloses a trust intent, despite the informality of its language. No particular terminology is requisite to create a trust. *Taber v. Bailey*, 22 Cal. App. 617, 135 P. 975; *In re Estate of Ingram*, 104 Cal. App. 1, 285 P. 365; *In re Estate of Shaw*, 198 Cal. 352, 246 P. 48.

[2] We are satisfied, also, that the trust purpose is not too uncertain. Defendant relies upon *Wittfield v. Forster*, 124 Cal. 418, 57 P. 219, where a conveyance of the grantor's property to a trustee in trust for a lodge was held invalid for lack of a declared purpose. On the other hand, in *Lynch v. Rooney*, 112 Cal. 279, 44 P. 565, a letter in which the writer, referring to the beneficiary, "resolved that he should have half the estate," was held to create a trust, the purpose being to acknowledge an undivided interest in fee in the beneficiary. Many other decisions have sustained such informal declarations of trust. See *Taber v. Bailey*, supra; *Sinclair v. Purdy*, 235 N. Y. 245, 139 N. E. 255. It is true that the instrument before us does not fix a time for the transfer of the legal title to the beneficiary; but it would seem clear that upon reaching her majority, plaintiff could have procured such transfer, either on the theory that this was the approximate time set for the conveyance, or that she was *sui juris* and en-

titled to have the trust terminated and the corpus given to her. See *Moor v. Vawter*, 84 Cal. App. 678, 679, 258 P. 622; *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566, 100 Am. St. Rep. 99. The record shows that Mrs. Frisbie offered to convey to plaintiff on several occasions, and that she did so finally in 1930, in accordance with the provisions of the instrument.

Defendant also questions the legality of the trust purpose. The instrument was executed before the repeal of section 857 of the Civil Code, and hence its purposes were limited by the statute; but it was executed after the effective date of the amendment of 1913 (St. 1913, p. 438), which added subdivision 5 to section 857, and the trust may be considered one to convey property, a purpose made legal by that amendment.

[3] We are of the opinion that the trial court was justified in its conclusion that a valid express trust was created by the instrument executed by Mrs. Frisbie in 1913, and that in subsequently transferring the legal title to the beneficiary under the trust, she did not convey property in fraud of her creditors.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.



3 Cal.2d 279

PEOPLE v. TANNER et al.
Cr. 3777.

Supreme Court of California.
April 19, 1935.

Rehearing Denied May 17, 1935.

1. Criminal law ☞511(2)

Evidence to corroborate testimony of an accomplice need not tend to establish precise facts testified to by accomplice, but it is sufficient if corroborative evidence standing alone tends to connect defendant with commission of crime charged.

2. Criminal law ☞511(2)

In kidnapping and robbery prosecution, accomplice's testimony held sufficiently cor-

roborated by other evidence tending to connect accused with commission of offense.

3. Criminal law ☞1159(2)

In prosecution for kidnapping and robbery with deadly weapons, jury's verdict of guilty on competent evidence sufficient in its probative effect to sustain verdict held conclusive on Supreme Court (Pen. Code, § 209, as amended by St. 1933, p. 2617).

4. Statutes ☞148

Valid amendment to Code section may be made by reference to its number.

5. Statutes ☞118(6)

Amending section entitled, "An act to amend section 209 of the Penal Code relating to the punishment of kidnapping," held not invalid on ground that subject-matter of section exceeded express limitations of its caption where no confusion could possibly arise as to acts which constituted a felony on reading original and amended sections (Pen. Code, § 209, as amended by St. 1933, p. 2617).

6. Criminal law ☞9

Statute defining kidnapping and providing for punishment held not invalid because certain acts therein set forth widely departed from common-law requirements which consisted of forcible abduction or stealing away of person from his own country and carrying him into another (Pen. Code, § 209, as amended by St. 1933, p. 2617).

7. Kidnapping ☞1

That some or all elements of robbery formed material part of definition of kidnapping would not deprive Legislature of right of including such acts in restatement of offense of kidnapping and prescribing greater penalty for its commission (Pen. Code, § 209, as amended by St. 1933, p. 2617).

8. Kidnapping ☞1

Application of fire to hands of person who was bound to chair to degree that person suffered acute pain, and imprisonment of another in close and overheated closet, three by five feet in dimension, with two other persons for quite a period held to amount to "bodily harm" within kidnapping statute providing death penalty if person kidnapped suffered bodily harm (Pen. Code, § 209, as amended by St. 1933, p. 2617).

"Bodily" used singly is defined as pertaining to the body. It is opposed to "mental" as bodily labor or pain; "physical" is often synonymous with bodily, as physical discomfort, suffering. "Harm" is defined as hurt; injury; damage; grief, pain, sorrow; evil; wrong; wickedness. "Bodily harm" is generally defined as any touching of the person of another against his will with physical force in an inten-

tional, hostile, and aggravated manner, or projecting of such force against his person.

[Ed. Note.—For other definitions of "Bodily," "Bodily Harm," "Harm," "Mental" and "Physical," see Words & Phrases.]

9. Criminal law ☞1206(1)

Amended statute providing death penalty for kidnapping if person kidnapped suffered bodily harm held not invalid because statute was allegedly result of aroused public feeling against kidnapping (Pen. Code, § 209, as amended by St. 1933, p. 2617).

10. Constitutional law ☞70(3)

Courts are powerless to enter field of legislation and to set up their judgments as to questions of policy or expediency as against findings of legislative body on matters which are purely legislative.

11. Criminal law ☞1206(1)

Judgment of Legislature in imposing death penalty for crimes in which no person is killed will not be nullified by courts where enormity and heinousness of crimes are apparent.

12. Criminal law ☞1206(1)

Legislature held to have power to impose death penalty for kidnapping where person kidnapped suffered bodily harm (Pen. Code, § 209, as amended by St. 1933, p. 2617).

13. Kidnapping ☞4

That conspiracy was not pleaded in indictment charging kidnapping and robbery with deadly weapons did not preclude prosecution from proving existence of conspiracy if one actually existed (Pen. Code, § 209, as amended by St. 1933, p. 2617).

14. Criminal law ☞665(1)

Trial court committed no prejudicial error in refusing to exclude witnesses from courtroom until after they had testified.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William E. Tanner and others were convicted of kidnapping and robbery by means of deadly weapons, and they appeal.

Affirmed.

Dan Critchley, Griffith Jones, and Edward Feldman, all of Los Angeles, for appellant Harry C. Brooks.

John Groene, of Los Angeles, for appellant William E. Tanner.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SEAWELL, Justice.

The appellants, William E. Tanner, Harry C. Brooks (Kiewiet), and James J. Hill, who entered a plea of guilty, as will hereafter appear, were tried and convicted in the superior court of the county of Los Angeles upon an indictment returned against them by the grand jury accusing them of the crimes of kidnapping and robbery by means of deadly weapons.

The defendants were jointly charged and jointly tried, with the exception of Hill, who, on the second day of the trial, was permitted to withdraw his pleas of not guilty to the counts charging robbery (2 and 4) and enter pleas of guilty to said two counts of the indictment. The two counts charging kidnapping (1 and 3) as to Hill were subsequently dismissed, and he was called as a witness by the prosecution and gave testimony on behalf of the people implicating his two confederates in the commission of the offenses of which they were found guilty. Judgment was pronounced upon Hill on his pleas of guilty as provided by law.

Counts 1 and 3 accused said defendants and appellants with the crime of seizing, confining, abducting, kidnapping, and carrying away the persons of Henry G. Bodkin and Ruth Bodkin, his wife, respectively, with the intent and for the purpose of committing robbery, as said crime is described by section 209, Penal Code, as it now reads (St. 1933, p. 2617), after having passed through the amendatory processes of several Legislatures—a subject which will receive consideration hereafter. Counts 2 and 4, respectively, accused said defendants and appellants with the separate crimes of robbing said Henry G. Bodkin and his wife, Ruth W. Bodkin, said defendants being armed with deadly weapons in the perpetration of said respective crimes of robbery. Defendant Tanner was charged with a prior conviction of a felony committed in Texas, in 1926, to which he entered a plea of having suffered said prior conviction.

Both Brooks and Tanner were found guilty of the offenses charged in the four counts. The jury returned separate verdicts against each of the defendants of guilty of kidnapping for the purpose of robbery, as charged in counts 1 and 3, and the court pronounced

a judgment which carried with it the death penalty in compliance with said verdicts. The jury also found each defendant guilty as charged in said counts of robbery, and the court pronounced its judgment as provided by law, with sentences of imprisonment as to each defendant running consecutively. During the trial Tanner was granted leave to interpose a plea of not guilty by reason of insanity. This issue was submitted to the same jury which tried him on the offenses alleged in the indictment, and it found against him on the issue of insanity.

Defendant Brooks has appealed from the orders refusing to grant his motion for a new trial and from the several judgments of conviction. Defendant Tanner has appealed from the judgments of conviction; from the order refusing to dismiss counts 1 and 3; from the order denying his motion in arrest of judgment; and from the order denying his motion for a new trial.

Mr. Henry G. Bodkin, a well-known lawyer of the city of Los Angeles, was residing with his family at the family residence, No. 2015 North Berendo street, on December 16, 1933. His family consisted of himself, his wife, Ruth W. Bodkin, and his twelve year old son, Grattan. Mrs. Amelia Smart was also a member of the household, serving in the capacity of housemaid. Mr. and Mrs. Bodkin had prepared themselves to attend a Christmas entertainment given by the Bar Association of Los Angeles county. At about 6 o'clock in the evening Mr. Bodkin left the residence to go to his garage and put his automobile in readiness for the drive to the place of entertainment. His garage contained two machines and was situate about seventy-five feet from the residence. Shortly after entering the garage, he turned on the automobile lights and backed the automobile down the driveway a short distance, when a stranger, whom he identified at the trial as Tanner, approached him and inquired if he was Mr. Bodkin. Upon being assured that he was, Tanner, who at this stage was unmasked, said: "We have a Christmas present for you." Tanner carried a book which resembled a book of blank receipts, and told Mr. Bodkin that he should sign for the present. At this moment Mr. Bodkin looked about and saw the second man, whom he identified as Hill, approaching carrying a large pasteboard box or carton. Mr. Bodkin instructed him to put the package in the rear of the car. At this juncture Hill, being partially masked by a handkerchief tied across the lower part of his face and holding a gun in his hand,

said: "This is a stick-up. We mean business. We want your money." Mr. Bodkin took his wallet out of his pocket and said, "Here it is." Hill said, "We want real money. We are going inside." He ordered Mr. Bodkin to cut off the motor and get out of his car. Tanner, who was unmasked when he first approached Mr. Bodkin under the guise of a messenger delivering a Christmas present to him, immediately slipped up a handkerchief which was tied about his neck and so adjusted as to serve as a mask. He also held a pistol in his hand.

Mr. Bodkin was ordered to put his hands up, which he did, and led the way into his residence. The two men walked behind him with guns touching his back, and followed him into the house. They repeatedly said to him, "Not a squawk out of you, or we will plug you. We are going inside." The distance to his rear door was about fifty feet. On the way to the house Mr. Bodkin informed them that the maid was in the kitchen and she might become excited and give an alarm. One of the men said, "It is up to you to keep her quiet. If she hollers we will plug you. Keep her quiet." Mr. Bodkin rang the rear door bell and as the maid came to the door he cautioned her not to get excited and asked her to let them in. She opened the door and Mr. Bodkin and the defendants entered. The defendants had guns in their hands, but Mr. Bodkin told the maid they were friends of his and to go forward and not to get excited. Mr. Bodkin and the maid were marched to the dining room and Mrs. Bodkin was observed walking in the hallway toward the dining room. Mr. Bodkin said to her, "Ruth, do not get excited; do not holler. These men are armed and they will shoot." He inquired as to where Grattan the twelve year old son was, and Mrs. Bodkin said that he was in the bathroom. Mr. Bodkin requested that he be permitted to remain where he was, but Hill refused the request. Tanner followed Mrs. Bodkin into the bathroom and the boy was brought into the dining room, where he joined the group of captives.

The dining room was fully lighted, but the shades were carefully drawn and pulled together by Hill and Tanner to shut out the view of persons on the outside. They compelled Mrs. Bodkin to turn off the front porch electric light. Mr. Bodkin was searched for arms, and required to take off his overcoat, undercoat, and vest. Mr. Bodkin's wallet containing \$19 was placed on the dining room table. All present were commanded to sit down. Each one faced the table. Hill said,

"We want your money." Mr. Bodkin assured them that all the money he had on the premises was the \$19 contained in the wallet on the table. Hill said, "No, we want real money. We know you have it. We have a straight tip on you. You have been beating the government on your income tax and you have got the money here in the house. You have got real money and we want it." Mr. Bodkin assured them he had no other money and the defendants repeated several times their demands at the same time walking back and forth brandishing their weapons. One of them asked Mrs. Bodkin if she had any money whereupon she took out her pocketbook containing \$24 and placed it on the table. When the \$24 was produced, one said, "No, we want real money. You have got real money, and we are going to get it, and we are not going to leave here until we get it."

After much walking from room to room, and searching of the premises and making positive statements that large sums of money were concealed in the house, one of the defendants gave the order to search the fur coat which Mrs. Bodkin was wearing. She had her three diamond rings—an engagement ring, a wedding ring, and a dinner ring—in her coat pockets. The value of said rings was approximately \$2,000. When ordered to remove the coat, she took out the rings, saying, "Here are my rings." She placed them on the table with the money that they had taken from Mr. and Mrs. Bodkin. They insisted most strongly that money was concealed in the house and that they did not intend to leave until it was forthcoming. The telephone wires were cut. Mrs. Bodkin, the maid, and the boy were taken out of the room and placed against their protest in a small closet which had no window or means of ventilation. A heating pipe which was laid in the closet wall added to the discomfort of the occupants. The door was locked. It was suggested that a larger closet with a window in it was available, but the defendants refused to remove the occupants to the other closet. As they were taken to the closet by Tanner, Hill said, "We will have to give him [Bodkin] a working over." He was required to take off his shoes. Hill then gave the order, "Tie him down." His hands were then tied behind and made fast to the chair he sat in with wire which the defendants brought with them. Defendants frequently iterated and reiterated the statement, "We have got to have more money; we know you have it." Finally they said, "We will have to make him talk." Tanner took a position behind Mr. Bodkin and Hill stood before him with cock-

ed pistol pressed to his chest in the region of the heart, and in a menacing tone said, "Now talk; tell us where that money is." Mr. Bodkin again told the defendants there was no more money in the house, and that if there were he would gladly give it to them. Mr. Bodkin's appeals had little effect. Hill said, "Bring out the woman." Mrs. Bodkin was brought into the room and seated. Both said, "We have got to make them talk." Hill then said to Mrs. Bodkin, "How would you like to see his [Mr. Bodkin's] body floating around in the bay? Now you had better talk or that is what is going to happen. We haven't got rough yet. We have got another gang outside and if you do not talk, we will let them in and they will tear this joint up."

Mrs. Bodkin used her best persuasive powers to convince the defendants that there was no other money in the house. All attempts to compel the Bodkins to bring forth or reveal the hiding places of any large sums of money having failed, one of the defendants said, "We have got to give them a little heat." Mrs. Bodkin became quite overcome at the suggestion and begged the defendants not to hurt her husband. Tanner then tore the heavy cover off a Christmas magazine, made it into a torch and lighted it, and applied it to Mr. Bodkin's hands, which were tied behind him. Mr. Bodkin cried out at the pain. After the magazine cover was totally consumed, Hill said, "I believe you are telling the truth. * * * I think we have got a bum steer. Wait until we get ahold of that man, that party who gave us this bum steer, and we will take care of him."

The defendants had a whispered conference. Mrs. Bodkin said she had cashed a \$25 check that day and spent one dollar. The \$24 on the table represented the balance. Tanner requested her to produce the stub and upon doing so the defendants carried on a whispered conversation and left the premises. Before leaving, however, they started to return Mrs. Bodkin, the maid, and the boy to the closet, but upon the protests of all that they would suffocate if returned, they were brought out to the dining room, and bound hand and foot with ropes and wire. Mr. Bodkin had been securely bound. Upon leaving they were told not to give an alarm for forty-five minutes, and that they might know the time, Tanner placed Mr. Bodkin's watch in a place where he might see the time. Hill said that an automobile containing a machine gun was across the street and any one attempting to leave the premises before the expiration of forty-five minutes would be

shot. Upon leaving, Tanner and Hill took all of the money and the three diamond rings above described.

The defendants were actually in the presence of Mr. Bodkin for a period of one hour and ten minutes, and in the presence of the members of the household the greater part of this period. Mr. Bodkin had seen and talked with Tanner before he lifted the handkerchief over the lower portion of his face. He conversed with and measured the height and form of both defendants with his eyes and employed all other senses, faculties, and powers of discernment and identification with which normal persons are endowed. Mr. Bodkin is a lawyer and there can be no doubt that he studied the features and characteristics of the men with whom he was in close personal contact for more than an hour with unusual care and with a consciousness of what misidentification would mean to the accused. Mr. Bodkin, Mrs. Bodkin, the maid, and the son expressed not the least doubt as to the identity of Tanner and Hill. In addition to this personal identification, we have defendant Hill coming forward and admitting his part in the conspiracy and detailing minutely the part that Tanner and Brooks played in the commission of the crime. His testimony is strongly corroborated by independent facts and circumstances. Brooks did not directly participate in the commission of the crime, but it appears that he was the directing mind in plotting the crime and that he is more adept and cunning than either of his confederates. At the time of his arrest he was living at 2960 West Ninth street. He was a confessed bootlegger, and had been plying his trade for some time. He operated his liquor order business from said number. It will not be possible to point out all of the evasions, contradictions, and improbabilities with which he is confronted by the record. His subsequent contradictions of prior statements no doubt caused the jury to distrust his testimony in toto. The evidence is sufficient to sustain the conclusion that he was a guilty participant in the commission of the acts above and hereafter to be narrated.

[1, 2] Appellants strenuously contend that the testimony of the accomplice is not corroborated by other evidence tending to connect the defendants with the commission of the offense. We are of the view that under the rule announced in the case of *People v. Kempley*, 205 Cal. 441, 271 P. 478, which is but the restatement of a well-established rule, the corroborative evidence in the present case satisfies all legal requirements.

Such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence standing alone tends to connect the defendant with the commission of the crime charged. Brooks first denied that he was acquainted with Hill. That Hill had had wine sale transactions with him and that this acquaintance was of long standing, Brooks was finally forced to acknowledge.

A brief statement of the relationship of Tanner, Brooks, and Hill and one or two other characters whose shadows frequently flit across the picture is necessary to appraise the corroborative force of the evidence upon which the people rely. That Tanner, Hill, and Brooks were sympathetic with devious methods of acquiring money there can be no doubt. One J. B. Kyte was a dealer in secondhand automobiles, occupying a lot at No. 813 East Fifth street. Tanner and Hill and other traders in secondhand cars made Kyte's place their rendezvous. Brooks was undoubtedly acquainted with Tanner, Hill, and other questionable characters who made Kyte's lot their headquarters. The preparation for the commission of the crime as told by Hill may be thus briefly summarized:

At about 4 o'clock, December 16, 1933, Tanner and a driver whose identity was not established called for Hill and the defendants were driven to an apartment house on West Ninth street, where Brooks had apartments. This was also the place from which he conducted an illicit wine and liquor business by telephone and personal contacts. When Hill left for Brooks' residence, he supposed he was going to a mine in which the two seemed to have had some sort of interest. Hill placed his working clothes in the automobile and proceeded with Tanner to Brooks' apartment. A man by the name of Ed Guyer, a friend of Brooks, whom Hill had met at said mine, was at Brooks' apartment. Brooks asked Hill if he wanted to make some easy money. Hill replied that he would like to get the lawsuit over the mine ended so he could get possession; that his wife was very sick, which was a fact, and if she died he did not have enough money to bury her. Brooks said they could make money easier than that. He then outlined the Bodkin plot. Brooks said that a man, presumably Mr. Bodkin, had \$150,000 in cash in his house, and between \$60,000 and \$80,000 in jewelry. He further said, "I am going to get it tonight." He asked Hill if he would like to help get it and he replied that he had never

done such a thing in his life. Brooks said to Hill that he knew what they were planning to do, and that he was going to help. Hill replied that he did not want to join in the crime. Brooks said, "If you don't you have got to keep your mouth shut. If you don't, it takes just one bullet to shut it." He picked up two guns lying on a table. Tanner took one of the guns and the other was handed to Hill. Tanner went to the car and brought out Hill's old clothing, and the change was made in Brooks' room. Handkerchiefs were furnished by Brooks and tied about the necks of each man in such manner that they might readily serve as masks. The men were furnished with wire cord and rope by Brooks.

While they were discussing the plan of the job, Guyer, Tanner, and Hill were present. Guyer, who was well known to both Hill and Brooks, did not appear at the trial of the case and his presence was unaccounted for. Hill was not sure as to the identity of the driver of the car. Tanner and Hill left the automobile some distance from the Bodkin home, with the driver at the wheel. There is some suggestion that another car followed the Tanner and Hill car and parked opposite Bodkin's home.

Upon leaving the Bodkin home, Hill and Tanner, in the same car and with the same driver who transported them to said home, returned to the Brooks' apartment, where they found Brooks alone. Upon entering Brooks' apartment both Tanner and Hill took what money they had extorted and the three diamond rings from their pockets and placed them in a heap on a table. Brooks asked if that was all and Tanner replied that it was. Brooks then asked if they made him talk, and Tanner replied that they could not make him talk. Brooks said he knew the money was there. Tanner said he applied the heat to him and still he would not talk. Brooks said, "I will get him again. I know it is there." Brooks said that a man named Lorraine had given him the information, and he expressed some doubt as to whether he had given him a "bum steer." Brooks gave Hill a dollar and told him to get out of his clothes and go home. He changed his clothing, leaving the old clothes at Brooks' apartment. He did not see Brooks again until December 20, at which time he went to see Brooks to try to recover the jewelry which had been taken from the Bodkins' home. Evidently the police had a clue as to the perpetrators of the crime. Hill told Brooks that they were going to get into trouble.

Brooks refused to consider the matter and ordered him out of his apartment.

On December 21, five days after the commission of the crime, Hill and Tanner were arrested at Hill's apartment, and a little later on the same day Brooks was arrested at his apartment. Mr. Bodkin accompanied several police officers when they arrested Brooks. Mr. Bodkin testified that immediately upon entering Brooks' room Officer O'Connor said to Brooks: "Where are the rings, the diamonds? The boys said they left them here." Brooks said: "No, they had them out here, but they took them away." The officer said he knew the rings were there, to which Brooks replied that they were not there. On December 26 the three diamond rings were found under Brooks' window by his landlady. Between his apartment and the adjoining residence there exists a strip of unused ground seven feet in width, which was somewhat covered with vegetation. The landlady was cleaning up the yard at the time she discovered a chamois skin bag which contained the three diamond rings which had been taken from the Bodkin home. The apartment house was a two-story building. Brooks' room was on the second floor. One of the windows of his room is directly over the spot where the bag was found. A small portion of the window pane, sufficiently large to permit the passing of the bag, was found to be broken out. The keyhole in the door opening into Brooks' room had been plugged by him. This was done about the time of or shortly before December 16. Brooks said that he had lost some personal articles by theft, and that was the reason he plugged the keyhole. He had not, however, reported any such loss to the landlady, or the police, or any one else. A copy of the Los Angeles Examiner, published December 17, the next morning after the crime was committed, was lying on the radio. The exposed part of the newspaper contained this headline in large type: "Lawyer Held Up By Bandits and Tortured." When questioned as to how he came to retain that particular paper, he said he did not know how the paper came to be preserved; that he had not seen the paper and knew nothing about it being there. Upon being asked what he did and where he was Saturday evening, December 16, he said that he did not know. The officers discovered a pistol holster and a large box of pistol shells in one of his closets. He appeared pale and nervous and took a drink of whisky to quiet his nerves. When first confronted with Hill, he denied

that he ever knew him. On another occasion he said that he believed Hill was at his apartment on the evening of December 16, but he was busy 'phoning and had no conversation with him. He further stated that he had a bad cold at the time he was arrested and that he had drunk so much whisky as a remedy that he was oblivious to passing events.

Brooks' testimony, together with his statement, covers a large number of pages and taken as a whole it is difficult to pick out the portions which are entitled to credence. The man Lorraine, who is believed to be the man who gave him the information as to Mr. Bodkin's wealth, is known to have been in communication with him very soon after the crime had been completed. Hill testified that he understood from Brooks that Lorraine was his informant. Whether or not there was a cross up on the part of the perpetrators of the crime as to the house which it was understood contained large sums of money and jewelry does not satisfactorily appear from the record.

Mr. Bodkin kept the carton which was supposed to contain the present Tanner and Hill made a pretense of delivering to him. In size and shape it corresponded with the cartons which Brooks used in his bootlegging business. It had the word *claret* printed on it. Of course, it may have been used as a container for port wine or any other variety. It was such a carton as was popularly used by bootleggers. Brooks boldly asserted to the officers that he was a bootlegger. We are convinced that what has been set forth herein does tend to connect the defendant Brooks with the commission of the crime.

Both defendants Tanner and Brooks offered evidence which, if believed, would tend to establish the defense of alibi. Their testimony and the testimony of their witnesses generally is not impressive. Weighed against them is the testimony of four intelligent and apparently credible witnesses, who were under the personal control of Tanner and Hill for a period of more than one hour under circumstances which caused them to scrutinize their physical characteristics by every test that the human powers of identification are capable of calling to their aid. It is true that masks partially hid the lower portions of their faces. It is also true that one did not use a partial mask at the beginning, and his face was fully exhibited to Mr. Bodkin. Proof of the guilt of defendants Tanner and Hill bore so heavily upon Hill that he ad-

mitted his part in the crime. Tanner stood upon the sole plea of not guilty until the evidence began to establish his guilt beyond a reasonable hope of escape, and, realizing that the inevitable was before him, he asked and was granted permission to withdraw his plea of not guilty and interpose the additional plea of not guilty of the offense by reason of insanity.

[3] Brooks, if the evidence offered by the prosecution is true, is more guilty than either of the other two. The jury having found him guilty upon competent evidence sufficient in its probative effect to sustain the verdict, said verdict is conclusive on this court.

We now come to the consideration of the second major objection raised by appellants, which is directed at the validity or constitutionality of section 209, Penal Code, as amended the second time during the closing days of the 1933 session of the Legislature. Two amendatory sections were passed. The first became effective August 21, 1933 (St. 1933, p. 1757), and the second, which is the one now under discussion, became effective October 25, 1933 (St. 1933, p. 2617). Both sections are identical in subject-matter, with the exception that the second amendment provides a much severer penalty than does the first in case the offense therein defined is accompanied by bodily harm.

It is contended that the title of the 1933 amending section 209, which is entitled, "An act to amend section 209 of the Penal Code, relating to the punishment of kidnapping," is insufficient in that the subject-matter exceeds the express limitations of its caption. In other words, the amendment is not germane to the title. With this contention we cannot agree. We think there are sufficient grounds upon which the validity of the amendment may rest. Section 209, being the original section herein amended, was added to chapter 3, tit. 8, pt. 1, entitled "Kidnapping," in 1901 (St. 1901, p. 98). It was entitled, "An act to amend the Penal Code of California by adding a new section thereto, to be numbered two hundred and nine, relating to crimes and penalties." It appears in the Code in this form: "Penalty for kidnapping for purposes of extortion or robbery." It provides that "every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and

shall be punished therefor by imprisonment in the state's prison for life, or any number of years not less than ten." It will be noted that the forcible taking of any person with intent to commit extortion or robbery, the exact offense of which the defendants were convicted, is made a felony. The only change made by the amendments of 1933, so far as they affect the instant case, was to increase the penalty if the person forcibly taken suffers bodily harm.

The act effective October 25, 1933, under which the appellants were convicted is entitled, "An act to amend section 209 of the Penal Code, relating to the punishment of kidnapping." It reads: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm." St. 1933, p. 2617.

[4, 5] The act of 1901, as above set out, provides that every person who forcibly takes any person with intent to restrain such person and thereby to commit extortion or robbery is guilty of a felony. The section as amended provides that every person who seizes, confines, kidnaps, or who *holds or detains* any person for the purpose of committing extortion or robbery is guilty of a felony. The same elements, to wit, the forcible taking of a person with intent to extort from such person money or other valuable thing, or with the intent to commit robbery, enter into and constitute a felony, and the name given to the crime specifically defined is immaterial in such circumstances. Appellants concede that a valid amendment to a Code section may be made by reference to its number. The amendment was made by reference to the Code section in the instant case. No confusion could possibly arise as to acts which constituted a felony upon reading the original and amended sections. It is true

that the term "kidnapping" was used in the title of the amendment, but it could not have misled any one in view of the Code section reference and the acts set forth in the Code section describing the particular felony. The acts made punishable by the amendment were also punishable under the provisions of the original section. The amendment, so far as it affects the appellants herein, relates only to increased punishment. The title of the original section is, "An act to amend the Penal Code of California by adding a new section thereto, to be numbered two hundred and nine, relating to crimes and penalties." This is a very comprehensive title and kidnapping has always been classified as a crime. It is certainly a felony. So it may be said that the title of the 1933 amendment makes specific reference to a numbered section of the Penal Code, which increases the penalty for the commission of the offense described in said Code as a felony. The original section, which has existed as a Code section for thirty-three years, is prefaced by the following (prepared by the annotators of the Code) introductory line, printed in boldface type: "§ 209. Penalty for kidnapping for purposes of extortion or robbery." The Code annotators were doubtless brought to the conclusion that the felony therein described was, speaking specifically, kidnapping. However this may be, we feel satisfied that neither the lawmakers who framed the amendment, nor the public upon which it operates have been or will be deceived or misled by the title of the amendment.

Objection is made to the statute of 1933 on the ground that a number of the acts therein set forth describing kidnapping widely depart from the common-law requirements which consisted of the forcible abduction or stealing away of a person from his own country and carrying him into another, and inasmuch as the acts described by the evidence contain no flavoring of the ingredient of the common-law requirement as to the carrying away of the person kidnapped, the contention is made that the crime described by the evidence is not within the purview of the offense of kidnapping. It is true that many of the acts which are made punishable by statute as kidnapping differ as widely from those which anciently constituted kidnapping as do the particular social and economic conditions which gave rise for the necessity of the enactment of penal statutes as protection against the dangers peculiar to their times, differ from each other. Ancient-

ly, kidnapping was defined to be "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another, [and] was capital by the Jewish law. 'He that stealeth a man and selleth him, or if he be found in his hand, he shall surely be put to death.' (Exodus, XXI, 16.) So likewise in the civil law, the offense of spiriting away men and children * * * was punished with death. This is unquestionably a very heinous crime as it robs the King of his subjects, banishes a man from his country and may in its consequences be productive of the most cruel and disagreeable hardships. * * *" 2 Cooley's Blackstone (4th Ed.) p. 1379.

[6, 7] The common-law definition of kidnapping has long since become obsolete and has passed with the particular primitive civilization in which the offense as originally defined was practiced. The offense has since been redefined by statute in a number of states, domestic and foreign, to meet the requirements of modern conditions. Its ancient definition would mean nothing in the way of deterring criminals from the commission of such crimes as our statutes were designed to prevent. It is the duty of Legislatures, without regard to allegiance to archaic forms, to enact laws adaptable to the protection of the citizen in the enjoyment of life and property. The common law has been supplanted by statutory law in this state since 1872. Section 4, Civ. Code, provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." No reason has been given why it is not within the purview of the sovereign power of the state to pronounce or classify as an act of kidnapping (following closely the language of the statute) the act of seizing and *confining* a person by *any means whatever*, with intent to *hold* such person for ransom or reward, or to commit *extortion* or *robbery*, and also to provide as a penalty that if such person suffers bodily harm at the hands of the kidnappers, the punishment shall be death or life imprisonment at the discretion of the jury or judge trying the case. The crime as defined by section 209, Penal Code, enlarges upon the offense of robbery at common law, which was defined to be "larceny committed by violence from the *person* of one put in fear." Conceding that some or all of the elements of robbery

form a material part of the definition of kidnapping, that fact would not deprive the Legislature of the right of including said acts in a restatement of the offense of kidnapping and prescribing a greater penalty for its commission. In the instant case there was a forcible possession of the bodies of the victims who were bound and held captive and terrified by threats of defendants Tanner and Hill of resorting to the most shocking and painful means of inflicting death or injury upon the victims for the purpose of extorting property from them. Gain has always been the motive of kidnappers.

There can be no good reason for doubting the power of the Legislature to impose the extreme penalty of the law upon persons who commit offenses in the manner and by the means employed by the defendants in the instant case, who carried loaded weapons for no other purpose than to use them upon the slightest show on the part of the victims to gain their release or to give an alarm that would thwart them in their designs.

[8] It is the contention of appellants that no bodily harm was suffered by any of the parties against whom the crime was committed. It will be noted that the statute does not use the words actual bodily harm, or great bodily harm, or bodily injury. Bodily, used singly, is defined as pertaining to the body. It is opposed to mental "as bodily labor or pain"; physical is often synonymous with bodily, as physical discomfort, suffering. Harm is defined as "hurt; injury; damage; (2) grief, pain, sorrow; (3) evil; wrong; wickedness." Webster's International Dictionary (2d Ed.). *Bodily harm* is generally defined as "any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person." 8 C. J. 1134; *People v. Moore*, 50 Hun (N. Y.) 356, 3 N. Y. S. 159; 1 Words and Phrases, First Series, page 817; *King v. Hostetter*, 7 Canadian Criminal Law, 221. There can be no doubt that applying fire to the hands of a person in the manner described by the witnesses in the instant case to the degree that it causes such person to suffer acute pain is to do bodily harm. To bind persons in the manner in which the Bodkins were bound is to do them bodily harm. Mrs. Bodkin, while not subjected to the ordeal of fire, was imprisoned in a close and overheated closet, three by five feet in dimension, with two other persons for quite a period, and was finally left bound with the other members of the household. These acts unquestionably amount to bodily harm.

[9-12] Counsel for appellant Tanner criticizes the Legislature for passing the amendment which provided the death penalty as punishment for the crime committed by the appellants as an emergency measure during the last days of the legislative session. He challenges the procedure and questions the motives of the members of the Legislature who were pressing the passage of said amendment. The suggestions that it was the result of an aroused public feeling against kidnapping is no reason why it should be condemned as invalid. Perhaps every measure adopted is the result of a public need or demand. Courts are not empowered to enter the field of legislation and to set up their judgments as to questions of policy or expediency as against the findings of the legislative body on matters which are purely legislative. "The fixing of penalties for crimes is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual. Where the sentence imposed is within the limits prescribed by the statute for the offense committed, it ordinarily will not be regarded as cruel and unusual. [Citing authorities.] Kidnapping is a heinous offense. A sentence to *life imprisonment for transporting a kidnapped victim in interstate commerce, or for conspiracy so to transport a kidnapped person*, is not, in our opinion, cruel and unusual punishment within the constitutional inhibition." *Bailey v. United States* (C. C. A.) 74 F.(2d) 451, 452. (Italics ours.) An attempt to wreck a railroad train by doing any of the acts set forth in section 219, Pen. Code, is made punishable with death at the option of the jury trying the case. So also is treason and assaults made by persons serving a life sentence in a state prison who commit an assault upon the person of another with a deadly weapon or instrument, although life is not taken, punishable by death. The judgment of the Legislature in such cases will not be nullified by courts where the enormity and heinousness of the crimes are apparent. In passing the act challenged, the Legislature acted in response to the will of the people. That it had the power to provide the infliction of the death penalty in such cases cannot be disputed. That the home life of the state and Nation was frequently being brutally invaded by kidnappers, and the peace and safety of the citizen was being threatened at the time the amendment

in question was adopted, was a matter of common knowledge and concern, and the fact that the Legislature hastened to adopt such measures as in its judgment would tend to protect the citizen against kidnapping furnishes no ground for the claim that its act was without mature deliberation and consideration on a very important matter of legislation. It has not been pointed out that the Legislature failed to follow the procedure provided by law in the adoption and passage of said amendment. Its validity appears to be unimpeachable.

[13, 14] Many other assignments of error are presented on the appeal, but we have examined them all and found no real merit in them. It was not error correctly to give the jury the law as to conspiracy. The fact that conspiracy was not pleaded in the indictment did not preclude the prosecution from proving the existence of a conspiracy if one actually existed. The district attorney was not guilty of misconduct in the presentation of the case, nor did the court commit prejudicial error in refusing to exclude the witnesses from the courtroom until after they had testified. No errors of law appear to have been committed by the court in giving its charge to the jury. No other matters occurring at the trial require consideration.

The judgments and orders appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; CURTIS, J.



3 Cal.2d 274

**TOSI et al. v. NORTHERN CALIFORNIA
BLDG. & LOAN ASS'N et al.**
S. F. 15082.

Supreme Court of California.
April 19, 1935.

Rehearing Denied May 17, 1935.

1. Principal and agent — 25(1)

Owner of encumbrance *held* estopped to deny agency of one receiving payments on encumbrance and failing to turn over all payments made by debtor to owner, where owner, by a continued course of conduct, had recognized person receiving payments as its agent.

2. Principal and agent $\Rightarrow$ 170(2)

Owner of encumbrance held liable for payments made by debtor to agent who failed to turn over all payments to owner under doctrine of ratification, where owner knew that agent was collecting from debtors for its own account and was compensating him part of the time for such collection service, and debtor had no notice that agent was not acting in good faith, while owner had notice that agent was guilty of fraudulent dealing (Civ. Code, §§ 2307, 2311).

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Amadio Tosi and another against the Northern California Building & Loan Association and others. Judgment for defendants and plaintiffs appeal.

Reversed.

Rehearing denied; SHENK and THOMPSON, JJ., dissenting.

Thomas C. Nelson and Milton Newmark, both of San Francisco, for appellants.

Cross & Brandt, of San Francisco, for respondents.

PRESTON, Justice.

Plaintiffs appeal from judgment for defendants. The word "defendant" will be used to refer to defendant Northern California Building & Loan Association, a corporation.

Plaintiffs, for the sum of \$10,000, purchased a home in Mill Valley upon which there existed an encumbrance of \$8,512.74, plus \$159.62 interest, in favor of defendant. They made a \$6,000 down payment, \$1,500 to be paid the owner for his equity and \$4,500 to be applied toward discharge of the encumbrance. The remaining indebtedness they promised to pay in monthly installments of \$100 or more, so as to retire the loan within a short period. All negotiations with respect to the transaction were handled through a real estate man named MacArthur, whom plaintiffs first approached upon their visit to Mill Valley in search of a purchasable home. MacArthur represented to them that he was the agent of the encumbrancer and that all payments could be made to it through him. Plaintiffs never questioned this representation and did not even know or inquire as to the name of said encumbrancer. From October 1928, time of purchase, to January, 1932, plaintiffs made to MacArthur periodical payments on account of principal and interest, sufficient in all to cancel their entire indebted-

ness. MacArthur thereupon acknowledged payment in full and gave plaintiffs a fictitious document which purported to be a duly recorded "deed of reconveyance." Plaintiffs accepted this document and believed themselves to be owners of the property free and clear of all liens.

In February, 1932, MacArthur disappeared under such circumstances that resulting publicity caused plaintiffs for the first time to apprise themselves of the name of the encumbrancer, defendant, and communicate with it, whereupon it was discovered that MacArthur had failed to remit to defendant some \$2,500 of the \$6,000 down payment and numerous items of \$25 or more from the monthly installment payments. According to defendant's records, MacArthur sent in for plaintiffs' account a total of \$4,229.23, which was applied as received to principal and interest, leaving still due and unpaid a balance of \$5,145.07. Defendant refused to acknowledge MacArthur as its agent or to accede to plaintiffs' demands for reconveyance, although this refusal appeared to be entirely inconsistent with defendant's course of conduct throughout the transaction and the dealings between the parties.

In April, 1932, plaintiffs filed their complaint herein for the purpose of compelling a cancellation of the encumbrance. Issue was joined and the cause went to trial. The evidence was without substantial conflict. From it the court concluded that at all times and in all matters connected with the transaction, MacArthur acted solely as the agent of plaintiffs and that at no time was he the agent of defendant. Predicated upon a finding to this effect, the court gave judgment for defendant and plaintiffs appealed. The issue on appeal is whether the evidence supports said finding of agency. We are of the view that it does not, and that the judgment must therefore be reversed.

[1] Section 2307, Civil Code, provides: "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification." Section 2311 of said Code provides: "Ratification of part of an indivisible transaction is a ratification of the whole." Although in this case MacArthur may not have been expressly authorized to act for defendant in the first instance, it is clear that in the course of this indivisible transaction and in making the collections from plaintiffs, he became the agent of defendant. Furthermore, the evidence establishes a later express agency which, under elementary princi-

ples of ratification, effectively estops defendant to deny authority for earlier acts in the same transaction.

Indisputable proof to support the conclusion just announced is found in the following: Plaintiffs' Exhibit 3, a ledger card of defendant covering this loan, showing insertion thereon of plaintiffs' name in place of that of the former owner and entry of collections from MacArthur, including an item of \$75 received on May 23, 1929. Plaintiffs' Exhibit 6, which is a letter from defendant to MacArthur, dated May 29, 1929, acknowledging receipt of a check covering various collections made by MacArthur for defendant, including the \$75 item just mentioned, which letter reads in part:

"Dear MacArthur: Enclosed herewith our check No. 8442 in the amount of \$2.67 being 1% of the amount of collection check which we received today. It is our custom to pay this to people who make collections for us and this fee will continue to be paid you as long as you do said collecting * * *."

The above arrangement, whereby defendant paid MacArthur a fee of 1 per cent. for making collections for it continued from May, 1929, to November 29, 1930. In this connection the secretary of defendant corporation testified that during the period from October, 1928, to February, 1932, MacArthur was sending over other payments on loans and he thought MacArthur handled nine loan accounts in the way of sending over money.

During said period MacArthur handled numerous other dealings for defendant with people in Mill Valley. He had minor work done on homes or gardens and handled loan applications and appraisements for defendant. Defendant's president testified: " * * * where he didn't get the money in before the end of the month, and Mr. Taylor (defendant's secretary) hounded him for not getting it over—he had some collections—and he brought it over and I told him, 'Well give him one percent as a kind of collection expense to recompense him for little odds and ends he did for us in that way.' " As a rule, MacArthur would send over one check to cover collections with a statement as to how the items should be allocated. Defendant "used to urge" MacArthur to get money over to it, sometimes by phone and sometimes by letter. In all, plaintiffs produced upon the trial some twelve exhibits, records, and letters passing between MacArthur and defendant, which established a continued course of conduct and dealings between them admitting of no other conclusion than that defendant recognized

MacArthur as its agent, either directly or by adoption and ratification of acts done in that capacity, in such manner that defendant may not now be permitted to deny the relationship to the injury of persons, such as plaintiffs, who dealt with MacArthur as such agent.

[2] There is no merit in the contention that the doctrine of ratification is not applicable because defendant knew nothing of the sale to plaintiffs. Defendant was apprised of the sale by the former owner and saw the indorsement on fire insurance policies as well as the deed from said owner to plaintiffs and it wrote plaintiffs' name on its ledger card. It also knew that MacArthur was collecting from plaintiffs for its loan account and that it was compensating him part of the time for this collection service. Plaintiffs believed MacArthur was defendant's agent; they paid him no commission. They were warranted in assuming that if the encumbrancer was not receiving the installment payments in proper amount when due, it would communicate with them. They could not think that in such case the encumbrancer would permit them to remain, over a long period, in peaceful and unquestioned possession of the home. When MacArthur reduced the monthly remittance to defendant on plaintiffs' loan from \$100 to \$75, defendant did not communicate with plaintiffs, although it knew they had planned to retire the indebtedness within a short period. There was no circumstance which should have put plaintiffs on notice that MacArthur might not be acting in good faith.

This is not true of defendant, for it had received ample warning of MacArthur's predilection for evasive and fraudulent dealing. In January, 1931, a year before plaintiffs thought they had paid their account in full, MacArthur and his wife met with defendant's officers to discuss the disclosure that four other loans which defendant had made in Mill Valley were irregular and the transactions fraudulent. The outcome of this meeting was that, to cover their fraud, MacArthur and his wife executed to defendant four promissory notes in amount of the four fraudulent loans and promised to give them as security therefor assignments of life insurance, etc. Subsequent letters passing between defendant and MacArthur show that defendant was endeavoring to protect itself from loss on account of these frauds by permitting MacArthur to carry on his business uninterruptedly and continue to make collections for it, in order that he might get in a position to pay said personal notes given to

cover the fraud. In fact, defendant did not succeed in securing from MacArthur said assignment of insurance until September or October, 1931. With all this knowledge, defendant failed to investigate the condition of the other loans, including plaintiffs', which MacArthur was handling for it, and failed to take any steps whatsoever to guard against further fraud. In this connection the trial court said: "I am satisfied that this discovery of the defalcation of MacArthur was made in January * * * and the company had some notice that this man was crooked * * * and they were trying to protect themselves * * * and I will find that to be a fact if it is necessary. * * * This is admitted: that the Building & Loan in January, 1931, knew that MacArthur was crooked in at least four deals, and that they did not notify this plaintiff. * * * They took whatever assets they could to make themselves whole, and that has been proved."

The evidence is susceptible of no other construction than that MacArthur was expressly authorized to make collections for defendant from plaintiffs from May, 1929, to November, 1930, and that, upon principles of ratification and estoppel, this express employment constituted a ratification of the entire indivisible transaction.

The judgment is therefore reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.



3 Cal.2d 157

BRAINARD v. FITZGERALD et al.

S. F. 15252.

Supreme Court of California.

April 16, 1935.

Rehearing Denied May 16, 1935.

1. Assignments for benefit of creditors ☞159

Proviso that act, invalidating transfers of personality without change of possession as against transferor's creditors, shall not apply to assignment, statutory "or otherwise," for benefit of creditors generally, held to exempt not only such statutory assignments, but all other such assignments executed in good faith (Civ. Code, §§ 3440, 3449-3473).

2. Assignments for benefit of creditors ☞159

Assignment of copartnership's entire assets for benefit of its creditors generally held within statutory proviso exempting all good-faith assignments for benefit of creditors generally from provisions invalidating transfers of personality without change of possession as against transferor's creditors (Civ. Code, §§ 3440, 3449-3473).

3. Assignments for benefit of creditors ☞32

Assignment of copartnership's assets for benefit of its creditors generally held supported by consideration consisting of indebtedness to creditors.

4. Assignments for benefit of creditors ☞184

Assignment of copartnership's assets for benefit of its creditors generally vested title in assignee as trustee for all creditors.

5. Assignments for benefit of creditors ☞44

Creditor's acceptance of transfer of copartnership's assets for benefit of its creditors generally is presumed until contrary is shown.

6. Assignments for benefit of creditors ☞44

Any particular creditor's nonacceptance of assignment of copartnership's assets for benefit of its creditors generally is not fatal to assignment, though it may postpone such creditor to other creditors; preferences not being illegal (Civ. Code, § 3451).

7. Assignments for benefit of creditors ☞44

Assignment for benefit of assignor's creditors generally prevails over subsequent attachment or execution, though not accepted by particular creditor, who cannot prefer himself over creditors abiding by transfer.

8. Assignments for benefit of creditors ☞184

Copartnership's property right in assets, assigned in good faith for benefit of its creditors generally, passed out of it, and thereafter no legal title, on which attachment could fasten, existed in it.

9. Exchanges ☞14

Court is not inclined to interfere with practice of local boards of trade in procuring assignments, executed in good faith, for benefit of assignor's creditors generally, in absence of conflict with or violation of statutory law (Civ. Code, §§ 3440, 3449-3473).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by G. W. Brainard against W. J. Fitzgerald, the Massachusetts Bonding and Insurance Company, and another. From a

Judgment for plaintiff against the bonding company, the latter appeals.

Affirmed.

For prior opinion, see 34 P.(2d) 761.

Fred A. Watkins, of Long Beach, for appellant.

John F. O'Sullivan, of San Francisco, amicus curiae.

Norman A. Eisner and Grant H. Wren, both of San Francisco, for respondent.

Craig & Weller, Frank C. Weller, and Merrill L. Granger, all of Los Angeles, Dinkelspiel & Dinkelspiel and William H. Penat, all of San Francisco (Fred S. Herrington, of San Francisco, of counsel), amici curiae.

WASTE, Chief Justice.

This is an appeal from a money judgment entered in favor of the plaintiff in an action brought against the surety on an attachment bond furnished in another action.

It appears that the Richard Behrendt Company was a copartnership engaged in the business of selling at wholesale toys, fireworks, and novelties. At about 9:15 o'clock on the morning of January 20, 1932, the copartnership executed and delivered to the plaintiff herein, who is the secretary of the board of trade of San Francisco, an assignment of all its assets for the benefit of creditors generally. The assignment is on a printed form used generally by boards of trade. We shall not pause to quote its provisions, for it is conceded on all sides that the assignment was not to benefit any individual creditor or group of creditors, but, as stated, was for the benefit of creditors generally. Immediately following such assignment, and at about 10 o'clock the same morning, a representative of the assignee arrived at the premises occupied by the copartnership and proceeded to check the books and to take inventory, remaining at the store until approximately 2 o'clock, when he left to attend a meeting at the board of trade office. During his absence, and some time between 2 and 3 o'clock of the same afternoon, the sheriff levied an attachment and placed a keeper in the premises. The attachment issued in an action commenced that day by a creditor of the copartnership. It is undisputed that the assignment was executed and delivered several hours prior to the levy of the attachment. Shortly after such levy the assignee served a third-party claim on the sheriff, whereupon the attaching creditor furnished a bond, the one here sued on and in which the appellant is named as surety, to prevent the release of the property. The

sheriff having subsequently removed certain quantities of the attached merchandise and sold the same under execution, this action was commenced. Though named in the complaint as defendants, the action was abandoned as to the sheriff and attaching creditor and prosecuted solely against the surety on the attachment bond. From a judgment for plaintiff in the sum of \$3,000, the surety has appealed.

It is the appellant's contention, in substance, that the assignment made by the debtor to the respondent, though for the benefit of creditors generally and prior in point of time to the levy of the attachment, is nevertheless subservient thereto inasmuch as it was not executed in conformity with sections 3449-3473 of the Civil Code, and was not accompanied by a change of possession.

Respondent, on the other hand, while conceding that the assignment to him does not satisfy the statutory requirements as to form and recordation, urges that it constitutes a valid common-law assignment for the benefit of creditors generally, and, being prior in point of time to the attachment, should prevail over the attachment.

Concisely stated, we are required to determine whether a valid common-law assignment of stock in trade for the benefit of creditors generally prevails over a subsequent attachment. No question of actual fraud arises as to the assignment herein.

[1] So far as material here, section 3440 of the Civil Code provides that "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession; * * *

"Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, * * * otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, * * * unless at least seven days before the consummation of such sale, transfer, assignment, * * * the vendor, transferor, assignor * * * or the intended vendee, transferee, assignee * * * shall record in the office of the county recorder * * * a notice of said intended sale, transfer, assignment; * * *

"Provided, further, that the provisions of this section shall not apply or extend * * *

to any transfer or assignment, statutory *or otherwise*, * * * made for the benefit of creditors generally. * * *

The italicized words, "or otherwise," were added to the section by an amendment thereof in 1917 (Stats. 1917, p. 255) and, in our opinion, indicate a definite legislative intention to exempt from the provisions of the section not only statutory assignments for the benefit of creditors generally executed in accordance with sections 3449-3473, *supra*, but all other assignments, executed in good faith, for the benefit of creditors generally. To conclude otherwise would be to disregard and render meaningless the very language placed in the section by the cited amendment.

In some of the decisions we find persuasive language suggesting that common-law assignments for the benefit of creditors generally are valid and exempt from the provisions of section 3440, *supra*. The decision in *Jarvis v. Webber*, 196 Cal. 86, 97-99, 236 P. 138, 143, after reviewing the history of the pertinent Code sections having to do with assignments for the benefit of creditors, and the cases construing the same, contains the following:

"While the case of *Heath v. Wilson* [139 Cal. 362, 73 P. 182] was pending, in fact only a few weeks before the decision was handed down, section 3440 of the Civil Code, providing that certain transfers of personal property are conclusively presumed to be fraudulent, if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, was amended (Stats. 1903, p. 111) to provide that the provisions of the section should not apply or extend to any transfer or assignment made for the benefit of creditors generally. In 1905 (St. 1905, p. 622), section 3451 of the code was amended by providing that the provisions of the title relating to assignments for the benefit of creditors do not affect the power of a person, although insolvent, to transfer property in good faith to a particular creditor, or creditors, or to some other person or persons in trust for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors. Under a more recent amendment (Stats. 1917, p. 255), the provisions of section 3440, *supra*, relating to fraudulent transfers, are declared not to apply or extend to any transfer or assignment, 'statutory or otherwise,' made for the benefit of creditors generally.

"We think it must be conceded, therefore, that two kinds of transfers or assignments

for the benefit of creditors generally are recognized in the code sections we have enumerated. One is the statutory assignment for the benefit of creditors, enabling an insolvent debtor, through his assignee, to provide for the immediate conversion of the assigned property, or the disposal thereof, and the distribution of the proceeds ratably among the creditors. Civ. Code, § 3449 et seq. If the debtor adopts this method of satisfying his creditors, it matters not whether the creditors give their consent to the transfer. If the provisions of the code are complied with, the assignment is binding on consenting and non-consenting creditors alike. The other form of transfer is one which, while containing certain characteristics of an assignment for the benefit of creditors, is, in effect, only a conveyance in trust by way of paying or securing certain obligations of the debtor. These transfers are not invalid because they do not conform to the provisions of the sections of the code relating to assignments for the benefit of creditors. Civ. Code, §§ 3432 and 3451; *Heath v. Wilson*, *supra*. If made for the benefit of creditors generally, such conveyances are protected in their operation as to delivery, and continued change of possession of the property transferred, by the exception contained in section 3440 of the code as amended. But in the present case we are unable to agree with appellant that the transaction whereby D'Egilbert and his allied corporations transferred the property to *Jarvis* resulted in an assignment for the benefit of creditors generally. By its terms, it inures only to the benefit of one named creditor of the grantors, 'and all other creditors * * * who shall consent to the agreement,' the final provision being that the creditors 'who shall consent to the trust in writing shall be entitled to an equal pro rata right, with all other creditors who consent to the trust in writing, in the benefits thereof.' A nonconsenting creditor is not bound by such a transfer, and his consent thereto cannot be compelled by any act of the debtors, the trustee, or the other creditors. In order, therefore, that an attempted transfer by a debtor, for the purpose of paying or securing one or more creditors—which does not amount to an assignment for creditors generally—may be made effective as against nonconsenting creditors, the conveyance must be executed with due regard to the general principles of law applicable to such transactions. We are unable to construe the transfer in this case as an assignment for the benefit of creditors generally. It was, therefore, not within the exception provided by section 3440, *supra*. The

question whether or not delivery and change of possession attended the transaction thus becomes a material consideration in the case."

The assignment here under consideration, as distinguished from that involved in the cited case, was made for the benefit of creditors generally, and is not therefore hedged with the restrictions surrounding an assignment for the benefit of a limited number of creditors, as was the situation in *Jarvis v. Webber*, supra.

We also find language in *Moore v. Schneider*, 196 Cal. 380, 386, 238 P. 81, 83, which, contrary to appellant's contention herein, tends to recognize the existence in this state of common-law assignments for the benefit of creditors generally. In the course of the opinion it is there stated that "In the case of an assignment for the benefit of creditors, either statutory or nonstatutory, the estate passes as the result of some positive act or agreement on the part of the owner of the property. In the one case, the estate of the insolvent 'devolves' upon the assignee by operation of law. In the other, the estate is 'granted' by the owner." As in *Jarvis v. Webber*, supra, but as distinguished from the case at bar, the nonstatutory assignment in *Moore v. Schneider*, supra, was not made for the benefit of creditors generally.

The same criticism may be leveled at the attempted assignment involved in *Kaye v. Jacobs*, 122 Cal. App. 421, 428, 10 P.(2d) 186, 189, wherein the opinion, after indicating that said assignment did not satisfy the requirements essential to a statutory assignment, went on to point out that, "Since, however, the assignment which was attempted to be made by the instrument of October 6, 1924, was an assignment of a stock in trade, it must be considered with reference to the provisions of section 3440, Civil Code. This section expressly provides that the sale, transfer, or assignment of a stock in trade, in bulk, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, or assignor unless the notice required by the statute shall be given. Assignments for the benefit of creditors generally are expressly exempted from the requirements of the statute. It is not contended that the assignment attempted to be made by the instrument under consideration was intended as an assignment for the benefit of creditors generally, but it is conceded that it was intended to operate as

an assignment of a stock in trade for the benefit of a certain class of creditors, viz., the mercantile creditors or creditors of the jewelry business. It was not, therefore, under the circumstances disclosed, an assignment exempted from the provisions of section 3440, Civil Code. *Jarvis v. Webber*, 196 Cal. 86, 236 P. 138."

[2-8] The assignment of the entire assets of the copartnership having been made for the benefit of creditors generally, it falls squarely within the proviso of section 3440, supra, and does no violence to the provisions of that section. It is supported by a consideration (the indebtedness to the creditors), and vested title in the assignee as trustee for all the creditors. *Jarvis v. Webber*, supra. The transfer having been made for the benefit of creditors, their acceptance is presumed until the contrary is shown. *Forbes v. Scannell*, 13 Cal. 242, 243, 288; *Bump on Fraudulent Conveyances* (2d Ed.) 327. While the nonacceptance of any particular creditor may result in postponing him to other creditors, it is not fatal to the assignment (*Bump*, supra), for preferences are not illegal under our law. Section 3451, Civ. Code. This being so, the assignment prevails over a subsequent attachment or execution. *Bump*, supra. In other words, a nonconsenting creditor cannot prefer himself over those who abide by the transfer. The assignment herein having been made in good faith, the property right passed out of the copartnership debtor, and thereafter no legal title existed in it on which the attachment could have fastened.

[9] Because of varying statutory provisions there involved, we shall not undertake to refer to the numerous authorities from other jurisdictions wherein common-law assignments have been held to take priority over subsequent attachments or executions of an opposing creditor. In the absence of any conflict with or violation of our statutory law, we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith, for the benefit of creditors generally. Experience has shown that this practice has much to commend it.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

3 Cal.2d 192

LOS ANGELES COUNTY v. ROCKHOLD,
County Surveyor.
L. A. 14798.

Supreme Court of California.
April 17, 1935.

1. Constitutional law ☞143
Counties ☞175

Refunding Special Assessment Bond Act *held* invalid as impairing obligation of contract of landowner in that it changed nature of landowner's obligation, reduced period of redemption, and imposed upon landowner expenses of foreclosure (St. 1933, p. 1915).

St. 1933, p. 1915, authorizing any ad valorem assessment district to refund indebtedness, provided that proceedings might be instituted by legislative board creating the improvement district, with consent of 75 per cent. of bondholders, and consent of a majority of the electors in the district, with reassessment based upon benefits and credit given each parcel for prior payment under ad valorem assessments, with further provision in event of delinquency for foreclosure, in which action the property owner was liable for attorneys' fees and costs, and reduced the redemption period from five years to one year.

2. Counties ☞175

Refunding Special Assessment Bond Act *held* not in violation of constitutional provision prohibiting gift of public funds because calling for contribution of county funds in working out reassessment plan, since county, had it seen fit in first instance, could have paid for improvement from general county funds or from funds received by county under Gasoline Tax Act (St. 1933, pp. 1249, 1915; Const. art. 4, § 31).

3. Municipal corporations ☞405

Street assessment constitutes a contract with landowners.

4. Constitutional law ☞143
Municipal corporations ☞581

Redemption after sale of property for improvement assessment is governed by law in force at time of sale, and, once sale for delinquency is made, right to redeem under law as it then exists is one which Legislature cannot alter.

5. Counties ☞175

Provision of Refunding Special Assessment Bond Act requiring majority vote of electors to approve refunding plan *held* insufficient to sustain validity of act as requirement for consent of owners of over half of area to approve reassessment plan (St. 1933, p. 1915).

6. Constitutional law ☞117

Impairment of obligations of landowner's contract by Refunding Special Assessment Bond Act *held* not justifiable under reasonable exercise of police power (St. 1933, p. 1915).

7. Counties ☞175

Refunding Special Assessment Bond Act *held* invalid as falling adequately to protect rights of dissenting bondholders (St. 1933, p. 1915).

In Bank.

Original mandamus by the Los Angeles County against John E. Rockhold, Surveyor of Los Angeles County.

Alternative writ discharged, and application for peremptory writ denied.

Everett W. Mattoon, Co. Counsel, and Harold W. Kennedy, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., and Robert J. Stahl, Deputy City Atty., both of Los Angeles, amici curiæ for City of Los Angeles.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, amici curiæ for Walter Everett and Dominguez Estate Co.

Clyde Woodworth, City Atty., of Inglewood, amicus curiæ for Cities of Southgate, El Segundo, Inglewood, and Manhattan Beach.

Louis H. Burke, of Los Angeles, amicus curiæ for City of Montebello.

O. L. Byers, of San Diego, amicus curiæ for City of San Diego.

Maurice M. Myers, City Atty., of Ocean-side, amicus curiæ for City of Oceanside.

C. E. Kennedy, City Atty., of Lynwood, amicus curiæ for City of Lynwood.

M. Tellefson, City Atty., of Los Angeles, amicus curiæ for Culver City.

Harold P. Huls, City Atty., of Pasadena, amicus curiæ for City of Pasadena.

Boyd C. Barrington, City Atty., of Santa Maria, amicus curiæ for City of Santa Monica.

Roscoe R. Hess, of Los Angeles, for respondent.

PER CURIAM.

This is a petition for a writ of mandate to compel the respondent county surveyor of Los Angeles county to prepare a diagram and make a reassessment for the refunding of bonds of acquisition and improvement dis-

trict No. 67 in said county. The refunding proceedings were instituted in accordance with the provisions of the "Refunding Special Assessment Bond Act of 1933" (Stats. 1933, ch. 749, p. 1915). The purpose of the proceeding is to test the constitutionality of that statute.

A brief review of the legislative and economic background of this case is necessary to a complete understanding of the issues involved.

Improvement districts of various kinds have long been authorized by statute in this state. The earlier type provided for financing the improvement by assessments levied upon the property benefited, which assessments or bonds issued in lieu thereof became a specific lien upon the particular parcels of property, usually in odd denominations, and payable at varying dates. Of this type were the bonds provided for in the Vrooman Act of 1885 (St. 1885, p. 147, as amended), the Street Opening Act of 1903 (St. 1903, p. 376, as amended), and the Improvement Act of 1911 (St. 1911, p. 730, as amended). In 1907 a new type of financing was introduced in the "Road District Improvement Act of 1907" (Deering's Gen. Laws 1931, Act 3276). Under the method therein provided, the bonds were issued in even denominations, and were to be paid by annual ad valorem assessments levied in the district; a bond was not a specific lien against any parcel of land, but was secured by the unpaid assessments and the general taxing power. The "Acquisition and Improvement Act of 1925" (St. 1925, p. 849, as amended, Deering's Gen. Laws 1931, Act 3276a) and the "Improvement Bond Act of 1915" (Deering's Gen. Laws 1931, Act 8209) also employed this new type of lien. The bonds were found to be a more marketable type of security and sold at a lower interest rate than the specific lien special assessment bonds under the old acts. A large number of districts was organized and financed by this method, and a great deal of development took place. It is stated in some of the briefs filed herein that over \$50,000,000 of bonds of this type are now outstanding. Many of the ventures financed in this manner were speculative in character and turned out badly; other districts were adversely affected by the general shrinkage in land values and the serious economic depression of recent years. A great many landowners have been unable to meet the annual assessments for the payment of principal and interest on the bonds and have defaulted. From 1930 to the present time de-

linquencies have increased until it appears that in over half the districts the delinquencies are greater than the amount paid. In many districts, the delinquencies total over 90 per cent. of the total area. This increasing default has led to the evil of "pyramiding" the tax; the district being forced to levy taxes, not only for principal and interest due in the current year, but also for past due principal and interest. The result is that the landowner who is able to pay may be forced to meet the delinquencies of those who do not, or else lose his property in spite of the fact that he has paid the amount reasonably attributable to the benefits accruing to his land by the improvement. This fact has undoubtedly contributed to a general unwillingness to pay these assessments. Inasmuch as such assessments are collected as part of the county and municipal taxes, it appears that the collection of such taxes has been likewise adversely affected. Large areas of land have been sold for unpaid taxes, with the result that the burden falls unequally on the remaining properties. The duty of the county or municipality under the Acquisition and Improvement Act to pyramid the taxes was declared by this court and by the United States Supreme Court in *American Securities Co. v. Forward*, 220 Cal. 566, 32 P.(2d) 343; *Irones v. American Securities Co.*, 55 S. Ct. 403, 79 L. Ed. 1232.

Viewing this uncertainty as the principal cause of distress, an attempt was made to refund the obligations of these districts by eliminating the ad valorem method of bond payment, and substituting for it the old system of a specific assessment upon each parcel of land in accordance with the benefits actually received. The owner, by paying that assessment in cash, or paying off the particular bond issued against his land within the period specified, would satisfy his obligation in full, and would not be subject to any tax or assessment by reason of delinquencies of others in the district. The evils incident to pyramiding would thus be done away with. This plan was embodied in the "Refunding and Reassessment Act of 1931" (Deering's Gen. Laws 1931, Act 3276c). The statute came before this court in the case of *San Diego County v. Childs*, 217 Cal. 109, 17 P.(2d) 734, 738, and we held it unconstitutional on the ground that it impaired the contract rights of the landowner by subjecting him to certain burdens not imposed upon him at the time the original bonds were issued.

[1] The Legislature then enacted the present statute, the "Refunding Special Assessment Bond Act of 1933," which has the same general object; namely, to substitute specific lien bonds for the existing ad valorem bonds. It is necessary at the outset, in view of our decision in *San Diego County v. Childs*, *supra*, to compare the two statutes in order that it may clearly appear wherein the 1933 act purports to eliminate the infirmities of the 1931 act.

The 1931 act could be used to refund bonds issued by districts established under the Acquisition and Improvement Act of 1925; the consent of all bondholders was required in all cases; refunding might be had, regardless of delinquency, by consent of all bondholders and all property owners; but, where there was delinquency, proceedings might be taken without consent of any property owners. The new bond consisted of the proportionate part of the reassessment allocated to the particular parcel of land; and that reassessment included the total amount of principal of the original bonds with interest, and the estimated expenses of the reassessment and refunding proceedings. Credit was given the property owner for previous payments on the original bonds. In the event of delinquency, the bondholder could require the county treasurer to advertise and sell the property, or could bring his own action of foreclosure. The property owner was liable for costs of the action, attorneys' fees, and not more than \$5 for a title search. The redemption period was cut down from five years to one year, and the property owner, upon redeeming, was required to pay the cost of advertising and \$1 for a certificate of sale where the treasurer had sold the land; or 50 cents for service of notice of expiration of the period of redemption, where the bond was foreclosed.

The important provisions of the 1933 act are as follows: It may be used to refund the indebtedness of any ad valorem assessment district. The proceedings may be instituted by the legislative board that created the improvement district, with the consent of 75 per cent. of the bondholders and the consent of a majority of the electors in the district. St. 1933, p. 1927, § 15. In the refunding, the principal of the original bonds must be discounted, and the interest rate on the new bonds must, for at least one payment, be less than that on the outstanding bonds. Section 1 (page 1915). The legislative body fixes the total amount of the reassessment, the term of years of the refunding bonds, and may

provide for an appropriation of money for relief of the district. Section 2. An election is then called, and the vote of a majority of qualified electors of the district is sufficient to authorize the refunding. If there are no electors in the district, the written assent of the owners of a majority in area of the land therein is sufficient. Section 3 (page 1916). Upon a favorable vote, the county surveyor or similar officer must prepare a diagram and levy the reassessment. Section 5 (page 1918). This reassessment is based upon benefits, and credit is given each parcel for prior payments under ad valorem assessments. Section 6. Notice and hearing are given, and objections not raised at the hearing are waived. Sections 9, 10, 11 (pages 1920-1922). If the assessments are not paid off in cash, the refunding bonds are issued, each representing an assessment upon a specific parcel and payable in annual installments. Sections 14-17 (pages 1926-1928). The old bonds are canceled and "all unpaid final assessments, taxes levied to pay principal and interest thereon" are "canceled and annulled." Section 15 (page 1927). In the event of delinquency, the bondholder may have the property sold by the treasurer, or may bring an action of foreclosure, in which action the property owner is liable for attorneys' fees and costs. Section 20 (page 1932). The period of redemption is cut down to one year. Section 27 (page 1937).

From the foregoing summary, it may be seen that the chief differences between the two statutes are as follows: (1) The 1931 act required the consent of all bondholders for the initiation of refunding proceedings, while the 1933 act requires the consent of only 75 per cent. (2) The 1931 act did not require the consent of any landowner, or the electors of the district, while the 1933 act requires the consent of a majority of electors of the district, or, if there are no electors in the district, the filed assent of the owners of a majority in area of the land. (3) The 1931 act required the reassessment to be in the total amount of outstanding principal and interest of the bonds, plus the expense of refunding proceedings; the 1933 act requires the discounting of some of the principal, the cutting down of at least one interest payment, and the county or municipality not only bears the cost of the proceedings, but may contribute some money toward the reduction of the obligation. It is further apparent, however, that the acts are substantially similar in (1) their provision for the additional remedy of foreclosure, with the resulting liability for costs and at-

torneys' fees placed upon the landowner; (2) their provision for cutting down the period of redemption from five years to one year; (3) the provisions for modification of the contract without the consent of the landowners; and (4) the changing of the nature of the obligation from an ad valorem to a specific lien basis.

The proceeding to refund the bonds of acquisition and improvement district No. 67 is the first one instituted under the new statute. The total outstanding indebtedness of the district was \$43,185.26. Up to and including the fiscal year 1933-34, assessments in the sum of \$34,335.84 had been levied, of which \$8,197.63 had been collected, and \$26,138.21 was delinquent on April 1, 1935. The fourth assessment, for the tax year 1933-34, resulted in a 93 per cent. delinquency. The board of supervisors, on April 16, 1934, adopted a resolution providing for an election within the district on the question of refunding, and submitted a plan of reassessment and refunding. Under this plan the reassessment was to be in the principal sum of \$21,592.63, or 50 per cent. of the total indebtedness; the county was to pay to bondholders the sum of \$10,796.31, or 25 per cent. of said total, in cash; and the bondholders were to consent to a discount of 25 per cent. of the total amount due. The new bonds were to bear interest at the rate of 6 per cent., whereas the interest rate on the original bonds was 7 per cent. The term of the bonds was increased. The election was held on May 4, 1934, and a favorable vote of the electors within the district of 29 to 0 resulted. The owners of more than 75 per cent. of the unpaid bonds then filed their written assent to the plan, and the board of supervisors ordered the respondent county surveyor to make the diagram and reassessment, which he refused to do, claiming that the proceedings were void. No question is raised as to the regularity of the reassessment proceedings, and it may be conceded that they were in conformity with the statute. The questions raised are concerned with the constitutionality of the act.

[2] The first point urged by respondent is that, inasmuch as the reassessment plan here worked out calls for a contribution of county funds, it is violative of section 31 of article 4 of the state Constitution, prohibiting the gift of public funds. In this refunding proceeding, the county intends to contribute \$10,796.31 from public funds. In addition, incidental expenses of the refunding assessment will be paid by the county from public

funds. These contributions cannot be held to be gifts of public funds in violation of the constitutional provision. The bonds here sought to be refunded were issued for the improvement of a public street in the county of Los Angeles. The county, had it seen fit in the first instance, could have paid for this improvement from the general county funds or from the funds received by the county under the provisions of the Gasoline Tax Act. Cal. Stats. 1933, ch. 481, p. 1249. It cannot be held that, because the county originally proposed to pay for the improvement by assessments levied on those benefited, it cannot now assume a portion of the burden. The exact point has already been decided adversely to respondent by several decisions in this state. *Reclamation Board v. Chambers*, 46 Cal. App. 476, 189 P. 479; *Sacramento & San Joaquin Drainage District v. Riley*, 199 Cal. 668, 251 P. 207; *Reclamation Board v. Riley*, 208 Cal. 661, 284 P. 668. These cases conclusively determine that such contributions, under the circumstances here disclosed, do not constitute gifts of public funds within the meaning of the constitutional provision.

The major question presented is whether the 1933 refunding statute impairs the obligation of any contract, either of the landowner or bond owner, or infringes upon vested rights, in violation of the federal and California Constitutions. We turn to a discussion of this problem.

[3] When a district is formed, assessments are levied, and bonds are issued, there is, of course, a contractual relationship between the state or its agency on the one hand and the bondholder on the other. It is also the settled doctrine in California that by such proceedings a contractual relationship arises as far as the property owner is concerned. This doctrine that a street assessment constitutes a contract with the landowners was given its first authoritative statement in this state in the case of *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962, and it has been since uniformly followed and approved in this state. *Jeffreys v. Point Richmond Canal, etc., Co.*, 202 Cal. 290, 260 P. 548; *San Diego County v. Childs*, supra; *Sammon v. Wing*, 105 Cal. App. 689, 288 P. 711; *Warden v. Barnes*, 111 Cal. App. 287, 295 P. 569; *Security Trust & Savings Bank v. City of Los Angeles*, 120 Cal. App. 518, 7 P.(2d) 1061.

The application of the doctrine was the basis of the decision in *San Diego County v. Childs*, supra, holding the 1931 refunding act unconstitutional. We there said:

"It is likewise the well-settled law of this state that when valid proceedings for improvements by special assessment have been completed and bonds have been issued to represent the assessments, a contractual relation between the property owner and the bondholder has been established. In *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962, 963, it was said: 'A street assessment is a contract, and the provisions of the statute in force at the time providing the manner of its enforcement are a part of such contract. *Creighton v. Pragg*, 21 Cal. 115; *Houston v. McKenna*, 22 Cal. 550, 553. * * * The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16. It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts, and can have only a prospective effect.'

"The same rule was applied and was deemed controlling in *Jeffreys v. Point Richmond Canal, etc., Co.*, 202 Cal. 290, 260 P. 548. In that case the holder of street assessment bonds issued under the Improvement Act of 1911 sued to foreclose the bonds. At the time the bonds were issued the law did not provide for foreclosure by suit on the part of the bondholder. After the bonds were issued the statute was amended (St. 1921, p. 297, § 10) to authorize such a suit as 'a separate, distinct and cumulative remedy' available to the bondholder. It was held that the rights of property owners against whose property assessments had been levied and bonds issued therefor under the 1911 act became vested prior to the amendment and could not constitutionally be affected thereby, even under the guise of an additional remedy, as it adversely affected a substantial right of the property owner. * * *

"The petitioner necessarily concedes that if it prevail the cases of *Chapman v. Jocelyn*, supra, *Jeffreys v. Point Richmond Canal Co.*, supra, and other cases in this state to the same effect, must be overruled. It is insisted that they be not followed for the stated reason that they are ill considered, are contrary to the doctrine of other cases in this state, and contrary to decisions in other jurisdictions. The California cases cited as authority for the statement are not in point. Three of them correctly hold that the property owner is not a party to the improvement contract and the others are not inconsistent with the declared doctrine that when the

special assessment proceedings are completed a contractual relation arises as between the bondholder and the property owner to such an extent that the substantial rights of either may not be impaired by subsequent legislation. It may be conceded that cases in other jurisdictions are in support of the petitioner's position, but we cannot agree that those against its contentions in this state are ill considered. They are based on sound principles of public policy for the protection of both the bondholder and the property owner. In any event they are the established law of this state and as they constitute a rule of property they should not be set aside except for cogent reason not now made to appear."

With the nature of the landowners' rights and obligations under the original ad valorem bonds in mind, we find, upon an examination of the present statute, that it makes three important changes: (1) Change in the nature of the obligation; (2) shortening of period of redemption; (3) addition of remedy of foreclosure. Each of these several changes constitutes an impairment of the contract of the landowners, unless such landowners have consented thereto. We will first discuss the impairment point and then will discuss the question as to whether the landowners have assented to such impairment.

The nature of the obligation is changed from an ad valorem basis to a specific lien. Instead of being liable for an indefinite number of general ad valorem assessments, the landowner is liable for a definite total sum, secured by a specific lien on the property. From a common-sense view, this change, under the act here involved, is beneficial to the interests of the landowner. Under the plan here involved, the principal of the bonds is reduced 50 per cent., the interest rate reduced, and the term of payment extended. The landowner is released from the contingent liability to meet the obligations of other owners. However, whether the property owner can be forced, against his will, to accept this change in the nature of his obligation, raises several constitutional points which we think are disposed of in the discussion hereinafter appearing. It is obvious that if, by proper statutory provision, the consent of the property owner is first obtained to such a change, there would be no violation of his constitutional rights. This will be discussed hereafter.

[4] The other two important changes—the shortening of the period of redemption and subjecting the landowner to the additional remedy of foreclosure, with costs and attorneys' fees—received consideration by this

court in *San Diego County v. Childs*, supra, in which it was held that both changes constituted impairments of the contract rights of the landowner. The rule is well established in all jurisdictions, even in those states that do not hold as does California, that the assessment constitutes a contract as far as the property owner is concerned, that redemption is governed by the law in force at the time of sale. Once the sale for delinquency is made, the right to redeem under the law as it then exists is one which the Legislature cannot alter. In the instant case, a great many parcels have already been sold to the state. It is obvious, therefore, that, unless the property owners consent thereto, the provision of the statute which purports to reduce the period of redemption from five years to one year, as to the owners of those parcels already sold to the state, is unconstitutional. This was one of the points expressly decided in the *Childs* Case, supra, 217 Cal. 109, page 119, 17 P.(2d) 734, 738.

"It has been held by a long and unbroken line of decisions in this state that the law in force at the time of a sale for nonpayment of taxes governs the right of redemption. The question presented in *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 615, 58 Am. St. Rep. 194, was: 'Can the legislature, after a tax sale, lawfully amend the law so as to apply new and more onerous conditions to the right to redeem than those which existed when the sale was made?' The question was answered in the negative on the authority of text-writers and the adjudicated cases. This court quoted with approval from *Black on Tax Titles*, § 175, as follows: 'The right of redemption from a tax sale must be governed by the law in force at the time of sale. It cannot be affected by subsequent legislation,' and the following from *Blackwell on Tax Titles* (5th Ed.) § 729: 'The law in being at the time of sale governs the right of redemption. The time can be neither lengthened nor shortened by subsequent legislation. * * * The right to redeem is a condition attached to the sale and the legislature cannot defeat it by a subsequent act. A provision affecting the period of redemption can only apply to sales after the day on which the act took effect.' The following is quoted from *Merrill v. Dearing*, 32 Minn. 479, 21 N. W. 721, in support of the rule with the citation of numerous other cases: 'The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged

by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor.' This court continued, 116 Cal. [518], at page 525, 48 P. 613, 615 [58 Am. St. Rep. 194]: 'The enforced sale of property on execution, or for the nonpayment of taxes, institutes a contract with the purchaser which cannot be materially altered without his consent. The right of the owner to redeem is perhaps, strictly speaking, one not resting in contract, but is a right vested in him under the law,—a right pertaining to the contract itself, and which, in reason and justice, is not more open to attack than that of the purchaser.' This rule has consistently been followed in this state."

Petitioner and amici curiæ assert, however, that the rule just stated does not apply because there is in fact no shortening of the period of redemption before sale. The argument is that under section 15 of the 1933 act (St. 1933, p. 1927), upon the issuance of the refunding bonds, the old bonds are canceled; that all proceedings to enforce the old bonds fall with such cancellation; that all sales for delinquency theretofore made are wiped out and the owners' rights are unaffected thereby; that the new bonds represent a new obligation, and, upon any delinquencies occurring thereafter, the tax sale will be governed by the new law. However, it cannot be denied that the right of the property owner to redeem became fixed at the time of sale. At that time, he had a five-year period to redeem. Under the new law, he is given one year to redeem. To hold that this can be done indirectly when it admittedly cannot be done directly would be to place the entire emphasis on the form of the transaction rather than its substance. We cannot hold that constitutional rights may thus be taken away without the consent of the landowner. We think that, unless the landowners have consented to this change, the 1933 act is subject, on this point, to identically the same objections as was the 1931 act, and, under the decision of this court in the *Childs* Case, must be held unconstitutional, for the reasons therein advanced.

[5] The same reasoning applies to the foreclosure provisions of the 1933 act. Under the Acquisition and Improvement Act of 1925, upon default, the property was sold at a regular tax sale. This was the sole remedy given the bondholder by the 1925 act. Under the refunding act of 1933, however, the bondholder

is given the additional remedy of foreclosure, and the landowner is made liable for costs and attorneys' fees. These provisions are substantially the same as those included in the 1931 act. Under that act, in the Childs Case, *supra*, it was held that such provisions, although dealing with the remedy, undoubtedly add to the landowner's obligation, and therefore constitute an impairment of the landowner's contract. See, also, *Jeffreys v. Point Richmond Canal, etc., Co.*, *supra*; *Sammon v. Wing*, 105 Cal. App. 689, 288 P. 711. The case of *Lincoln v. Superior Court* (Cal. Sup.) 39 P.(2d) 405, 407, in which we upheld the retroactive application of the 1933 statute giving the creditor under a deed of trust the additional remedy of foreclosure, where formerly only a statutory sale could be had, is not in conflict with the above decisions. The contract involved therein did not specify sale as the exclusive remedy; on the contrary, it gave broad powers to the trustee to commence "any action or proceeding" affecting the security. This court declared that such provision was "sufficiently comprehensive to include any remedies subsequently authorized by the Legislature for the protection of the beneficiary's rights or enforcement of the trustors' obligations under the instrument." It was also pointed out that, by virtue of the alternative remedy, the debtor gained a right, the statutory right of redemption. In the instant case, the statute and bonds, by necessary implication, provided for an exclusive remedy, and this distinguishes the *Lincoln* Case from the bond decisions above cited. For the foregoing reasons, it necessarily follows that the foreclosure provisions of the 1933 act must be held to constitute an impairment of the landowner's contract, unless it be found that the landowner has consented to the change.

The conclusion that the 1933 refunding act, like its 1931 predecessor, for the foregoing reasons, impairs the obligation of the contract with the landowner, inevitably follows from the decision in the *Childs* Case, *supra*. However, counsel for petitioner and amici curiæ advance three propositions, seeking to avoid this result. The first is that the contract doctrine is wrong and should be abandoned. They argue that the assessment is an exercise of the sovereign power of taxation, and that the obligation to pay it arises by law and not by consent. *Chapman v. Jocelyn*, *supra*, and the whole group of cases following it, are condemned as wrong in principle and in conflict with the great weight of authority elsewhere. The identical argument was made in the *Childs* Case, and we there reaf-

firmed the doctrine, declaring it to be the established law of this state and a rule of property. The contract theory having become a rule of property, we are not disposed to overrule it at this late date. It is therefore unnecessary to discuss in detail petitioner's argument in this connection.

It is further suggested by petitioner that, if the contract doctrine be not abandoned, it should be strictly limited. It is contended that, since the doctrine had its origin in an assessment which constituted a specific lien against the property, it should not be applied to bonds supported by *ad valorem* assessments. We are unable to perceive any reason for this distinction, and, as already seen, it would be directly in conflict with the *Childs* Case.

The third and final argument of petitioner in this connection is that, assuming the applicability of the contract doctrine, the obstacle is nevertheless overcome by the provision found in the 1933 act requiring the refunding to be approved by a majority of the electors residing within the district. This provision was not found in the 1931 act, and there is no reason to dispute petitioner's statement that this provision was intended to overcome the infirmities of the 1931 statute, as pointed out in the *Childs* Case. The basis of this argument is that, since a majority of the electors in the district have approved the refunding, such approval is binding on all the property owners in the district, and they must be deemed to have consented to the change. Of course, if the landowners consent to a change in the contract, there cannot be impairment as to them. If the landowners have consented to the reassessment, then all of the arguments of respondent as to shortening the period of redemption, adding the remedy of foreclosure, and changing the nature of the assessments are of no avail. This consent argument, if based on the proper foundation, would be a complete answer to every objection now urged by the landowner. There can be no impairment if the contracting parties consent thereto. The difficulty with the present act is, as will be pointed out, that it does not require or even permit the consent of any landowner in the district, unless there are no electors in the district.

Under the provisions of the Acquisition and Improvement District Act of 1925, as originally enacted, there was no provision requiring the consent of the landowners to the creation of the district or the issuing of the bonds. By section 9 of the act (St. 1925, p. 861), as it originally read, and as it read when the bonds herein sought to be refunded were issued, it

was provided that landowners could protest, and that a protest of the owners of over half the area could be overridden by a four-fifths vote of the legislative body authorized to create the district. This section was amended in 1931 (Stats. 1931, c. 744, p. 1550, Deering's Gen. Laws 1931, Act 3276a) to provide that, in the event a majority in area of the owners protested, the legislative body was without power to continue with the improvement. Under the law as it existed in 1925, and as it existed when the bonds involved herein were issued, the legislative body could override the protests of all the property owners, and could create the district and cause bonds to be issued over the objections of all the landowners. When the bonds were issued, they became a contract with the landowner, under the cases already cited. Since this contract could come into existence against the will of the landowners, one of the contracting parties, it must be a contract created by operation of law. Once it becomes a contract, it cannot be impaired without the consent of the landowner. But we do not have to indulge in any strained construction to hold that such contract may be changed or modified by a majority vote of the landowners, provided the Legislature sees fit to provide for such a change. There is persuasive, if not conclusive, authority that a majority vote is sufficient to authorize a modification of the contract as far as the landowners are concerned. In *Mulcahy v. Baldwin*, 216 Cal. 517, 15 P.(2d) 738, an irrigation district authorized a bond issue by a two-thirds vote of the electors of the district. Subsequently, by a majority vote, a refunding issue was authorized. The same argument as to the impairment of the obligation of the contract of the landowners was made. In 216 Cal. 517, at page 526, 15 P.(2d) 738, 741, it is stated:

"It is also contended that rights of contract with the landowners upon the organization of the district will be impaired by the proceedings under the new legislation. It is elementary that there can be no impairment of a contract by a change thereof if the change is effected with the consent of the contracting party affected thereby. Here there can be no change in the landowners' contract for the issuance of new bonds without the consent of a majority of the electors of the district, just as there could be no contract in the first instance without their consent. The vote of the electors in each instance must be deemed to be binding on the landowners. There is no constitutional requirement of a favorable two-thirds vote in the authorization of a bond issue of such a district. A majority vote would

seem to be in harmony with our system and form of government."

See, also, *Palo Verde Irrigation District v. Seeley*, 198 Cal. 477, 245 P. 1092; *San Diego County v. Childs*, supra, 217 Cal. 109, p. 123, 17 P.(2d) 734.

It necessarily follows that if the 1933 refunding act required the consent of the owners of over half of the area involved, it would meet all objections of respondent as far as the contract clause is concerned. There would be no impairment of the obligation of the contract, as far as the landowners are concerned, because they would have consented to the changes made in their respective obligations. The difficulty with the 1933 act is that it does not require or even permit the owners of over half the area involved to approve the plan of refunding. The only right conferred on the landowner as such is the right to protest, but there is no provision that the protests of the owners of one-half the area or more will kill the refunding plan. Section 1 of the 1933 act (St. 1933, p. 1915) provides that the refunding may be done by the legislative board that created the improvement, with the consent of the electors of the district. Section 3 (page 1916) provides that an election shall be called on the question of the refunding and that it shall be necessary to secure a majority vote of the electors before the refunding may proceed. In the event there are no electors within the district, a situation not here involved, then, and only then, may the refunding be authorized by the landowners. It is obvious that in many, if not most, districts, the electors residing therein will not consist of the landowners liable for the assessment.

Petitioner urges that in the *Mulcahy* and *Palo Verde* Cases above referred to we recognized that a vote of the electors could bind the landowners. This is true, but in those cases the original bonds were authorized by the electors, and this included the implied authority that the same group should have authority to change or modify the contract created by the bond. So far as those cases involving irrigation, reclamation, and drainage districts are concerned, they are not in point, except in so far as they recognize the principle of the majority vote being binding on the minority. Moreover, it should be mentioned that by article 11, § 13, of the Constitution, the Legislature has broad plenary powers over those districts which it does not possess over the type of district here involved. In a situation where neither the landowner nor the electors authorized directly or indirectly the issuance of the original bonds, we cannot hold

that a majority vote of one group, the electors, can change the constitutional rights of another group, the landowners.

The consent of the owners of over half the area of the district to the refunding, in order to be binding on the minority, must be a consent required by the statute and not a mere informal consent not provided for in the statute. The petition herein alleges that the owners of a majority of the area within the district petitioned the board of supervisors of Los Angeles county "requesting that refunding proceedings be taken in accordance with the provisions" of the 1933 refunding act. For two reasons this cannot be held to constitute a sufficient consent of a majority of the landlords to modify the contract. In the first place, it was a mere request that "refunding proceedings be taken," and in no sense can it be held to be an approval of the ultimate plan that was worked out. At the time the petition was filed, no one knew what the amount of the reassessment was to be, the rate of interest on, or the term of, the new bonds. In the second place, the 1933 refunding act contains no provision authorizing such a petition to be filed. The act does not contain any provision giving the owners of over half the area in the district the right or power to consent to the refunding. Under such circumstances, the informal, extralegal petition shown by the record cannot be held to be the consent necessary to make the reassessment binding on the minority of the landowners. In order to constitute a consent on the part of the landowners and to permit the owners of over half the area to bind all the landowners, the consent must be one required by the statute.

[6] Petitioner's last argument on this point is that, assuming the 1933 refunding act constitutes an impairment of the obligations of the landowner's contract, such impairment is justified under a reasonable exercise of the police power. Great reliance is placed by petitioner and amici curiae in its behalf on the case of *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 429, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. The holding in that case is now so well known and understood that no useful purpose would be served by reviewing it here. Sufficient it is to say that it was there held that a moratorium statute which postponed the enforcement of a contract for a limited time, without affecting the substantial rights of the creditor, was justifiable under the police power. The 1933 statute here involved, although it was undoubtedly intended to meet an emergency, is not limited as to time, nor does it merely post-

pone the enforcement of the contract. By the 1933 refunding act the contract of the landowners is completely changed. Such a complete change in the nature of the contract cannot be justified under the police power. This has been the holding of the United States Supreme Court in cases subsequent to the *Blaisdell* Case. See *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1314, 93 A. L. R. 173, and *W. B. Worthen Co. v. Kavanaugh*, 55 S. Ct. 555, 79 L. Ed. 1298, decided April 1, 1935. The point is so self-evident that no further discussion is required.

[7] The second ground of unconstitutionality urged by respondent is that by the 1933 act the contract of the bondholders has been impaired. As already stated, the act provides that the refunding may take place when 75 per cent. of the holders of outstanding bonds consent. Under the refunding scheme, the nature of the security is changed and the principal and interest of the bonds are reduced. It is plain, therefore, that the obligation of the existing bonds is impaired. As to the 75 per cent. or more bondholders who consent, there is, of course, no complaint. But as to the nonconsenting bondholders, including those who are absent and those incapacitated or incompetent, who may hold up to 25 per cent. of the bonds, there is an obvious impairment, if their bonds are canceled and they are forced to take new bonds with a different security, in a lesser amount, and bearing a reduced interest, or if their security is lessened. Is this the effect of the act? Respondent claims that it is. He points out that the act makes no specific provision for safeguarding the rights of the nonconsenting bondholders, but leaves those rights entirely "up in the air"; that, although no attempt may be made to cancel these bonds, still no provision is made for their payment, unless the ad valorem tax provisions of the old statute are left in force, in which case the property owner would be liable, not only for the new obligation, but for further ad valorem assessments in an indefinite amount to pay off these old bonds. It is further pointed out that, in substituting the new specific lien bonds for the old ad valorem bonds, there is no means provided for their apportionment among the existing bondholders; that is, it cannot be determined which of the new bonds will go to the 75 per cent. of consenting bondholders. Respondent points out also that, although it might be possible to work out the problem under the Federal Bankruptcy Act, as amended (11 USCA), or by negotiation with the nonconsenting bondholders, resulting in

purchase or payment of their obligations by the other bondholders or by the county, still the act does not so provide.

Counsel for petitioner and amici curiae in its behalf, in oral argument and in their final briefs, concede that no change can be made in the bondholders' contract, unless 100 per cent. of the bondholders consent thereto, or unless some provision is made for all dissenting bondholders. There can be no doubt that it is indispensable, from a constitutional standpoint, so far as bondholders are concerned, that either 100 per cent. consent to the change or that the dissenting bondholders be so taken care of that no impairment of their contract ensues. Petitioner contends, however, that the act may be interpreted to require the satisfactory adjustment of the rights of all nonconsenting bondholders before the refunding can be actually effective. Section 15 of the act (St. 1933, p. 1927), upon which they rely, provides, it would seem, for two situations: (1) Where all bondholders consent at the outset. The statute reads: "All moneys collected on the reassessments, and all refunding bonds shall be paid and delivered to the holders of the original bonds in such amounts and proportions as may be agreed upon between the legislative body and the bondholders, or as may be provided by law; provided, however, that prior to said payment and delivery or concurrently therewith, said bondholders must deliver up the unpaid refunded bonds for cancellation, and same shall forthwith be canceled." This sentence undoubtedly contemplates consent of all bondholders, and is inapplicable to the situation before us in this case. (2) Where not all bondholders consent at the outset. The statute provides in the next sentence: "In the event that all of the outstanding bonds are not exchanged for such refunding bonds, nevertheless if 75 per cent or more of the outstanding bonds are exchanged for refunding bonds, the legislative body shall have authority to issue such refunding bonds under the provisions of this act and to do and perform all acts necessary or convenient for the retirement or payment of the outstanding bonds not surrendered for exchange and cancellation."

It is the contention of petitioner that by this language the Legislature has recognized and protected the rights of nonconsenting bondholders; and that the broad terms of the provision do not leave those rights "up in the air," but give the legislative body the option of a number of methods of satisfying such bondholders, not limiting it to any one. They

suggest that, at the time the refunding bonds are issued, funds must be set aside sufficient to pay matured bonds of nonconsenting holders, and sufficient, also, to pay principal and interest on unmatured bonds of nonconsenting holders, when due. Another method proposed is the sale of such refunding bonds as cannot be exchanged, and the deposit of the proceeds in an interest and sinking fund, together with other money furnished by the city or county, or by the remaining bondholders, to meet the claims of nonconsenting holders. In short, they conclude that, where the statute provides for authority to do all things "necessary or convenient for the retirement or payment of the outstanding bonds," it contemplates that all acts shall be performed which may be essential to protect rights of nonconsenting bondholders; and, so construed, it is not violative of any constitutional guaranty.

With this concession made by petitioner, the problem becomes one of interpretation rather than constitutionality. They admit that the proceedings cannot be completely effective without the consent of 100 per cent. of the bondholders, and all they demand is that those proceedings be initiated when the requisite 75 per cent. has been obtained. They admit that no bond can be canceled, or the obligation represented by it impaired in any way, unless the consent of the holder be first obtained, or unless some adequate means of payment be made.

We are of the opinion that, in spite of the concessions made by petitioner, and giving the act the broadest and most liberal interpretation, we cannot hold that the present act adequately safeguards the rights of dissenting bondholders. Any act, to meet constitutional tests as far as the bondholders are concerned, must provide either for the consent of all the bondholders or the rights of the dissenting bondholders must be protected. The exact means to be employed to protect these rights is, of course, a matter for legislative determination.

In closing this opinion, we think it well to summarize our holdings herein.

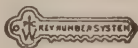
1. The 1933 refunding act impairs the obligation of the contract of the landowner, in that it changes the nature of the landowner's obligation, reduces the period of redemption, and imposes upon him the expenses of foreclosure.

2. All of these objections, as far as the landowners are concerned, could be met by a provision requiring the consent of the owners of over half the area to approve the reassessment plan.

3. The provision in the present act requiring a majority vote of the electors to approve the plan is not sufficient.

4. The act is unconstitutional, in that it fails adequately to protect the rights of dissenting bondholders.

For the foregoing reasons, the alternative writ is discharged, and the application for a peremptory writ is denied.



3 Cal.2d 384

**FROSS v. WOTTON et al. (RETHERS,
Intervenor).**
S. F. 15107.

Supreme Court of California.
April 26, 1935.

1. Fraudulent conveyances ⇨295(1)

In action by assignee of note secured by trust deed to set aside conveyances allegedly defrauding creditors, assignee's failure to show insufficiency of security at time of conveyances, though fatal to contention that case had been established under statute invalidating transfer by insolvent transferor, did not preclude recovery, in view of proof of fraudulent intent (Civ. Code, §§ 3439, 3442).

2. Fraudulent conveyances ⇨59

Amply secured debts should be disregarded in determining whether grantor's financial condition renders conveyance presumptively fraudulent as to existing creditors, though when actual fraud is charged, sufficiency of security at time of conveyance becomes important, but only as evidencing existence or nonexistence of fraudulent intent (Civ. Code, §§ 3439, 3442).

3. Fraudulent conveyances ⇨58

Where there is actual fraud as to creditors in making conveyance, it is immaterial that grantor has other property from which creditors may be satisfied (Civ. Code, § 3439).

4. Fraudulent conveyances ⇨273

Although question of fraudulent intent as to creditors is always one of fact, statute establishes rule that where grantor is insolvent at time of conveyance, conveyance is deemed fraudulent, otherwise intent must be proved (Civ. Code, §§ 3439, 3442).

5. Fraudulent conveyances ⇨299(11)

Evidence held to warrant inference that grantor intended to defraud creditors when

conveying lands to grantor's sister and declaring homestead on grantor's only remaining tract six weeks after notice of default and election to sell under trust deed previously executed by grantor, especially where parties to transaction invoked privilege against self-incrimination and refused to testify (Code Civ. Proc. § 2065).

6. Fraudulent conveyances ⇨273

Fraudulent intent as to creditors in making conveyance may be inferred from circumstances surrounding transaction, and parties' relationship and interests.

7. Witnesses ⇨309

In action to set aside conveyances allegedly defrauding creditors, drawing inference of fraud from refusal of parties to transaction to testify because of privilege against self-incrimination held not invasion of such privilege (Code Civ. Proc. § 2065).

8. Witnesses ⇨297

Constitutional provision that no person shall be compelled in criminal case to be witness against himself protects ordinary witness in civil proceedings from being compelled to answer questions which, if answered, would disclose facts tending to prove his guilt (Pen. Code, §§ 688, 1323; Code Civ. Proc. § 2065; Const. art. 1, § 13).

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by B. Fross against A. D. Wotton, Osca A. Peach, and others, wherein Frank A. Rethers, as the first-named defendant's trustee in bankruptcy, intervened. From a judgment of nonsuit as to the last-named defendant, the intervener appeals.

Reversed.

Torregano & Stark and A. B. Kreft, all of San Francisco (August B. Rothschild, of San Francisco, of counsel), for appellant.

Phillip Barnett, of San Francisco (Samuel Vartan, of San Francisco, of counsel), for respondents.

THOMPSON, Justice.

During August, 1929, the defendants A. D. Wotton and Maude Wotton, his wife, gave to Louis Greenwald, in connection with the purchase of certain real property in Glenn county, their promissory note for \$12,500, dated August 27, 1929, and secured by a trust deed on the purchased property. On January 11, 1930, notice of default and election to sell under the trust deed was given by the trustee.

On February 21, 1930, the Wottons conveyed to the defendant Osca A. Peach, who is a sister of A. D. Wotton, four parcels of land in Santa Clara, San Francisco, and Marin counties, and, on the same day, declared a homestead on their one remaining piece of real property on Irving street in San Francisco. Sale was had under the trust deed on May 12, 1930, and Greenwald repurchased for about \$1,500, assigning his interest in the note to B. Fross, plaintiff in this action, on May 15, 1930. Fross commenced action on the note on May 17, 1930, and recovered a deficiency judgment on March 10, 1931, for \$12,239.96 plus interest and costs. On June 1, 1931, Fross instituted this action to set aside the four conveyances to Mrs. Peach as having been made in fraud of creditors. On June 16, 1931, the Wottons were adjudged bankrupts on voluntary petition, Fross filing the only substantial claim in the bankruptcy proceeding. A complaint in intervention was filed by Frank A. Rethers, trustee in bankruptcy of the estate of A. D. Wotton. The defendants A. D. and Maude Wotton defaulted. From a judgment of nonsuit granted on motion of the defendant Osca A. Peach, the intervening trustee in bankruptcy prosecutes this appeal.

[1] It is the contention of the appellant that the proof has shown, not only a conveyance conclusively presumed to be fraudulent under section 3442 of the Civil Code, but an actual intent on the part of A. D. Wotton to hinder, delay, and defraud his creditors by means of the conveyances attacked.

Respondent contends that there is a complete absence of proof that the grantors conveyed the property with intent to hinder, delay, or defraud the plaintiff and that, conceding the sufficiency of appellant's evidence in all other respects, the ruling of the trial court granting the nonsuit must be sustained because of the failure to show that the security for the note was insufficient at the time of the conveyances sought to be set aside. Respondent cites in support of this contention, *Norton v. Blenkiron*, 138 Cal. App. 66, 31 P. (2d) 807, *McMillan v. McMillan*, 42 Idaho, 270, 245 P. 98, 99, and *Polk County Nat. Bank v. Scott* (C. C. A.) 132 F. 897.

We do not regard the failure of appellant to show that the security was insufficient to satisfy the debt at the time of the conveyances as fatal to his case, nor do we think the cited cases so hold. In *Norton v. Blenkiron*, *supra*, the defendant conveyed practically all his remaining property to his sister pending a foreclosure action, a deficiency judgment was returned unsatisfied, and the

conveyances to the sister were attacked as fraudulent, plaintiff relying upon section 3442 of the Civil Code which provides that "any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors," and making no attempt to prove an actual fraudulent intent. It was there held that the plaintiff, being a secured creditor, had not established his right to have the conveyances set aside as fraudulent without a showing that his indebtedness was not fully secured. The defendant had in fact testified that the market value of the property was greater than the debt it secured. That case cites and relies upon *McMillan v. McMillan*, also *supra*, in which it was held that it was not sufficient for the secured creditor seeking to set aside as fraudulent a gift from the debtor to his wife, to merely show the debt, the voluntary transfer, and the subsequent foreclosure and deficiency judgment, but that "evidence is required from which an intent to defraud may be inferred," and the transfer was not fraudulent if the husband had sufficient remaining property to pay his debt and the defendant was put to no necessity to prove its sufficiency when the gift was made in the absence of a showing that the property mortgaged was not sufficient. In *Polk County National Bank v. Scott*, *supra*, it was held that a voluntary conveyance to the debtor's wife was not presumptively fraudulent where the only debt he owed at the time was fully secured. Here also there was no proof of actual fraud offered. In *Craig v. Partridge*, 48 Idaho, 471, 282 P. 940, cited in the *Blenkiron* Case, the evidence was held to support a finding that the conveyance was not fraudulent where there was no evidence that the land mortgaged to the creditor was not ample security for the loan, and the inference was that the creditor so considered it, the default taking place in 1923, the conveyance to the wife in 1924, and action for foreclosure not having been begun until 1926.

[2, 3] The most these cases can be said to hold is that where there is no other evidence to show a fraudulent intent in making the conveyance complained of, or where reliance is placed upon a presumption of fraud from the making of a voluntary conveyance during or in contemplation of insolvency, as in *Norton v. Blenkiron*, and the only debt is a secured debt, the security must be shown to be insufficient to meet the obligation at the time the conveyance is made. We understand the true rule to be that amply secured debts

are not to be taken into consideration for the purpose of determining whether the financial condition of the grantor renders the conveyance presumptively fraudulent as to existing creditors, but that when actual fraud is charged the sufficiency of the security at the time of the conveyance is important only as evidencing the existence or nonexistence of a fraudulent intent. This is in accordance with the long-established rule in this state that where there is actual fraud it is immaterial that the debtor does not entirely strip himself of his assets and there is other property from which the creditor may be satisfied. In *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64, it was found that, in addition to the property covered by the deed of trust which it was sought to have set aside, the debtor owned real estate aggregating several thousand dollars over encumbrances and unencumbered personalty worth between five and six thousand dollars. The court said in 123 Cal. 360, at page 372, 55 P. 980, 983, 69 Am. St. Rep. 64: "This is not a finding that the trust deed was not made to delay and defraud creditors, though competent as evidence tending in some measure towards that conclusion, though far from being in itself conclusive. In 2 *Bigelow Frauds*, p. 393, it is said, 'Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm any one, by reason of the fact that the debtor has other property, ample in amount, within the reach of his creditors;' and in *Hager v. Shindler*, 29 Cal. [47] 60, it was said, 'a rich man may make a fraudulent deed, as well as one who is insolvent.' See, also, *Bull v. Bray*, 89 Cal. [286] 300, 26 P. 873 [13 L. R. A. 576].

"There can be no question, upon the evidence appearing in the record, that there was on the part of the grantor such personal intent to defraud, and the facts stated in said finding do not overcome that evidence; and, besides, it is a finding of probative facts, merely, and not of the fact of fraudulent intent or its opposite."

In *Vogel v. Sheridan* (Cal. App.) 40 P.(2d) 946, 949 (hearing denied by this court April 1, 1935), after holding that the evidence would support a finding that the conveyances were "voluntary transfers made with the fixed intent and purpose of delaying and defrauding creditors and that Mrs. Sheridan accepted these transfers with full knowledge of such intent and purpose," the court said: "Appellants contend that [the] findings are deprived of support because the corporation was solvent * * * when the transfers * * *

were made to Mrs. Sheridan. In this connection, it may be stated that the corporate books were not all before the court and it is not possible to ascertain definitely whether the corporation was solvent or insolvent at the time said transfers were made. This action, however, may be sustained under section 3439 of the Civil Code regardless of the question of solvency as the evidence was sufficient to show an actual intent to delay and defraud creditors. Such intent invalidates the transaction as against creditors even though the debtor is not entirely stripped of assets and may still have sufficient property after such transfers to satisfy his creditors. Title Insurance, etc., *Co. v. California Dev. Co.*, 171 Cal. 173 [see page 213], 152 P. 542; *First National Bank of L. A. v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; *Alpha H. & S. Co. v. Ruby Mines Co.*, 97 Cal. App. 508, 275 P. 984; *Benson v. Harriman*, 55 Cal. App. 483, 204 P. 255; *Johns v. Baender*, 40 Cal. App. 790, 182 P. 55; *Bekins v. Dieterle*, 5 Cal. App. 690, 91 P. 173; 12 Cal. Jur. pp. 976, 977. It is only in actions maintained under the proviso in section 3442 that the insolvency of the transferor becomes of controlling importance, and in such actions, the question of actual intent becomes immaterial. The distinction is pointed out in *Hanscome-James-Winship v. Ainger*, 71 Cal. App. 735, 236 P. 325, and *Allee v. Shay*, 92 Cal. App. 749, 268 P. 962. It has been stated that both sections should be liberally construed to effect their purpose which 'undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach.' *Borgfeldt v. Curry*, 25 Cal. App. 624, 626, 144 P. 976, 977."

[4] In other words, the question of fraudulent intent is always one of fact, but where, at the time of the transfer, the grantor is insolvent, section 3442 of the Civil Code supplies the rule that the conveyance shall be deemed fraudulent, otherwise the fact is to be proven under section 3439 of the Civil Code.

Under the rule of *Norton v. Blenkiron*, supra, and the views expressed above, the failure of the appellant to make a showing of the insufficiency of the security at the time of the conveyances to Mrs. Peach is fatal to his contention that he has made out a case under section 3442 of the Civil Code. It remains, however, to determine whether there has been made out, by other evidence, a prima facie case of an actual intent to defraud the plaintiff by putting beyond his reach all other assets to which he was en-

titled to resort to satisfy a deficiency judgment for the balance remaining due on his note after exhaustion of the security.

[5] When called as witnesses under section 2055 of the Code of Civil Procedure, A. D. Wotton, Maude Wotton, and Osca A. Peach, the grantee, all refused to testify on the ground that their answers might tend to incriminate them and subject them to a criminal prosecution for defrauding creditors, replying to practically all questions addressed to them with a claim of privilege under section 2065 of the Code of Civil Procedure. Consequently the record is composed of exhibits introduced by the intervener, consisting of copies of documents in the bankruptcy proceeding, the note sued on, the notice of default and election to sell, the abstract of the deficiency judgment, the deeds to Osca A. Peach from A. D. Wotton, and the declaration of homestead, all dated February 21, 1930, the deeds of the Santa Clara and Marin county and one of the San Francisco properties to A. D. Wotton from his predecessors in interest, dated respectively October 22, 1929, October 21, 1929, and October 5, 1910, and portions of the testimony given by A. D. Wotton at a referee's hearing in San Francisco on August 25, 1931, and by Osca A. Peach at proceedings before a referee in San Diego on March 25, 1933, introduced as admissions against interest.

In substance Wotton testified that in February of 1930 he transferred to his sister, Mrs. Peach, the properties above mentioned, that he had two other pieces of property in San Francisco which he traded about the same time, that they were encumbered for more than they were worth, and that after all these various deals, starting with 1929 and ending with February, 1930, he was broke. Counsel for appellant places great stress upon the fact that in giving this evidence Wotton said that he "gave" the property to Mrs. Peach. However, this expression appears to have been carelessly used and to be without great significance.

Mrs. Peach's testimony was inconsistent and evasive and is correspondingly difficult to summarize, but, in brief, her story is that between 1920 and 1926 she loaned Wotton, or gave him to invest for her and for safe-keeping, between \$3,000 and \$6,000. It was all in cash, except for about \$100 in traveler's checks, despite the fact that she had bank accounts at the time and she lived in San Diego and Wotton in San Francisco. All the money she gave her brother came from the east by way of postal money orders, telegraph,

or traveler's checks. No records were kept or they have since been destroyed, and Mrs. Peach was unable to say how she arrived at the stated amount of \$6,000 or upon what basis she estimated it at that. She testified that Wotton told her he had invested her money in a place in Mill Valley (but she did not know whether he purchased it or loaned money on it) and in "some lots in different places—some in Santa Clara County," and because she needed money and to even up her accounts with him, he conveyed the Marin, Santa Clara, and San Francisco property to her in 1926. (It should be noted here that the Santa Clara and Marin county properties were not acquired by Wotton until 1929 and that all the deeds from Wotton to Mrs. Peach were dated February, 1930.) She further testified that after the conveyances to her she got no money out of the property, left her deeds with her attorney, got no reports from Wotton, received no rent, paid no taxes, knew nothing about the condition of the properties, whether rented or encumbered, except for a memorandum on the back of a calling card, used by her to refresh her memory, which she said was made by herself at the time she received the deeds, and which had written thereon "Mill Valley property mortgage \$1,500—\$2,000 Tamalpais Investment Company \$37 ½ Mo. 6 lots in San Francisco 4041 Irving Street." After this the word "lives" had been written and erased, then the date, "Feb. 1930." The witness did not know where she got this information but insisted the memorandum was made at the time she got the deed to the Mill Valley property and her brother may have told her about the mortgage later. She testified she had some conversation with her brother in 1930 in regard to this indebtedness and that some papers, some deeds, were sent her, but when asked by whom they were sent she claimed her constitutional privilege and refused to answer. Prior thereto she had testified that her brother had told her in 1930 that he was losing money in "some kind of a deal"; that this was the last time she saw him, in May, 1930.

The evidence is most unsatisfactory, but there are present a number of factors from which it can reasonably be inferred that the four conveyances attacked were not a part of a bona fide transaction but were executed for the purpose of putting the property which was the subject thereof beyond the reach of the plaintiff, among them the following: The fact that the deeds were executed little more than a month after the notice of default and election to sell under the trust deed, and the declaration of homestead upon the grantor's

one remaining piece of property on the same day, amounting to a disposal of his entire available property at a time when he could well have been anticipating the entry of a judgment against him, the continued exercise of dominion and control by the grantor over the property after the conveyance, and the grantee's total lack of knowledge or information concerning the property, the absence of any accounting to her either for receipts from or disbursements on account of the property, her own admission that she gave no authorizations, directions, or instructions to her brother as to his handling of her property or the investing of her money and, finally, a mistake of four years as to the time of the transfer, placing it prior to the time Wotton acquired a large part of it, coupled with an almost incredible account of the consideration for the deeds and the close relationship of the parties.

[6] From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties. *Moore v. McDonald*, 122 Cal. App. 61, 69, 9 P.(2d) 556, and cases cited. The inference of fraud from the irregularities of the instant transaction is reasonable, particularly in view of the refusal of all of the parties thereto to testify upon the ground that their answers would tend to incriminate them.

[7] We are here met by the argument that it is a violation of the constitutional privilege to draw an inference from the refusal to testify when put upon the ground of the privilege against self-incrimination. However, we do not think the inference here drawn constitutes a denial or invasion of that privilege.

[8] The California Constitution provides, in article 1, § 13, that no person shall "be compelled, in any criminal case, to be a witness against himself." This privilege is reaffirmed in the Penal Code, sections 638 and 1323, and it is no longer questioned that it protects the ordinary witness in civil proceedings from a disclosure which would tend to subject him to a criminal liability. The privilege of the witness in a civil case, who is compellable to take the stand, is to refuse to answer those specific questions put to him which would if answered disclose facts which would tend to prove his guilt. Code Civ. Proc.

§ 2065. Prohibition of comment upon and an inference of guilt from the defendant's silence or failure to take the stand has been held to be inherent in the constitutional privilege for the reason that, were the rule otherwise, the defendant would, as a practical matter, be furnishing proof against himself by the mere exercise of his privilege. *People v. Tyler*, 36 Cal. 522. This was the state of the law at the time the instant case was tried. However in November, 1934, an amendment to section 13 of article 1 of the Constitution was adopted, providing that, in any criminal case, "whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or jury."

Concerning privilege in general which excuses the giving of testimony, it is said in *Wigmore on Evidence* (2d Ed.) volume 4, page 659, § 2196: "The grounds for exemption from the testimonial duty are entirely extrinsic to the purpose of ascertaining the truth (ante, § 2175). They are based on a policy of dispensing with the compulsion of attendance and disclosure wherever it is not necessary, or is more disadvantageous in respect to other interests of the community (ante, § 2192). The exemptions are therefore in no sense provided for the benefit of the party whose opponent is deprived by them of the evidence which he desires. They are not intended to secure for him a better likelihood of demonstrating the truth of his cause; on the contrary, they constitute so many obstacles to the ascertainment of the truth, and these are suffered only because the several extrinsic policies are deemed to be in these respects paramount to the purpose of ascertaining the truth."

The historical background of the privilege against self-incrimination provides the key to its purpose and scope. It is an outgrowth of and a protest against the compulsory self-incrimination, torture, and inquisition of the early English courts. *Wigmore* (2d Ed.) vol. 4, §§ 2250, 2251; *Andrew A. Bruce*, 31 Mich. L. Rev. 226; *Wartells and Pollitt*, 18 Ky. L. J. 18. Rather than in excessive tenderness for the criminal, the reason for the rule is to be found in the protection of the innocent by preventing, as far as possible, conviction upon forced confessions. "The truth is that the privilege exists for the sake of the innocent—or at least for reasons irrespective of the guilt of the accused. * * * The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of

proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power." Wigmore (2d Ed.) vol. 4, p. 824, § 2251.

The rule that no inference must be drawn from the claim of the privilege is a rule of policy and conflicts with the inference which normally arises from the suppression of evidence by the party in control of it. The prohibition of the inference which logically flows from the claim of privilege is not based upon any lack of probative value in the inference itself but upon the fear of destroying the privilege. Hence all other inferences except that of the guilt of the defendant would logically seem to remain in force. See Wigmore (2d Ed.) vol. 4, § 2272.

In a civil case the claim of privilege on this ground may not necessarily give rise to an inference which is relevant to the issues involved. But here the claim of privilege is based upon the very fact in issue, the only excuse for silence is that an explanation of the real nature of the transaction would disclose conveyances made in fraud of creditors. The inference that the conveyances were not bona fide is inescapable, nor can we see that it is necessary to ignore it in order to preserve the constitutional privilege of the witnesses. The privilege is not for the benefit of the guilty nor to enable the claimant to prevail in civil suits by means of it. The privilege is to be protected from compulsory disclosure of criminal liability or facts connecting the claimant with the crime. See *In re Berman*, 105 Cal. App. 37, 287 P. 126. To hold that no inference could be drawn from the refusal of these witnesses to explain their dealings, in the face of so many suspicious circumstances, would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill.

While it is true that some authorities would seem to indicate that the contrary rule should be applied, we find support for what we consider to be the more just and salutary conclusion in such cases as *Andrews v. Frye*, 104 Mass. 234, *Fellows v. Wilson*, 31 Barb. (N. Y.) 162, and *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 16 Ann. Cas. 305.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.

3 Cal.2d 164
McCRACKEN v. LOTT et al.
S. F. 15022.

Supreme Court of California.
April 16, 1935.

Rehearing Denied May 16, 1935.

Execution ~~55~~ 55, 364

Where guardian was appointed for estate of incompetent judgment debtor, assets of estate were in custody of law and were not subject to seizure on execution and supplementary proceedings arising therefrom without an order from court having charge thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Jessie Joy McCracken against Mary Gesford Lott, wherein plaintiff obtained a judgment, E. W. Wilson was appointed guardian of the estate of Mary Gesford Lott, and under proceedings supplementary to execution the Wells Fargo Bank & Union Trust Company was ordered to appear at certain time and place to answer concerning indebtedness to defendant. From an order vacating the order of examination, plaintiff appeals.

Affirmed.

Thorton Wilson, of Oakland, for appellant.

Frank V. Kington, of San Francisco, for respondent E. W. Wilson.

Morgan V. Spicer, of San Francisco, for respondent Wells Fargo Bank & Union Trust Co.

WASTE, Chief Justice.

This appeal presents for consideration the question: May the assets of a judgment debtor, who has been judicially declared incompetent, be subjected to execution and supplementary proceedings arising therefrom, based on a valid final judgment rendered prior to the incompetency?

Plaintiff obtained a judgment against Mary Gesford Lott for the sum of \$5,000, with interest and costs. Execution issued against the property of the debtor, was returned by the sheriff wholly unsatisfied, and remained unpaid. On appropriate allegation, under proceedings supplementary to execution, that the Wells Fargo Bank & Union Trust Company was indebted to Mary Gesford Lott, the bank was ordered to appear on a day and at a place fixed to answer concerning the in-

debtedness. When the matter came on for hearing, there was filed in the proceeding by the guardian of the estate of Mary Gesford Lott a paper entitled "Claim of Exemption" from execution issued in the action "of all the property of the estate of Mary Gesford Lott, as now being in custody of law." Thereafter the guardian moved the court for an order vacating the order of examination of the Wells Fargo Bank & Union Trust Company, alleging that, after the entry of the judgment in question, the judgment debtor had been adjudged to be an incompetent person; that still later one Louisa J. Gesford died testate, leaving an estate in which the incompetent person was entitled to an interest; that the Wells Fargo Bank & Union Trust Company was the executor of the will of Louisa J. Gesford, and came and was then in possession of the property interest of the incompetent, Mary Gesford Lott, under the terms of the will and the decree of distribution made in the estate of the deceased. It was further alleged that, by the decree of distribution, the share of the incompetent was duly ordered paid to her guardian, who demanded of the executor the delivery of the money and property so distributed to him; that the levy of execution intervened before payment was made; hence the filing in this action of the claim of exemption of the property from execution upon the ground that it is in custody of law. The court granted the motion to vacate the order of examination, and the judgment creditor has appealed.

While some jurisdictions, notably Illinois, Massachusetts, Texas, and Washington, permit judgments against incompetents under guardians to be enforced by execution, it is the rule accepted by the great preponderance of authority that the estate in the hands of a guardian is in custodia legis. Among the large number of states following this trend are New York, Michigan, and Oregon. There is such similarity between the laws relating to guardianship in these states and the provisions of the California statutes that the decisions of the courts of those states are persuasive. In Michigan, the court held that the provisions in that state "are inconsistent with the view that the common-law courts may enforce their judgments by the ordinary process of execution." *Nolan v. Garrison*, 156 Mich. 397, 120 N. W. 977, 979. In Oregon the court said: "the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process against either the ward's estate or the guardian." *Sturgis v. Sturgis*, 51 Or. 10, 93 P. 696,

700, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724. The rule is the same in New York. In *Grant v. Humbert*, 114 App. Div. 462, 100 N. Y. S. 44, the court held that the established practice with respect to the enforcement of claims against an incompetent person for whom a committee has been appointed is to present a petition to the court praying that the claim be allowed and paid, or, in the alternative, that leave be granted to sue thereon. To the same effect see *Dean v. Halliburton*, 213 App. Div. 831, 209 N. Y. S. 200, and *In re McInerney*, 135 Misc. 481, 238 N. Y. S. 336. In *Loussac v. Jacobsen*, 7 Alaska, 598, it was held that property in the possession of the guardian of an insane person was in the custody of the law, and was not subject to levy under execution. See, also, *Hale v. Duncan*, *Brayton* (Vt.) 132; *Shinn on Attachment and Garnishment*, vol. 1, p. 73, § 46, note 2; 1 *Freeman on Executions*, § 181, note 436. The citation of other authorities seems unnecessary. We are satisfied to follow the rule in this case so definitely established, and to hold that the estate of the incompetent, Mary Gesford Lott, for whom a guardian has been duly appointed, was in the custody of the law. It was therefore not liable to seizure without an order from the court having charge thereof. *County of Yuba v. Adams & Co.*, 7 Cal. 35-37.

The order vacating the order of examination is affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; PRES-
TON, J.; LANGDON, J.



3 Cal.2d 143

**DUNCAN v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al. (two cases).**

S. F. 15317, 15318.

Supreme Court of California.

April 5, 1935.

I. Prohibition ☞5(3)

Supersedeas ☞3

Heir held not entitled to prohibition or supersedeas to prevent superior court from passing on supplemental account of administratrix filed during pendency of appeal from final account, where supplemental account

covered transactions occurring after final account was filed and all references to final account were removed therefrom (Probate Code, § 1020.5, as added by St. 1933, p. 2495).

2. Executors and administrators *↪*510(6)

Appeal from final account of administratrix held not to divest superior court of jurisdiction over supplemental account limited strictly to receipts and disbursements since final account was filed (Probate Code, § 1020.5, as added by St. 1933, p. 2495).

In Bank.

Two original proceedings by Emma C. Duncan, one for writ of mandate, and the other for a writ of prohibition or supersedeas, to be directed to the Superior Court of the City and County of San Francisco, and the Hon. Thomas F. Graham, Judge of Department 10 thereof, in Probate.

Petitions denied.

A. Don Duncan, of San Francisco, for petitioner.

Walter H. Linforth and William M. Cannon, both of San Francisco, for respondents.

LANGDON, Justice.

Petitioners brought two proceedings, one for a writ of mandate, and one for a writ of prohibition or supersedeas. Both involve the same parties and the same probate proceeding, and they are therefore considered together.

The decedent, Ernest C. Duncan, died intestate on January 11, 1933. His only heirs at law were his widow, Lucy N. Duncan, who became the administratrix, and his mother, Emma C. Duncan, petitioner herein. The widow claimed the entire estate as community property. Petitioner claimed half of it, contending that it was separate property. On December 1, 1933, the administratrix filed her final account and petition for distribution. Objections by petitioner were heard over a long period of time and overruled. On November 19, 1934, the court made its decree settling the final account. Petitioner took an appeal, which is now pending.

On the hearing of the application for letters of administration, petitioner herein objected to the fixing of the bond at the sum of \$20,000, and later moved for an order increasing it. This motion was denied, and she brought her petition for a writ of mandate to compel the probate court to increase the bond for the protection of her alleged interest pending the appeal. An alternative

writ was issued by this court. Subsequently, on January 8, 1935, the probate court made its order requiring an additional bond in the sum of \$63,000. This apparently gives petitioner sufficient protection and renders further action by this court on her petition unnecessary.

[1, 2] On November 19, 1934, almost a year after the final account of the administratrix had been presented, and after filing of the appeal from the final account, she filed a supplemental account covering transactions taking place after the filing of the final account. Petitioner then sought a writ of prohibition or supersedeas to prevent the court below from passing on the supplemental account, on the ground that the appeal divested the court of jurisdiction, and that the filing of supplemental accounts would result in a multiplicity of appeals and delay in settlement of the estate. This court made an order to show cause why a writ of supersedeas should not issue, and ordered all proceedings stayed pending the hearing.

Upon further consideration, we think petitioner fails to show the necessity or propriety of the relief she seeks. The filing of a supplemental account at the time final distribution is sought, showing receipts and disbursements since the rendition of the final account, is expressly required by statute. Probate Code, § 1020.5, as added by St. 1933, p. 2495; see *In re Estate of Sheid*, 129 Cal. 172, 175, 61 P. 920. Moreover, on December 3, 1934, the administratrix served a notice upon counsel for petitioner removing from the supplemental account all references to the final account, and limiting the supplemental account strictly to receipts and disbursements since the filing of the final account. The supplemental account was consequently a collateral matter unaffected by the appeal from the decree settling the final account; an appeal does not divest the lower court of jurisdiction over such a matter. *Hennessy v. Superior Court*, 194 Cal. 368, 228 P. 862. When the decree of distribution is eventually made, the items complained of may be reviewed on appeal therefrom, and no authority has been presented to us which would tend to show that such a remedy is inadequate.

The petition for a writ of mandate, and the petition for a writ of prohibition or supersedeas are, and each is, denied.

We concur: WASTE, O. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

3 Cal.2d 340

COWARD v. COWARD et al.
S. F. 15127.Supreme Court of California.
April 22, 1935.**Divorce** ☞184(6)

Where evidence was conflicting on question whether husband and wife had become reconciled, order denying motion to vacate interlocutory and final divorce decrees on ground of fraud was not disturbed.

In Bank.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Eloise Coward against Herbert C. Coward and others. From an order denying a motion by the defendant named to set aside an interlocutory and final decree of divorce, the defendants appeal.

Order affirmed.

A. Q. Lomba and W. L. Albert, both of Oakland, for appellants.

O. G. Foelker and J. H. McKnight, both of Oakland, for respondent.

CURTIS, Justice.

Appeal from an order denying motion by the defendant husband to set aside an interlocutory and final decree of divorce upon the ground that said decrees had been obtained by fraud of the plaintiff wife in that the parties had become reconciled in the interim between the trial of the action and the entry of the interlocutory decree and in the interim between the entry of the interlocutory decree and the entry of the final decree. The husband in an affidavit filed on behalf of said motion alleges that the plaintiff and defendant lived together as husband and wife subsequent to the trial of the divorce action and prior to the entry of the interlocutory decree of divorce; that while they were continuing to live together as husband and wife, subsequent to the entry of the interlocutory decree of divorce, the wife obtained the entry of the final decree without the knowledge and consent of the defendant; and that she perpetrated a fraud upon the court by filing an affidavit to the effect that the parties had not become reconciled whereas in fact they had become reconciled and had been living together as husband and wife for over two years prior to the entry of the final decree. The affidavit of the wife with reference to the fact of reconciliation and the liv-

ing together as man and wife flatly contradicts the affidavit of the husband and the other affidavits filed in support of his motion. Her affidavit is supported by the affidavits of some ten or twelve persons who were familiar with the domestic situation of the parties and were in a position to observe the attitude of the parties toward each other. Upon such a conflict of evidence, the order of the trial court denying the motion to vacate said decrees will not be disturbed by an appellate court.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



3 Cal.2d 180

HEINTZSCH et ux. v. LaFRANCE et al.

Sac. 4896.

Supreme Court of California.

April 16, 1935.

1. Landlord and tenant ☞213(5)

In action to recover money paid under purported lease contract which by reason of failure of mutual assent was not binding, evidence held to support finding of rental value less than that set by owner, in view of showing that no profits were earned through operation of property.

2. Cancellation of Instruments ☞59

In equitable adjustment of rights of parties following rescission of contract, where defendant is forced to restore entire consideration received, plaintiff must account for value of use of property during entire period of his possession.

3. Judgment ☞112

In action against principals and agents, agents by their default admitted charge of obtaining money from plaintiffs by fraudulent representations, and judgment against them was proper on this ground alone, even though such cause of action was not pressed at trial.

4. Judgment ☞240

Where judgment against principals rested on sound basis that they received money under purported contract which by reason of failure of mutual assent was not binding, and agents by their default admitted charge of

obtaining money from plaintiffs by fraudulent representations, judgment for full amount against both agents and principals in spite of motion that plaintiffs be required to elect which to hold was not error, but there could not be double satisfaction.

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by W. Heintzsch and wife against H. E. LaFrance and others. Judgment for plaintiffs, and named defendant and another appeal.

Modified and affirmed.

R. P. Stimmel and L. C. Smith, both of Redding, for appellants.

Jesse W. Carter and Glenn D. Newton, both of Redding (Dallas L. Barrett, of Redding, of counsel), for respondents.

LANGDON, Justice.

This is an action to recover the sum of \$1,000 paid under a purported contract, after rescission thereof by plaintiffs. The defendant Johansen, a real estate broker, acting as agent for defendants H. E. LaFrance and Alma LaFrance, his wife, entered into negotiations for the sale of an auto camp owned by Mr. and Mrs. LaFrance, to plaintiffs. The arrangement proposed was a sale of the business and movable property, comprising various kinds of equipment, and a lease of the land and buildings, at a specified rental. Plaintiffs paid the sum of \$1,000 to Johansen, receiving written instruments covering the agreements of the parties, and went into possession of the premises on January 15, 1933. On February 17, 1933, plaintiffs gave notice of rescission of the lease and agreement of sale, offering to restore possession of the land and all property received, and demanding return of the sum paid by them. Defendants refused to comply with the notice and demand, and this action was commenced. The complaint set forth three causes of action, one based on fraud, the second on mistake and absence of mutual assent, and the third in the form of a common count for money had and received. The defendants Johansen and Linthicum, the real estate brokers, failed to appear, and a default judgment was entered against them. The defendants H. E. and Alma LaFrance filed an answer and cross-complaint, denying material allegations of the complaint, and seeking affirmative relief for property used and deterioration of the premises. At the trial plain-

tiffs abandoned their claim of fraud, and the case proceeded on the single issue of mistake resulting in a failure of mutual assent. The trial court found in their favor. Judgment was thereupon entered canceling the instruments, and restoring to plaintiffs the sum of \$1,000, less \$389 for rental value of the property and goods consumed by them. The defendant owners bring this appeal.

[1] The conclusion of the lower court that the parties were never in agreement on the material elements of the lease and sale is not questioned, and the propriety of cancellation of the instruments is thus established. The main attack of the appealing defendants is on the court's finding that the reasonable rental value of the premises, for which plaintiffs were required to account, was \$30 per month, for ten months, a total of \$300. They assert that the undisputed evidence shows a rental value of \$75 per month for the real property and \$25 per month for the personal property, for eleven months and nineteen days, making a total of \$1,163.27, or more than the amount plaintiffs sought to recover. This evidence, apart from the testimony of defendant H. E. LaFrance, consists merely in the statement of plaintiff W. Heintzsch that this was the value represented to him by Johansen, the real estate agent. It is true that there was no opinion evidence offered by plaintiffs as to the rental value, but there was testimony to the effect that no profits were earned through the operation of the camp. This is in some measure indicative of the value of premises and equipment, and we think it gives sufficient support to the court's finding of a value less than that set by the testimony of the owner.

[2] The difference in the number of months arises from the fact that plaintiffs continued in possession up to the time of the judgment, January 4, 1934, a total of eleven months and nineteen days. There is nothing in the record to show why the lesser figure of ten months was chosen by the court. Plaintiffs, however, argue first that there should be no rental charge at all because there were no profits, and, second, that if a charge is made, it should be only for the period prior to notice of rescission, or at most, the commencement of the action, a few months only. But the rule in this state seems to be settled that in the equitable adjustment of the rights of the parties following rescission of the contract, where the defendant is forced to restore the entire consideration received, the plaintiff must account for the value of the

use of the property during the entire period of his possession. *Elrod-Oas Home Building Co. v. Mensor*, 120 Cal. App. 485, 8 P.(2d) 171; 25 Cal. Jur. 723, § 194. It follows that additional rental for one month and eighteen days at \$30 per month (\$1 per day) should have been credited to defendants, which amounts to \$48.

[3, 4] Defendants also complain that the judgment for the full amount plaintiffs sought to recover was rendered against both the agents and the principals, in spite of their motion that plaintiffs be required to elect which to hold. If this were an action on a contract made by an agent for an undisclosed principal, their attack would be justified. *Klinger v. Modesto Fruit Co.*, 107 Cal. App. 97, 100, 290 P. 127. But the complaint set forth a cause of action for fraud as well as one based on mistake. By their default, the agents admitted the charge of obtaining money from the plaintiffs by fraudulent representations, and judgment against them was proper on this ground alone. *Stirrus v. Adams*, 50 Cal. App. 730, 195 P. 955; *Lewis v. McClure*, 127 Cal. App. 439, 16 P.(2d) 166. That this cause of action was not pressed at the trial is of no consequence, so far as the liability of these defaulting defendants is concerned. The judgment against the principals rests upon the sound basis that they received the money under a purported contract which by reason of failure of mutual assent was not binding. There is, therefore, no valid objection to the double judgment. See generally, 14 Cal. Jur. 887, 902. There cannot, of course, be a double satisfaction thereof.

The final point made by defendants is that the judgment is uncertain in failing to specify the time within which plaintiffs must surrender the premises and personal property. It seems obvious that an immediate transfer thereof to defendants was contemplated, and to avoid misunderstanding this may now be declared.

The judgment is modified by adding the sum of \$48 to the amount recoverable by defendants H. E. and Alma LaFrance from plaintiffs, and it is further modified to require that all property ordered restored to said defendants be so restored within ten days after this judgment becomes final. As so modified, the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.

REINERT v. PROUD.*

Civ. 10009.

District Court of Appeal, Second District,
Division 2, California.

April 22, 1935.

As Modified May 10, 1935.

Rehearing Granted May 22, 1935.

1. Pleading ⚡126

Denial on information or belief that note and deed of trust were assigned to plaintiff on specific date alleged *held* insufficient as admission of assignment on some other date.

2. Trial ⚡396(7)

Finding that matters alleged in certain paragraph of complaint were untrue and judgment based thereon *held* error, where answer to such paragraph admitted facts therein alleged by reason of defective denial and there was no evidence contrary to the allegations in such paragraph.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Jane V. Reinert against Richard T. Proud. From a judgment for defendant, plaintiff appeals.

Reversed.

T. H. Canfield, of Santa Barbara, for appellant.

Ross MacLeod, of Santa Barbara, for respondent.

FRICKE, Justice pro tem.

[1] Action for balance due on a note secured by a trust deed. Appellant alleged in paragraph IV of the complaint that on the 18th day of January, 1930, the payee of the note assigned the note and deed of trust to the plaintiff and that plaintiff was the sole owner thereof. The court made the single finding that the allegations of paragraph IV were untrue and gave judgment for the defendant.

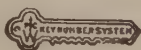
Appellant's first point is that the answer did not raise an issue as to the matters alleged in paragraph IV of the complaint. The answer attempted to raise an issue by the allegation "that defendant has no information or belief sufficient to enable him to answer the allegation of paragraph IV of said complaint, and basing his denial upon that ground he denies the allegation therein contained and the whole thereof." This denial amounts to no more than a denial that the assignment was made on the 18th of January, 1930, and is not

a denial, but amounts to an admission of such assignment upon some other day. Hess v. Sausser, 206 Cal. 15, 272 P. 1059; Poe v. Francis, 132 Cal. App. 330, 22 P.(2d) 801; Los Angeles Housing Corporation v. Crowley, 111 Cal. App. 202, 295 P. 371.

[2] In view of the admission of the allegations of paragraph IV of the complaint by failure to deny the same except as above mentioned, and the absence of any evidence contrary to the allegations of said paragraph, the finding of the trial court is wholly without support.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 61

**HARTFORD ACCIDENT & INDEMNITY
CO. v. SPRAGUE.**
Civ. 9203.

District Court of Appeal, Second District,
Division 2, California.
April 9, 1935.

Hearing Denied by Supreme Court
June 6, 1935.

1. Master and servant ☞389

Surgeon held not liable to employer's compensation carrier for alleged improper treatment of infection at knee of employee for difference between what carrier actually paid to employee and lesser sum which carrier would have paid had treatment by surgeon been proper, where only injury shown which might have been suffered in and arising out of course of employment was injury to groin, and carrier failed to show causal connection between injury to groin and infection at knee.

2. Appeal and error ☞882(10)

Appellant could not claim error of court's alleged rejection of evidence tending to prove that with proper care appellant's liability for hospital and medical care would not have exceeded certain sum, where record disclosed that appellant's counsel made offer of proof to such effect, following which there was discussion between counsel with occasional remark by court and, without securing any ruling from court, counsel proceeded with introduction of certain documentary evidence.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by the Hartford Accident & Indemnity Company against Norman F. Sprague. From a judgment of nonsuit, plaintiff appeals. Affirmed.

George L. Greer, of Los Angeles, for appellant.

W. I. Gilbert and Mills, Hunter & Dunn, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal from a judgment following the granting of a motion for nonsuit in an action for damages.

One Edward Trueman, in rising from his desk, struck his left groin against a projecting portion of the desk, injuring himself so that he went home and to bed and a week later was taken to a hospital, where his condition was diagnosed by respondent, a physician and surgeon, as "an abscess at the upper end of the popliteal space toward the inner side of the thigh," and an operation at the knee was performed. A little over two weeks later Trueman, at the instance of appellant, the compensation carrier of Trueman's employer, was removed to another hospital and placed under the care of another physician. Appellant brought this action, claiming that respondent's treatment of Trueman was so unskillful and negligent that the latter was permanently crippled, to his damage in the sum of \$20,000, and that appellant had been compelled to pay \$1,639.75 for treatment and care and \$898.20 for compensation. The action is upon the theory that respondent is liable, by reason of improper treatment given, for the difference between what appellant actually paid and the lesser sum which it would have paid had such treatment by respondent been proper.

[1] Respondent's brief calls attention to the fact that, while the injury suffered by Trueman (the only injury shown which might be said to have been suffered in and arising out of the course of his employment) was an injury to the groin, the alleged malpractice involved the treatment of an abscessed condition in the region of the knee. Appellant has not pointed out any causal connection between the injury to the groin and the infection at the knee. As compensation carrier, appellant is concerned only with a liability for the results of the injury to the groin. Any action for damages arising out of the alleged improper treatment of the infection at the knee, not appearing in any way to be connected with the injury to the groin, would be one

which Trueman might bring but one as to which appellant is a total stranger. We cannot assume that the infection at the knee was caused by the injury to the groin, and, in the failure of proof of this fact, appellant has failed to show any basis for a recovery.

[2] Appellant also claims error of the court in rejecting evidence tending to prove that with proper care appellant's liability for hospital and medical care would not have exceeded \$300. The record fails to support this contention, but does show that appellant's counsel made an offer of proof to the effect above stated, following which there was a discussion back and forth between counsel with an occasional remark by the court and, without securing any ruling from the court, counsel proceeded with the introduction of certain documentary evidence. It therefore appears that the court made no ruling and that the proffered evidence was not excluded.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 428

**CITY TRANSFER & STORAGE CO. v.
WALKER et al.
Civ. 9083.**

District Court of Appeal, Second District,
Division 1, California.
April 25, 1935.

1. Appeal and error ☞1011(1)

Where evidence is conflicting, finding of trial court is binding on appellate court.

2. Bills and notes ☞92(3)

Uncle held liable on note executed by him in consideration of promise of nephew's employer not to initiate civil action to recover money appropriated by nephew.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by the City Transfer & Storage Company against S. O. Walker and others. From the judgment, the named defendant appeals.

Affirmed.

Sidney Sampson and Hare & Walden, all of Los Angeles, for appellant.

Ray Meacham, of Long Beach, for respondent.

ROTH, Justice pro tem.

One of the defendants, while in the employ of plaintiff City Transfer & Storage Company, respondent herein, appropriated money belonging to respondent. In the course of investigation made and action taken by respondent in an effort to determine what steps should be taken to enforce collection, all parties met at the office of respondent's attorney. It was there decided that a negotiable promissory note should be signed by appellant S. O. Walker, an uncle, and defendants Gill and De Lapp, brothers-in-law of the employee, and by the employee himself, said note to be paid in monthly installments with a provision that it should be paid in full in two years. Pursuant to such agreement a note was executed by the parties aforesaid, default was made in payment of the installments provided, and since the note contained an acceleration clause, the instant action was commenced thereon. Defendants Gill and De Lapp defaulted, the action was tried as to appellant S. O. Walker, respondent prevailed and had judgment for the amount remaining unpaid on the note, and from that judgment appellant appeals.

[1,2] Appellant contends that he executed the note to save his nephew from criminal prosecution, which was threatened by respondent, and upon respondent's promise to refrain from such prosecution. Respondent asserts there never was any threat of criminal prosecution by respondent or any one else with its knowledge or by its authorization, but that there was some talk of initiating a civil action to recover the money which had been appropriated. The evidence on this subject is conflicting, and it would serve no useful purpose to review the same in detail. We have read the record and we are satisfied, without the aid of the trial court's finding, that the evidence preponderates in favor of respondent's position, and that the trial court came to a judicious conclusion when it so found. In any event, the finding of the trial court is binding upon us. The facts being as outlined, we adopt the language of the court in *Keating v. Morrissey*, 6 Cal. App. 163, 164 (syllabus), 91 P. 677, as appropriate and decisive. In that case the court said, and we say here: "Where there was evidence tending to show that the note sued upon was executed

by the defendant under a promise made on the part of the payee that she would refrain from suing the son of defendant, who had been an unfaithful agent of the plaintiff, upon a note bearing his signature payable to plaintiff, such evidence tended to show what in law is a sufficient consideration to support the note of the defendant to plaintiff. The law in such case will not attempt to measure the amount, or weigh the quantum, of the consideration. * * *

"Though a note given in consideration of a direct promise not to prosecute defendant's son for a felony would be void as against public policy, yet where the jury found against such promise, its finding on that subject is binding upon this court; and where the evidence tended to show that defendant considered that a civil suit against her son would involve him in public disgrace, as exposing his bad faith and dishonesty, she had a sufficient incentive to execute the note in suit in consideration of forbearance of the plaintiff to sue her son; and if such was the only agreement in fact, her mere belief that her son had committed a criminal offense would be immaterial."

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 49

HOYT v. SOUTHERN PACIFIC CO.
Civ. 9312.

District Court of Appeal, Second District,
Division 1, California.
April 9, 1935.

Rehearing Denied May 1, 1935.

Hearing Denied by Supreme Court
June 6, 1935.

1. Negligence ⇨139(8)

Where the same standard of care applies equally to each of two parties, an instruction stating the rule as applying to one without any reference to its application to the other is misleading.

2. Appeal and error ⇨1170(9)

Giving of instruction that law presumed that driver of truck and trailer struck by train used due care and that in weighing evidence jury could consider such presumption and refusing similar instruction in favor of

railroad held reversible error, where evidence would have supported verdict for railroad (Const. art. 6, § 4½).

3. Appeal and error ⇨930(2)

It is presumed on appeal that jury followed court's instructions.

4. Appeal and error ⇨1170(9)

Where reviewing court could not estimate to what extent giving instruction concerning presumption of due care of plaintiff's employee but refusing instruction regarding presumption of defendant's due care influenced jury to find verdict for plaintiff, error required reversal (Const. art. 6, § 4½).

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by E. Hoyt against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Laselle Thornburgh, of Santa Barbara, for appellant.

Charles F. Blackstock, of Oxnard, for respondent.

EDMONDS, Justice pro tem.

Plaintiff recovered judgment upon the verdict of a jury for damage to a trailer struck by one of the trains of the defendant railway at a crossing in the city of Oxnard. The points presented by the defendant on appeal are that the evidence shows that the driver of the truck was guilty of contributory negligence as a matter of law, that there is no evidence of negligence on the part of the defendant, and that the court erred in instructing the jury.

By the court's instructions the jury was given the definition and effect of a presumption, and told that "It is presumed that plaintiff's servant and employee, George Owen, used due care and did everything that a reasonable, prudent person would have done under the same circumstances to avoid the collision and that he was not negligent." It was also told, as requested by plaintiff, that "in weighing the evidence in this case you may consider this presumption of care on the part of said George Owen as evidence in the case and weigh it against other evidence in the case to determine whether or not said plaintiff's servant and employee, George Owen, was guilty of contributory negligence, and, if the evidence, if any, introduced here of negligence on the part of said plaintiff's serv-

ant and employee does not produce conviction in your minds, then you are not bound to decide in conformity with such evidence as against the presumption of due care, but may decide that question in conformity with the presumption that said plaintiff's servant and employee, George Owen, was not negligent." The court refused to give an instruction requested by the defendant to the effect that the law presumes that the defendant was not negligent and which, in language almost identical with that of the last-quoted instruction, directed the jury to weigh and consider this presumption in behalf of the defendant against other evidence to determine whether or not the defendant was negligent. Appellant contends that the plaintiff was thus given the benefit of the presumption in his favor while the jury could reasonably conclude that the same rule did not apply to the defendant.

[1-4] In the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393, 395, the court approved the following instruction: "The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence." In *Tyson v. Burton*, 110 Cal. App. 428, 434, 294 P. 750, 753, the reason and authority for an instruction on this subject was considered at length, and the court said: "Just how this instruction can be considered proper, where each party to an automobile collision charges the other with the sole negligence which resulted in the collision, and the circumstances attending the collision are fully testified to by the respective parties and also by eye-witnesses, does not clearly appear." The court also said in that case: "It would seem that both parties would be equally entitled to the presumption of taking ordinary care for his own welfare, and also that he was obeying the law." This appears to us to be the only logical conclusion which can be reached. Where the same standard of care applies equally to each of two parties, an instruction stating the rule as applying to one without any reference to its application to the other, places them in different positions before the jury. This is misleading to the jury (19 Cal. Jur. 754; *Howard v. Worthington*, 50 Cal. App. 556, 195 P. 709), and the error of the trial court in refusing to give the instruction requested by the defend-

ant is cause for reversal if, after an examination of the entire cause, including the evidence, it appears that as a result of such error there has been a miscarriage of justice (Constitution, art. 6, § 4½).

At the time of the accident the railway company maintained five tracks crossing Third street. The plaintiff's driver was operating a very large truck and trailer on this street, approaching the tracks from east to west in the middle of the afternoon of a clear day. The railroad tracks cross this street on a curve which limits the vision of one looking for trains coming from the north. The main line was the center track of the five, and, as one approached them from the east, the farther north one could see. It is uncontradicted that at a distance of 10 feet from the center of the main line track one could see the track to the north for only 800 feet.

The driver of the truck testified that he stopped it about 10 feet from the main line track and looked both north and south; that he saw no train approaching in either direction, and heard no bell nor whistle; that he then started his truck in low gear; and that, when the front of the truck was about in the center of this track, he saw a train bearing down upon him from the north at a distance of 150 yards. He estimated the speed of the train at the time at 35 to 40 miles per hour.

The engineer of the train testified on behalf of the defendant that his position on the engine, as the train approached the crossing, was on the side opposite from that from which the truck was approaching; that because of the curve he could not see the track as he approached the crossing for more than 30 or 40 feet ahead; that he did not see the truck before the accident; that the train was running 25 or 26 miles per hour with the engine bell ringing continuously; that he had blown the whistle for the station and also for the crossing at the distances prescribed for each; that "the fireman hollered 'hold her'"; and that he immediately set the air brakes for an emergency stop. The fireman testified that, when he first saw the truck, it was in motion 60 or 65 feet east of the tracks; that the engine was then 250 feet from the crossing; that he did not realize that the truck was not going to stop until it was about 8 or 10 feet from the track, at which time he "hollered for the engineer to hold em hard." He also testified that the engineer had whistled for the station and the crossing some distance north of the place of the accident and that the engine bell was ringing continuously.

Other eyewitnesses to the accident testified, and the evidence as to the precautions taken by the truck driver before driving on to the track and the care exercised by the engine crew in approaching the crossing is in direct conflict. If a verdict had been rendered by the jury in favor of the defendant, it would be supported by the evidence. It is presumed that the jury followed the court's instructions, and we cannot estimate to what extent the instruction concerning the presumption of due care on the part of the truck driver influenced the jury to find a verdict against the defendant. The error is, therefore, substantial, and requires a reversal of the case for a new trial. *Zolkoske v. United States F. & L. Co.*, 72 Cal. App. 63, 236 P. 344. It is therefore unnecessary for us to consider the other points raised.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 89

**GLESBY v. HARTFORD ACCIDENT &
INDEMNITY CO.**
Civ. 9750.

District Court of Appeal, Second District,
Division 2, California.
April 11, 1935.

1. Appeal and error ☞ 1010(1)

Fact finding of trial court supported by evidence in record is conclusive on appeal.

2. Insurance ☞ 437

Injury to patient resulting from treatment by osteopathic physician's unlicensed assistant knowingly permitted by physician, which made both physician and assistant guilty of violating law, *held* not covered by liability policy excluding injuries caused while engaged in performing unlawful act.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Harry Glesby against the Hartford Accident & Indemnity Company. From an adverse judgment, plaintiff appeals.

Affirmed.

Abe Richman and Thomas L. Nair, both of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Prior to the present action, appellant recovered a judgment against Morgan Prime Lee and J. E. Matson for malpractice in the treatment of appellant. In the present action, appellant seeks to recover the amount of this judgment under a liability policy issued by respondent to Morgan Prime Lee, an osteopathic physician and surgeon.

[1] It appears that J. E. Matson was not a graduate of a medical school, nor was he licensed to practice osteopathy or medicine in this state. Appellant contends that there is no evidence to support the findings of the trial court that at the time in question J. E. Matson was the assistant of Dr. Lee, but an examination of the record discloses evidence sustaining this finding and, with such support in the record, that finding is conclusive here.

[2] Respondent's policy of insurance provides that it shall not cover bodily injuries "(1) caused by the assured or any assistant of the assured while to any degree under the influence of intoxicants, anaesthetics or narcotics or while engaged in or as the result of performance of any unlawful act; (2) caused as the result of criminal malpractice or the violation of any law or ordinance by the assured or any partner or assistant or substitute of the assured."

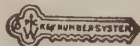
The basic question on this appeal is whether under these circumstances appellant could prevail in this action.

The liability of respondent under its policy of insurance is dependent upon the conditions in that contract. As J. E. Matson, the assistant of Dr. Lee, was without any license to heal the sick and afflicted in this state, his act in the treatment of appellant and the conduct of Dr. Lee in knowingly permitting such treatment made them both guilty of a violation of law and the performance of an unlawful act. The evidence sustains the conclusion that appellant's injuries were due to the lack of skill exercised by J. E. Matson, the unlicensed assistant, and were the result of the use by Dr. Lee of an unqualified and nonlicensed assistant in violation of the provisions of law. The loss is, therefore, one not covered by the insurance

policy of respondent. See *Betts v. Mass, etc., Co.*, 90 N. J. Law, 632, 101 A. 257, Ann. Cas. 1918E, 520.

The judgment is sustained.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 405

ALEXANDER v. HAL ROACH STUDIO, Inc.

Civ. 9878.

District Court of Appeal, Second District,
Division 2, California.

April 23, 1935.

Rehearing Denied May 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

Explosives ☞8

Evidence that fourteen year old trespasser on vacant land, which motion picture producer had temporarily utilized over two months previously while photographing war scenes in which bombs were used, was injured by bomb differing from type used by producer, who, before vacating land, had caused search to be made for any unexploded bombs, and that in meantime third persons had held at least one celebration on such land, held insufficient for jury as to producer's negligence.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by George Alexander, a minor, by Stanley V. Ward, his guardian ad litem, against the Hal Roach Studio, Inc. From a judgment on a directed verdict for defendant, plaintiff appeals.

Affirmed.

Torchia & Sefman and Ernest M. Torchia, all of Los Angeles, for appellant.

Kidd, Schell & Delamer and Benjamin W. Shipman, all of Los Angeles, for respondent.

CRAIL, Justice.

This appeal is from a judgment upon a directed verdict in favor of the defendant, Hal Roach Studio, Inc., after the evidence of the parties was closed.

Defendant-respondent obtained the temporary use of certain vacant land near its studios in Culver City for the purpose of photographing war scenes for a motion picture. A powder expert was employed by the studio to handle the explosives. He made bombs which he exploded at the command of the director by means of a battery connected with them. When the war scenes were finished and as a preliminary to vacating the premises, defendant's employees went over the ground to see that no unexploded bombs remained. After defendant left the premises and within the next two months, one celebration at least was held on the premises by others than defendant. Later the plaintiff, a boy of fourteen years, and his younger half-brother went on the lot to play. The boys were trespassers and to get on the lot the boys climbed through a barbwire fence. Plaintiff found what proved to be an unexploded bomb. He was of average intelligence for his age and he had been injured before while playing with powder. He picked it up, unwound the tape on it, and found on the inside a grayish cardboard cylinder with a cork in one end. Plaintiff pulled out the cork and the thing exploded in his hand. This bomb was not of the same type as that used by defendant on the lot. Plaintiff called as one of his witnesses, Alfred Fahey, the powder expert employed by defendant. Mr. Fahey described the type of bombs which he made for use in defendant's picture. They were altogether different in design. None of the explosives used by defendant would go off from concussion or anything except fire or a hot spark.

We have read the briefs and the transcript of the evidence. There must be more than surmise and conjecture. Viewing the evidence in the light most favorable to the plaintiff, we see no substantial evidence which would sustain a finding that the defendant was guilty of negligence.

"The case may be withdrawn from the jury where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound discretion, would be compelled to set aside a verdict returned in opposition to it." 24 Cal. Jur. 914.

Judgment affirmed.

I concur: STEPHENS, P. J.

6 Cal.App.2d 69

Ex parte DURAND.
Cr. 1843.

District Court of Appeal, First District,
Division 1, California.
April 10, 1935.

1. Constitutional law ☞42

To raise constitutional question, party complaining must show that his rights are injuriously affected by portion of law attacked.

2. Constitutional law ☞42

One pleading guilty to information, and sentenced pursuant to judgment of conviction, showing that he was in custody of city police chief at time of escape, for which he was convicted, *held* not entitled to attack constitutionality of statute defining such offense because of its failure to specify person, other than officer, in whose custody prisoner must be at time of escape (Pen. Code, § 107, as amended by St. 1933, p. 1072).

3. Escape ☞13

Statute declaring escape from prison or custody of officer by prisoner charged with or convicted of felony punishable by imprisonment in state prison, fine, or both, applies to misdemeanor, as well as felony, prisoners (Pen. Code, § 107, as amended by St. 1933, p. 1072).

Proceeding by Anthony Durand for a writ of habeas corpus compelling his release from the state prison at San Quentin.

Writ discharged, and prisoner remanded.

Gladys Towles Root, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

Petitioner is imprisoned in the state prison at San Quentin and seeks to be released therefrom on habeas corpus.

He was sentenced thereto by the superior court of Los Angeles county pursuant to a judgment of conviction which recites that he pleaded guilty to "the crime of escape from the legal custody of an officer, to-wit: Chief of Police of the City of Los Angeles * * * in violation of section 107 Penal Code of California, a felony, as charged in the information." Said section 107, as amended by St. 1933, p. 1072, reads as follows: "Every prisoner charged with or convicted of a felony who is confined in any jail or prison or an inmate of any public training school or

reformatory or county hospital or who is engaged on any county road or other county work or who is in the lawful custody of any officer or person, who escapes or attempts to escape from such jail, prison, public training school, reformatory or county hospital, or from the custody of the officer or person in charge of him while engaged on or going to or returning from such county work or from the custody of any officer or person in whose lawful custody he is, is guilty of a felony and is punishable by imprisonment in the State prison not exceeding ten years, or fined not exceeding ten thousand dollars, or by both such fine and imprisonment."

[1, 2] The first point made by petitioner is that said section is unconstitutional. In this regard he contends that inasmuch as it does not specify the person or persons (not an officer or officers) in whose custody a prisoner must be at the time of the escape, in order to commit the crime therein denounced, said section is "too vague, indefinite and uncertain to form a basis for a standard of guilt."

It is a well-settled rule, however, that in order to raise a constitutional question the party complaining must show that his rights are injuriously affected by the portion of the law he is attacking; that it must appear he is aggrieved by the operation of that particular part of the law. 5 Cal. Jur. 622-623. In the present case, the information to which petitioner pleaded guilty, and the judgment of conviction pursuant to which he was sentenced, both show that at the time of the alleged escape petitioner was not in the custody of a person acting without official capacity, but was in the custody of an officer, namely, the chief of police of Los Angeles. It follows, therefore, that his case does not fall within nor are his rights in any way affected by that part of section 107 involved in the constitutional question he seeks to have determined.

[3] Petitioner's second point is that said section 107, as indicated by the opening clause thereof, applies only to persons "charged with or convicted of a *felony*" (italics ours), whereas it affirmatively appears from the information in the present case that at the time of the alleged escape he was under conviction for a misdemeanor; and he contends, therefore, that the information does not state a public offense.

Irrespective of whatever force there may be in petitioner's point, the question raised thereby is no longer an open one so far as

the courts are concerned, because it has been held by the Supreme Court in the case of *In re Haines*, 195 Cal. 605, 234 P. 883, in conformity with a previous decision rendered by the District Court of Appeal (*In re Haines*, 68 Cal. App. 522, 229 P. 984), that the said section 107 applies to misdemeanor prisoners as well as to felony prisoners.

The writ is discharged, and the prisoner is remanded.

We concur: TYLER, P. J.; CASHIN, J.



6 Cal.App.2d 217

STOWE v. MERRILEES et al.
Civ. 5241.

District Court of Appeal, Third District,
California.

April 16, 1935.

Rehearing Denied May 16, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Statutes ☞231

Code provisions must be so construed as to avoid conflicts between them and harmonized so as to give effect to Legislature's apparent intention, if reasonably possible.

2. Mines and minerals ☞97

Owners of mining property may substitute limited partnership for mining partnership under Uniform Limited Partnership Act, in absence of provisions preventing formation of limited partnerships for mining purposes in Code relating to mining partnerships (Civ. Code, §§ 2479, 2511, 2512).

3. Statutes ☞239

Statutes in derogation of common law are not strictly construed in California.

4. Partnership ☞351

Statutes of character of Uniform Limited Partnership Act are remedial in nature and must be construed with view to effecting purpose thereof while protecting public (Civ. Code, §§ 2478, 2479, 2504).

5. Partnership ☞354

No time being fixed by Uniform Limited Partnership Act for filing and recording of limited partnership certificates, reasonable time, determined by circumstances of particular case, is allowed (Civ. Code, § 2478).

6. Mines and minerals ☞97

Valid limited partnership was formed as to one beginning to furnish labor and serv-

ice of dragline outfit to partnership for use in mining operations long after filing and recording of limited partnership certificates, though they were not filed and recorded until 49 days after partners executed them and commenced work (Civ. Code, § 2478).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by D. O. Stowe against F. W. Merrilees, Guy Hopkins, M. L. Mayer, and another. From a judgment for defendants Hopkins and Mayer, plaintiff appeals.

Affirmed.

Lafayette J. Smallpage, of Stockton, for appellant.

Clifton A. Hix, of San Pedro, for respondents.

PAULSEN, Justice pro tem., delivered the opinion of the court.

This appeal is taken upon the judgment roll alone. Briefly summarizing the findings, it appears that the defendant Merrilees, for some time prior to the fall of 1932, was mining upon certain property in Calaveras county under a lease from the owners thereof. On November 15, 1932, he and the other defendants, Adams, Hopkins, and Mayer, met in Los Angeles and executed limited partnership certificates pursuant to the provisions of section 2478 of the Civil Code, by the terms of which the four partners agreed to carry on mining activities on said leased premises. On the same day, and in accordance with the terms of the certificates, Merrilees assigned said lease "unto the limited partnership," which immediately commenced work upon said claims. Merrilees thereby became the general partner and sole manager and the other defendants became limited partners. The latter never attempted to exercise control of the operations. On January 3, 1933, the certificates were filed in the clerk's office and in the office of the recorder of Calaveras county, the principal place of business of the partnership. On March 7, 1933, plaintiff began furnishing labor and the service of a dragline outfit to the partnership for use in said mining operations. For this he was not paid, and the present action was brought to recover the amount due therefor. Plaintiff was given judgment against Merrilees and Adams, who had defaulted. The judgment further provided that plaintiff take nothing against Hopkins and Mayer, who were awarded their costs of suit. This appeal is

taken by plaintiff from that part of the judgment in favor of Hopkins and Mayer.

It is conceded by appellant that the judgment must be affirmed if a valid limited partnership existed at the time the debts were contracted. He contends, however, that, when persons who own or have an interest in a mining claim commence work thereon, a mining partnership is formed by operation of law, and that a limited partnership cannot be created for such purpose. He asserts further that there was not a substantial compliance with the provisions of the Code as to the filing and recording of the certificates. The points raised on the appeal appear never to have been decided in this state, and the cases cited from other jurisdictions throw little light upon the problem.

Section 2511 of the Civil Code provides that: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same."

Section 2512 reads: "An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom."

These sections have existed in their present form since 1872. Section 2479 of the Civil Code was adopted in 1929 (St. 1929, p. 1914) as part of the Uniform Limited Partnership Act, and states that: "A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking and insurance."

[1, 2] Appellant argues that there is an irreconcilable conflict between section 2479, supra, and the two sections dealing with mining partnerships, and that, under the familiar rule that the language of general provisions must yield to that of special provisions touching the same subject, sections 2511 and 2512 must govern. But it is also true that, if Code provisions can be reasonably so construed as to avoid conflict, that construction must be adopted. It is the duty of courts, when reasonably possible, to harmonize the several sections involved so as to give effect to the apparent intention of the Legislature. It was undoubtedly the intention of the Legislature in adopting the provisions of the Uniform Limited Partnership Act (St. 1929, p. 1913) not only to secure uniformity between our partnership laws and those of other states

but also to extend to all lines of business, except banking and insurance, the privileges of the act. There is no sound reason in public policy why the owners of mining properties should not be permitted to induce capital to participate in their ventures, with a limited liability as to partnership debts, if the rights of third parties are adequately safeguarded. The same status can be obtained by a corporate form of organization. As mining is not included within the exceptions mentioned in said section 2479, it follows that a limited partnership may be formed for such purpose, unless the provisions of the Code relating to mining partnerships prevent it. We find no provision therein that forbids it. The owners of mining properties may still form mining partnerships by express agreement, or, in the absence of such an agreement, such relationship may arise by operation of law. But under the plain provisions of section 2479 of the Uniform Limited Partnership Act, such owners may, by compliance with the terms of the act, substitute a limited partnership for a mining partnership, and the provisions of the latter act then determine their status.

[3-5] It appears from the facts stated above that defendants executed their certificates of limited partnership and commenced work on the property on November 15, 1932, but that the certificates were not filed and recorded until 49 days later. Appellant argues that this was not a substantial compliance with the Code. He has cited a number of authorities from other jurisdictions on the question of substantial compliance and others which hold that any failure to comply strictly with the provisions of the statute will defeat the attempt to form a limited partnership. None of these cases was decided under a statute exactly like ours, and undoubtedly most of them were influenced by the rule prevailing in such jurisdictions that statutes in derogation of the common law should be strictly construed. This rule is not in effect in this state and the act itself contains a provision that it is to be liberally construed. Section 2504, Civ. Code. The prevailing opinion as to the construction of statutes of this character is that they are remedial in nature and are to be construed with a view to effecting the purpose of the statute and at the same time protect the public. 47 C. J. 1278, § 1017. No time is fixed by the act within which such filing and recording must be done, and it must therefore be held that a reasonable time is allowed. What is a reasonable time must be determined by the circumstances of the particular case.

[6] Although the certificates were not filed promptly such failure could not have worked to the detriment of appellant. His business with respondents did not start until the certificates had been on file and of record for 64 days. The purpose of requiring such filing and recording is to acquaint third parties with the essential features of the partnership arrangement, and it appears that ample notice was given in this case. In the case of *Levy v. Lock*, 5 Daly (N. Y.) 46, 47 How. Prac. 394, decided under the statutes of New York before the adoption of the Uniform Limited Partnership Act by that state, it was held that, where a certificate and an affidavit of contribution were filed 28 days after their execution, the statute was sufficiently complied with and the firm became a limited partnership as to creditors whose debts accrued subsequent to the filing. We think the same rule may be applied here. Respondents complied with all the terms of the act long before appellant transacted any business with them, and, as to him, a valid limited partnership had been formed.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



6 Cal.App.2d 77

**SECURITY BUILDING & LOAN ASS'N OF
LOS ANGELES v. MARYLAND
CASUALTY CO.**

Civ. 9700.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1935.

1. Insurance ☞616½

In action on fidelity bond, judgment against employer on account of employee's fraud *held* admissible to prove amount of loss.

2. Insurance ☞666

Where employer protected by fidelity bond tendered defense of action brought against it on account of employee's fraud, which insurer declined, employer, in action on bond, *held* entitled to recover, not only amount of judgment and costs, but attorney's fees in defending the action (Civ. Code, § 2778, subd. 4).

Appeal from Superior Court, Los Angeles County; Clore Warne, Judge.

Action by the Security Building & Loan Association of Los Angeles against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Everett H. Smith, of Los Angeles, for appellant.

Julius V. Patrosso, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appellant executed a bond to respondent in which it agreed that it would "indemnify the employer against loss of money securities, and other personal property (including that for which the employer may be legally responsible to others), sustained by the employer, by reason of any act or acts of fraud, dishonesty, forgery, embezzlement, wrongful abstraction or willful misapplication of any employee while performing the duties of any office or position named in the schedule attached hereto." There is ample evidence in the record that one C. T. Owen, president of respondent corporation, and one of its employees covered by the bond, induced one R. D. Scott to deliver to respondent and himself certain shares of stock to be placed in an escrow, of which respondent corporation was represented by Owen to Scott as being the agent, and under which escrow Scott was to receive \$3,000; that Scott was induced to and did enter into the transaction as a result of the false and fraudulent representations of Owen; that in fact no such escrow was ever opened; that Scott suffered a loss of \$1,500, and thereafter secured a judgment against respondent for the amount of this loss, with interest thereon in the sum of \$131.25 and court costs in the sum of \$15.35. In the instant action respondent sought to recover the sum of \$1,685.67 paid in satisfaction of the Scott judgment, together with the further sum of \$250 which it had paid for attorney fees in defending the prior action and the sum of \$121.86 for court costs in the municipal court and appellate department of the superior court, a total of \$2,057.53, for which latter amount, with interest, respondent obtained judgment.

Appellant's contention that the bond is not a contract of indemnity seems to be negated by section 2772 of the Civil Code, which reads: "Indemnity is a contract by which one engages to save another from a legal conse-

quence of the conduct of one of the parties, or of some other person." See, also, Couch's Cyclopaedia of Insurance Law, vol. 1, § 26, p. 40; Cooley's Briefs on Insurance (2d Ed.) pp. 17, 22; and 25 C. J. 1089.

[1] The contention that the bond is not one of indemnity is made the basis of appellant's claim that the trial court erred in admitting in evidence the Scott judgment, that such judgment is not conclusive unless the facts litigated in that action were the same as involved here, and that the superior court did not have jurisdiction of this action. As part of the burden of respondent was to prove that it had suffered a loss and the amount of such loss, it was necessary and proper to prove the recovery and satisfaction of the judgment. It further appears from the record that the matters litigated in the former action are the same as those involved here, and that the proof in the instant case, apart from the judgment, is ample to support the finding that the loss suffered was occasioned by the fraudulent misconduct of Owen and establishes appellant's liability.

[2] Appellant's final point is that the complaint demanded, and the trial court included in the judgment here, an item of \$250 necessarily expended by respondent for attorney's fees in the action by Scott; that without the inclusion of this item the claim of respondent was not sufficient in amount to vest jurisdiction in the superior court rather than in the municipal court, and that appellant was not liable for this item under its bond. Section 2778 of the Civil Code provides (subdivision 4): "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity. * * * The record shows that respondent, upon being served with the summons and complaint in the former action, promptly notified appellant of the fact, tendered the defense to appellant, and advised appellant that, if it did not defend the action, respondent would hold it for the amount of the judgment recovered, together with the costs and attorney fees incurred. Appellant did not avail itself of the opportunity, and left the defense of the action to respondent, thus causing the latter to incur the items for costs and attorney's fees heretofore mentioned. Section 2778 further provides that an indemnity against liability "embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable dis-

cretion," a provision which of itself answers appellant's contention so that it is not necessary to devote any extended space in pointing out that the loss suffered by respondent from the fraudulent act of Owen was not merely the loss suffered by having to reimburse Scott, but also the loss suffered directly by respondent, which as a proximate result of the acts of Owen was compelled to expend money for attorney's fees and costs, a loss which appellant could and would have avoided had it taken over the burden of meeting the claim of Scott. We are of the opinion that the superior court had jurisdiction of this action.

We fail to find support for appellant's claim that the evidence is insufficient to support the judgment.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 132

KAYE v. M'DIVANI.

Civ. 9055.

District Court of Appeal, Second District,
Division 1, California.

April 12, 1935.

1. Landlord and tenant ☞90(1), 115(3)

Holding over by tenant under mutual oral agreement for one month after expiration of written lease did not extend lease, but created new tenancy from month to month or in any event renewed tenancy for one month, in absence of evidence of distinct agreement as to terms of extra month's tenancy, where rental under written lease was paid monthly (Civ. Code, § 1945).

2. Landlord and tenant ☞161(3)

Landlord's cause of action against tenant, holding over by mutual oral agreement for one month after expiration of written lease of furnished house, to recover value of stolen rug, accrued on expiration of written lease, and action brought before end of additional month was not premature.

3. Appeal and error ☞1010(1)

Trial court's fact finding, based on sufficient probative evidence, cannot be disturbed by appellate court.

4. Bailment ⇨14(1)

Lessee of personalty, as bailee for hire, is responsible for loss thereof only if he failed to use ordinary care, in absence of contract limiting or enlarging his liability.

5. Bailment ⇨13, 14(1)

Responsibility of gratuitous bailee or bailee for hire can be diminished or increased by contract.

6. Customs and usages ⇨19(2)

Evidence of custom of lessors of furnished houses to insure them against burglary held inadmissible in lessor's action against lessee for value of stolen rug.

7. Landlord and tenant ⇨161(3)

Defendant's testimony in lessor's action against lessee of furnished house for value of stolen rug that he would not have signed lease had he known that plaintiff carried no burglary insurance held properly stricken.

8. Landlord and tenant ⇨161(3)

Lessor of furnished house held not estopped to claim value of stolen rug from lessee by failure to carry burglary insurance, in absence of evidence that parties talked about such insurance or that any authorized person directly or suggestively represented to defendant that plaintiff carried burglary insurance on personalty covered by lease.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Morton Kaye against Serge M'Divani. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hazlett & Plummer, of Los Angeles, for appellant.

Walter E. Burke and Harold E. Thomas, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent leased in writing to appellant a furnished residence for the term from March 9 to September 9, 1931, at a rental of \$400 per month. Upon the expiration of the term of the lease, appellant held over by mutual oral agreement to October 9, 1931, at which time the premises were vacated. Attached to the lease was an inventory which listed the furniture, furnishings, and equipment of the residence and fixed the valuation of the several items thereof. Among the items listed in the inventory was one Shah Habbas blue (antique) rug, 10.1x14.4, "very rare," valued at \$6,000. This rug was stolen

on April 15, 1931, and this action was instituted for its value on October 7, 1931. The lease provided, among other things, " * * * and lastly, that at the expiration of the term of this lease or agreement, or other sooner determination thereof, he will peaceably and quietly surrender, yield and deliver up the entire possession of said House, Furniture, Goods and Chattels, unto the said party of the first part * * * in as good state and condition as the same are now in, ordinary wear and tear and damage by fire alone excepted. * * *" Further: "Party of the second part assumes all liability to the furniture and interior decorations in accordance with the inventory hereto attached, which is a part of this contract."

Respondent had judgment for \$6,000 and costs. Appellant prosecutes this appeal from that judgment, and contends that this action was prematurely brought; that the damages allowed were excessive; that there was no liability upon appellant except for negligence and that no negligence was shown; and that respondent was estopped from claiming any damage.

[1, 2] We will treat the points urged in the order in which they have been stated. By reason of the holding over by appellant, repossession of the premises was not actually delivered until October 9, 1931, and the action was filed October 7, 1931. It may be conceded that, if the period for the performance of the contract is fixed, the right of action accrues and the statute begins to run at the expiration of that period and not before. *Fratt v. Hunt*, 108 Cal. 288, 41 P. 12. Conceding the application of this principle, it is sufficiently answered by the fact that the written lease expired on September 9, 1931, and the holding over for one month did not, under the facts of this case, constitute an extension of the original written lease, but appears to have been a new tenancy from month to month. The evidence on this phase of the matter is meager. It does not appear with any certainty when the conversation for the extra month's tenancy was had or what the terms of this tenancy were. In any event, in the absence of evidence of a distinct agreement, it would by law be a renewal of the tenancy for a period of one month, since the rental under the written lease was paid in monthly payments. Civ. Code, § 1945. In addition, the written lease specifically provided: "And if the party of the second part shall hold over the term herein stated, then such holding shall be construed to be a ten-

ancy only from month to month." The cause of action undoubtedly accrued upon the expiration of the written lease.

[3] The evidence on the question of damages was conflicting. There is unquestionably sufficient probative evidence upon which the trial court based its finding that the rug was reasonably worth in this market the sum for which it gave judgment. That a finding so made cannot be disturbed by this court is to merely reiterate a thoroughly settled and salutary principle of law.

[4, 5] The rights and responsibilities of the parties with reference to the personal property leased are undoubtedly controlled by the principles of bailment. Considering the appellant as a bailee for hire, he would be responsible only in the event he failed to use ordinary care. This, however, would be true only in the event no contract were made between the parties limiting or enlarging such liability. That the responsibility of a gratuitous bailee or a bailee for hire can be diminished or increased by contract is settled. *Rainbow Petroleum Co. v. Union D. & P. Co.*, 115 Cal. App. 275, 1 P.(2d) 489; *Klein v. Baker*, 112 Cal. App. 157, 296 P. 631.

It has already been decided in a number of cases that language, similar in phraseology, context, and import to that used in the excerpted portions of the lease in question, enlarges the liability of a bailee and in effect makes him the insurer of the property bailed. *Commercial Acetylene Supply Co. v. Fox*, 47 Cal. App. 673, 191 P. 33; *Pope v. Farmers' Union, etc., Co.*, 130 Cal. 139, 62 P. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; *Caldwell v. Western Development Co.*, 54 Cal. App. 776, 203 P. 158; *Ambassador Airways, Inc. v. Frank*, 124 Cal. App. 56, 63, 12 P.(2d) 127; *Klein v. Baker*, *supra*; *Rainbow Petroleum Co. v. Union D. & P. Co.*, *supra*.

[6] Appellant's assertion of an estoppel is based on the fact that he offered to prove—which the trial court properly refused him permission to do—that a custom existed whereby lessors who let furnished houses always insure the same against burglary, that he was in fact told that the place was insured, and that he would not have rented the premises in question had he known otherwise.

[7, 8] There was evidence that some talk was had about insurance, but that it was fire insurance that was talked about and not burglary or other insurance, and the evidence showed that respondent did actually carry

fire insurance on the premises to the extent of \$40,000. There is nothing in the record from which it could be concluded that any one authorized so to do represented to appellant directly or suggestively that respondent carried burglary insurance on the personal property covered by the lease. The action of the trial court in granting respondent's motion to strike the testimony of appellant to the effect that he would not have signed the lease had he known that no burglary insurance was carried was correct. No citation of authorities is necessary to establish that the showing thus made does not remotely approach an estoppel.

It follows, from what has been said, that the judgment should be, and it is hereby, affirmed.

We concur: HOUSER, Acting P. J.;
YORK, J.



6 Cal.App.2d 145

IMMEL v. DOWD.

Civ. 1704.

District Court of Appeal, Fourth District,
California.

April 12, 1935.

Marriage §50(2)

Wife, whom husband deserted in 1881 and who married again in 1886, husband having remarried by ceremonial marriage in 1885, held not to have sustained burden of showing after husband's death in 1932 that he had not procured divorce from her (Code Civ. Proc. § 1963).

Evidence, offered to rebut the presumptions set forth in Code Civ. Proc. § 1963, showed that husband wrote wife inclosing copy of divorce decree which she thought had been rendered by court sitting in Ottawa, Kan.; that he had written and told her and had told others that he had not obtained a divorce from her; that she had never been served with any process in divorce action brought by him; that she had not obtained divorce from him; that, after death of her second husband, a veteran, she had applied for pension as his widow, and that application was disallowed because no evidence was found of divorce from first husband; that court records had been searched at Ottawa, Kan., and other places and no rec-

ord of her having been divorced by husband was found; there was no evidence indicating that husband lived in Kansas between years 1881 and 1885, during which period court found that marriage had been dissolved by divorce.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Martha E. Immel against Daisy M. Dowd, formerly Daisy M. Immel. From an adverse judgment, plaintiff appeals.

Affirmed.

Durley & Downes and Edward C. Maxwell, all of Oxnard, for appellant.

Biby & Biby and Harry C. Biby, all of Los Angeles, for respondent.

MARKS, Justice.

This action was brought by appellant seeking to recover title to a one-half interest in property in the city of Oxnard upon the ground that it was the community property of herself and Thomas J. Immel; she not having joined in the deed made by Thomas Immel conveying it to respondent.

The facts as found by the trial court are not in dispute. Appellant and Thomas Immel were married on March 8, 1872. About the year 1881 Thomas deserted appellant and they did not live together after that date. On February 8, 1885, Thomas married Mary E. Jameson. This marriage was ceremonial. Respondent was their daughter. On September 19, 1886, appellant married Amos Duckett and lived with him as his wife until his death. Thomas Immel deserted his second wife in 1893 and moved to California. That marriage was dissolved by divorce in 1908. The property in controversy was acquired by Thomas Immel in 1905 and 1906. On November 28, 1908, he conveyed it to respondent by deed of gift, reserving a life estate in it to himself. He died on March 7, 1932.

The trial court found that the marriage between Thomas Immel and appellant had been dissolved by divorce at some time between the years 1881 and 1885. This finding is attacked as not being supported by the evidence.

The sole evidence in support of the questioned finding is disputable presumptions, set forth in section 1963 of the Code of Civil Procedure. It is not questioned that these presumptions are a form of evidence and, if

not overcome, may be invoked to support the findings and judgment.

The evidence offered by appellant to rebut these presumptions may be summarized as follows: That Thomas Immel wrote her inclosing a copy of a decree of divorce from her which she thought had been rendered by a court sitting in Ottawa, Kan.; that he had written and told appellant, and had told others, that he had not obtained a divorce from her; that she had never been served with any process in a divorce action brought by him; that she had not obtained a divorce from him; that, after the death of Amos Duckett, a veteran, she had applied for a pension as his widow; and that her application was disallowed because no evidence was found of a divorce from Thomas Immel; that the court records had been searched at Ottawa, Kan., at Los Angeles and Ventura, Cal., and no record of her having been divorced by Thomas Immel was found.

In this connection it should be borne in mind that the trial court found that they had been divorced between the years 1881 and 1885. Thomas Immel did not come to California until 1893, and a search of the records of Los Angeles and Ventura counties was useless, as they could disclose nothing concerning a divorce supposedly granted before he came to this state. At the request of respondent, an attorney wrote the county clerk at Ottawa, Kan., asking if the "records of 50 years ago, more or less," disclosed that there had been a "divorce action between Thomas E. Immel and Martha E. Immel." To this inquiry the clerk replied: "No record of a divorce in the above named case in this County. Examined records to more than 50 years ago." There is no evidence indicating that Thomas Immel lived in Kansas between the years 1881 and 1885.

In the case of *Marsh v. Marsh*, 79 Cal. App. 560, 250 P. 411, 413, a question similar to the one we are considering was before the court. It was there said:

"It has been held time and again by the Supreme Court of this state that mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage—that there must be a further showing that the first marriage has not been set aside by judicial decree. *Estate of Hughson*, 173 Cal. 448, 160 P. 548; *Estate of Harrington*, 140 Cal. 244, 73 P. 1000 [98 Am. St. Rep. 51]; *Maier v. Brock*, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; *Hunter v. Hunter*, 111 Cal. 261, 43 P. 756, 31 L. R.

A. 411, 52 Am. St. Rep. 180; *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 187 P. 996. * * *

"The testimony does show that Henry Marsh was in the state of California some little period of time before his marriage with respondent, yet the record is silent as to the county or counties in which he may have lived, and also the transcript is silent as to whether any search was made of the records in the counties where the deceased may have lived long enough to acquire a legal residence to ascertain whether any divorce proceedings had been instituted by him. * * * The notes to this case [*Maier v. Brock*, *supra*] also point out what proof is necessary to overcome this presumption, to wit, proof of the first marriage, proof that the party attacking the validity of the second marriage had not obtained a divorce, and that the records of the courts of the different counties where the deceased may have resided and acquired a legal residence disclose that the deceased had not instituted and prosecuted to conclusion any such action. The burden of proof is clearly cast by the authorities upon the party attacking the second marriage, even though it involves the proving of a negative. * * * Other cases might be cited, but it is sufficient to say that the presumption is not overcome by testimony of one of the parties that such party has obtained no divorce and that no divorce papers, or summons, were ever served upon such party. It is further held that the burden of proving that a divorce has not been granted to either party of a former marriage is substantial and is not made by proof of facts from which mere inferences may be drawn."

Estate of Hughson, 173 Cal. 448, 160 P. 548, 550, is factually similar to the case at bar. *Julia J. Brigham* asserted that she was the surviving widow of *Hiram Hughson* by virtue of her marriage with him in October, 1860. *Luella R. Hughson* asserted she was his widow by virtue of a ceremonial marriage at *Stockton, Cal.*, in 1864. In 1861 *Hughson* left his first wife, *Julia*, and was never heard from or heard of by her until after his death in 1911. *Julia* married several times after 1861; each time in good faith believing her first husband was dead. Both *Julia* and *Hiram* had families by their subsequent spouses. In affirming the judgment of the trial court, holding that *Julia J. Brigham* was not the wife of *Hiram Hughson* at the time of his death, the Supreme Court said:

"The sole question is this: Did plaintiff meet the burden of proof resting upon her under her pleading? She was seeking to establish her position as the widow of *Hiram Hughson*. To succeed it would have been necessary for her to show that at the very moment of the death of *Hiram Hughson* she was his wife by virtue of a lawful and subsisting marriage. *Estate of Harrington*, 140 Cal. 244-246, 73 P. 1000, 98 Am. St. Rep. 51. * * *

"In many of the states of this Union the presumption in favor of the legality of a marriage is not overcome by mere proof of an earlier ceremony, but to show the illegality of the second marriage there must be proof of a continuance of the prior marital relation, even when such proof involves the establishment of the negative proposition that there has been no divorce. In California the principle announced more than 20 years ago by this court in an opinion written by Mr. Justice Temple has been consistently followed ever since. In that case the follow language was used: 'It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage.' *Hunter v. Hunter*, 111 Cal. 261-267, 43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180. * * * In *McKibbin v. McKibbin*, 139 Cal. 448, 73 P. 143, it was held that proof of a prior marriage and the continued life of both spouses was not sufficient to make a *prima facie* case as against a second ceremonial marriage; that there must be further showing that the first marriage had not been set aside by judicial decree. The books contain many similar decisions, but it is not necessary to go outside of California for authority. We will refer, however, to the frequently cited case of *Maier v. Brock*, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 763, which in its facts is very similar to the one at bar. It was a suit for assignment of dower. Plaintiff had married *Maier* in Ger-

many in 1865. In 1866 he left her and came to America. In 1885 he visited Germany, and she then saw him for the last time. It was shown that in 1872 he married another woman and lived with her until her death. In 1885 he married Mary Baldruff and lived with her until she died. He then married another woman and was divorced from her. In 1902 he married Nora Carl and lived with her until his death in 1904. The finding of the court in favor of defendants was upheld. Many of the leading cases were there discussed, and upon the very presumption upon which respondent here depends the judgment was upheld.

"We conclude that the court was justified in finding that the plaintiff was not Hughson's wife at the moment of his death."

As the trial court found that appellant was not the wife of Thomas Immel at the time of his death, and as, under this finding and the cases cited, she did not sustain the burden of proof cast upon her of establishing that Thomas had not secured a divorce from her, the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



6 Cal.App.2d 198

PEOPLE v. PAYTON.

Cr. 2666.

District Court of Appeal, Second District,
Division 1, California.

April 16, 1935.

1. Criminal law — 1159(3)

Jury's findings on disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit.

It is only where, as a matter of law, there is no legal evidence supporting charge that a reviewing court may disturb verdict, and in criminal case court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence.

2. False pretenses — 49(2)

In prosecution for issuing check without sufficient funds, evidence which justified inference of intent to defraud held sufficient to sustain conviction (Pen. Code, § 476a).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Frank Clay Payton was convicted of issuing a check without sufficient funds, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

Defendant was charged with the crime of issuing a check without sufficient funds. He waived a jury, and upon a trial by the court he was convicted of the crime charged. He appeals from the judgment of conviction and the order denying his motion for a new trial.

[1-2] Appellant contends that the evidence was insufficient to support the judgment, for the reason that the intent to defraud had not been established. Section 476a, Pen. Code. From the evidence it appears that on December 1, 1933, appellant purchased 128 bales of hay from H. J. Crinklaw, in Santa Susana, Ventura county. Appellant gave in payment for the hay a check drawn by him on a bank in which he had neither an account nor credit. Defendant testified, in effect, that he left the date blank on the check; that he told Crinklaw that he did not have an account in the bank, and asked Crinklaw to hold the check for a few days until he could sell the hay and return the money. The hay was sold and he further testified that he gave \$100 to his truck driver, Morrow, the following day for the purpose of redeeming the check, and that Morrow told him several days later that he, Morrow, had picked up the check and destroyed it. Morrow was reported to be in Arizona. Crinklaw testified that the check was dated December 1, 1933, and given to him by the appellant as payment for the hay, without any request being made to hold the check and without any mention of the fact that the appellant did not have an account or credit at the bank.

Although there is a direct conflict in the evidence, it is ample to justify the inference of guilt. "The findings of a jury upon disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb a verdict. The rule, upon an appeal in a criminal case, is that the court

must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt." *People v. Deysher* (Cal. Sup.) 40 P.(2d) 259, 262.

The appellant urges as prejudicial errors certain questions asked of him by the district attorney on cross-examination concerning other alleged offenses. There is no merit in the point.

The judgment and the order are, and each of them is, affirmed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 71

PEOPLE v. PODWYS.
Cr. 2643.

District Court of Appeal, Second District,
Division 1, California.
April 10, 1935.

Hearing Denied by Supreme Court May 8,
1935.

1. Criminal law §713

Prosecutor has no right to inject into proceedings by innuendo such prejudice against defendant or his counsel as prevents a fair and impartial trial.

2. Criminal law §1171(1)

Whether misconduct of district attorney is cause for reversal rests largely upon facts in each case.

3. Criminal law §919(1)

District attorney's misconduct in persistently referring to dilatory tactics of accused's counsel, in charging accused's counsel with breach of professional ethics, and in arguing that district attorney would never prosecute person unless district attorney was convinced that accused was guilty, *held* to entitle accused to new trial, where jury evidently was doubtful of accused's guilt (Const. art. 6, § 4½).

4. Criminal law §1037(2), §1129(1)

Generally, objectionable remarks or argument of district attorney must be objected

to at time they are made, and court requested to admonish jury concerning them before they can be made ground for appeal, but where examination of entire record fairly shows that acts complained of are of such character as to have produced effect which, as reasonable probability, could not have been obviated by instructions to jury, then absence of assignment and request will not preclude defendant from raising point in appellate court (Const. art. 6, § 4½).

5. Criminal law §1037(2)

Accused *held* not precluded on appeal from objecting to district attorney's alleged prejudicial remarks on ground that accused did not object to remarks at time they were made, where record disclosed that on some occasions district attorney persisted in his remarks concerning accused's counsel or witnesses after objection had been sustained and jury admonished, and misconduct continued throughout examination of witnesses and argument to such extent that it was doubtful if admonition by court would have removed effects of misconduct (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Henry Anthony Podwys was convicted of robbery, and of kidnaping for the purpose of robbery, and he appeals.

Reversed.

Frederic H. Vercoe, Public Defender, and Erling J. Hovden, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

The defendant was found guilty by the verdict of a jury of the crime of robbery on each of four separate counts, and of the crime of kidnaping for the purpose of robbery, on an additional count. Each count charged him with the prior conviction of a felony, which he admitted. A motion for new trial having been denied, defendant was sentenced, and has appealed from each of the judgments of conviction and from the order denying a new trial.

While appellant admits that the record contains sufficient evidence to sustain the verdicts, he contends that the district attorney was guilty of serious misconduct in the examination of witnesses and in his argument to the jury; that this was persistent, amounting to a course of conduct throughout

the entire trial; and that a fair and impartial trial was not had for that reason.

The transcript of the proceedings shows continuous criticism of the public defender, representing the defendant, by the district attorney. When the public defender asked a perfectly proper question of a witness, the district attorney said, "Counsel, what is the purpose of that—just your dilatory tactics." Again, he said, "I don't understand your dilatory tactics," and at another point, "I don't understand your tactics." Later, the district attorney called defendant's counsel a "clown" and charged him with a "breach of professional ethics," for which there does not appear to have been the slightest foundation. At another time the district attorney said: "I am surprised the public defender would use the tactics he does—that is I am not surprised; I know him," and later stated: "This district attorney doesn't use the tactics you do."

[1] These remarks and comments made by the district attorney during the trial concerning the defendant's witnesses, taken separately, one by one, may not amount to more than what is, unfortunately, a too common practice in the trial of cases. Making all due allowances for the fact that the district attorney was engaged in the prosecution of a defendant whom he believed was guilty under the evidence which he was presenting, it must be remembered that a conviction can only be justified by legal means. A prosecutor has no right to inject into the proceedings, by innuendo, such prejudice against the defendant or his counsel as prevents a fair and impartial trial.

There was no justification for this conduct on the part of the district attorney. As was pointed out in the case of *People v. Wells*, 100 Cal. 459, 465, 34 P. 1078, 1080: "It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent."

As against the asserted lack of good faith on the part of defendant's counsel in the presentation of the evidence, the district attorney in his argument to the jury presented his own impeccable integrity and official rectitude. He said: "Counsel on several occasions cast reflections on the District Attorney,

and let me tell you this, when first I went into that office as attorney for the People, I told several hundred that any time you can come to my office and any time you can show me that you have evidence in your possession that your client is not guilty, I will with great zeal and zest go into court and dismiss that case, and it will be dismissed; and if such a thing should happen that a man is convicted who is innocent, in the next fifty years, if you can prove to me that you have evidence in your possession that he was not guilty, you come and give it to me and if I believe that man is innocent, I will go to the Governor and see that a pardon is given—it will have to be given, and I will stay there on the State Capitol steps until they give me one. Because, why should I carry on my conscience twenty-four hours of the day the conviction of an innocent man, when there is no inducement and no other inducement? If fifty million dollars was laid on the plate, it wouldn't interest me in the least, because I think that much of my morality or the hereafter. What your creed or faith is, that is mine." There can be no excuse for such comment. In the case of *People v. Edgar*, 34 Cal. App. 459, 468, 167 P. 891, 894, the same kind of an argument was commented upon as follows: "When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial, that the defendant was guilty of the crime charged. *People v. Rogers*, 163 Cal. 476, 126 P. 143. But his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence."

[2] Whether or not misconduct of a district attorney is cause for reversal rests largely upon the facts in each case. In order to determine whether or not the trial of the defendant has resulted in a "miscarriage of justice," within the meaning of section 4½ of article 6 of the Constitution, we have examined the entire record, including the evidence. From such examination it appears

that verdicts in his favor would be supported by the evidence. The evidence presented by the people consisted in the main of the testimony of the victims of the robberies, whose identification of the defendant was by no means certain, and that of an accomplice who had been previously convicted of robbery other than that charged against the defendant. The accomplice's story of the happenings on the various occasions was not as clear and convincing as one might expect of a witness who had participated in such crimes. Moreover, the defendant offered by evidence of apparent reliability, an alibi for each one of the crimes charged against him. That the evidence of the defendant's guilt was such as to make a jury hesitate to return verdicts of conviction is apparent from the record of the case. The case has been tried twice. On the first trial a jury disagreed after deliberating for a full court day. The verdicts which we are considering on this appeal were returned by a jury which went out at noon and returned with their verdicts at 11 o'clock at night, adding to the one on the fifth count, "by unanimous agreement of the jury leniency is hereby recommended."

[3] We are convinced that the misconduct of the district attorney in this case weighed heavily against the defendant and may have brought about his conviction. The error has, therefore, resulted in a miscarriage of justice entitling the defendant to a new trial. *People v. MacPhee*, 26 Cal. App. 218, 226, 146 P. 522.

[4, 5] The respondent concedes that the remarks of the district attorney were improper, but contends that, as they were not objected to at the time they were made nor assigned as misconduct, the appellant cannot now take advantage of them. It is true that in a number of instances the record shows no objection by defendant's counsel. It is also true that on some occasions the district attorney persisted in his remarks concerning the defendant's counsel or the witnesses after objection had been sustained by the court and the jury admonished. The misconduct continued throughout the examination of the witnesses and the argument to such an extent that it is doubtful if any admonition by the court would have been sufficient to remove its effects. The general rule is that any objectionable remarks or argument of the district attorney must be objected to at the time they are made, and the court requested to admonish the jury concerning them, before they can be made a ground for appeal. However,

in the case of *People v. Stafford*, 108 Cal. App. 26, 290 P. 920, 921, this court after stating the general rule, approved the exception stated in *People v. Simon*, 80 Cal. App. 675, 679, 252 P. 758, as follows: "There is, however, a well-recognized exception to this general rule, and the exception is simply this: Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court." The record in this case clearly shows that it comes within this exception.

Other points raised by the appellant afford substantial basis for challenging the verdicts on this appeal, but it is unnecessary to comment upon them.

The judgments and the order are reversed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 180

BARCROFT v. ADKINS et al.

Civ. 8785.

District Court of Appeal, Second District,
Division 1, California.

April 15, 1935.

Rehearing Denied May 9, 1935.

Hearing Denied June 13, 1935.

1. Automobiles ☞158

Where companion's intentional interference with driver's control of automobile borrowed by companion caused accident, companion was guilty of "willful misconduct," entitling driver to recovery, since companion was presumed to have intended natural consequence of his deliberate acts.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ☞247

Finding that companion of driver of borrowed automobile was guilty of negligence and willful misconduct was not inconsistent, since finding of negligence would be treated as surplusage, where evidence supported finding of willful misconduct.

3. Automobiles ⇨198(1)

Where driver of automobile was injured in accident caused by willful interference of intoxicated companion who had borrowed automobile, driver's status was immaterial, since companion was liable to driver, even though driver was his guest, and regardless of Vehicle Act (St. 1931, p. 1693, § 141¼).

4. Automobiles ⇨244(41)

In action by driver of borrowed automobile for injury sustained in accident caused by willful interference of intoxicated companion, evidence held to support finding that driver was not contributorily negligent so as to bar recovery.

5. Automobiles ⇨192(6)

Owner held not liable to driver of automobile for injury sustained by driver in accident caused by willful interference of intoxicated companion, who had borrowed automobile from owner, within statute imposing liability on owner of motor vehicle for injuries to person resulting from negligence in operation of such motor vehicle (Civ. Code, § 1714¼).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Iola J. Barcroft against Virgil Homer Adkins and others. From a judgment for plaintiff, defendants appeal.

Affirmed in part; reversed in part.

W. M. Conley, Philip Conley, Matthew Conley and Conley, Conley & Conley, all of Fresno, and Preisker, Goble & Twitchell, of Santa Maria, for appellant Adkins.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants Ed Eymann and Eymann Motor Co.

C. Douglas Smith, of Santa Maria, for respondent.

SHINN, Justice pro tem.

Action for damages sustained in an automobile accident.

Defendant Adkins borrowed an automobile from defendants Eymann and Eymann Motor Company, a copartnership, in Fresno; drove to Monterey, where he was joined by plaintiff, a woman twenty-three years of age, on a trip to Los Angeles, to witness a football game. Plaintiff at all times drove the automobile. When they had reached a point south of Santa Maria, an accident occurred which resulted in severe injuries to plaintiff. She recovered judgment against Adkins based upon findings that the accident was caused by

his negligence and willful misconduct, and against defendants Eymann and Eymann Motor Company (hereinafter referred to as defendant Eymann) as the owner of the car. Both defendants appeal.

[1] The findings of negligence and willful misconduct on the part of Adkins are based upon the following facts: On the way down from Monterey, Adkins imbibed freely from a large bottle of whisky which he had brought with him, resulting in his intoxication, of which plaintiff became aware a short distance north of Santa Maria. When they were about 1½ miles south of Santa Maria, traveling down grade and approaching a turn in the highway to the right, at a speed approximating 40 miles per hour, Adkins made advances to plaintiff; he took hold of plaintiff's hand, and plaintiff jerked it away from him and told him not to do that, whereupon, in the language of the findings: "Said defendant, Virgil Homer Adkins, did immediately thereafter grab ahold of plaintiff's right leg with his right hand and put his left arm around plaintiff's left shoulder and did then and there pull plaintiff toward him with great force in an attempt to hug and kiss plaintiff." Plaintiff's foot was pulled away from the brake pedal and she lost control of the steering wheel. The car went off the road through a guard rail and plaintiff's injuries resulted. The accident occurred at 8 or 8:30 p. m.; the night was clear and the road was dry. A sign at the roadside gave warning of the curve ahead. Plaintiff called Adkins attention to the curve as she passed the sign, which was a considerable distance from the curve. She took her foot off the accelerator, applied the brake, and slowed down. She was applying the brake at the time Adkins interfered with her operation of the car in the manner stated. Plaintiff had had one drink with Adkins in Monterey, after which she drank no more. Adkins was sober when they started on the journey. The conduct of Adkins, prior to the time of the advances described, had not been alarming; he at no time drove or attempted to drive or interfered with plaintiff in driving the car. Upon these facts the court found Adkins to be guilty of negligence and willful misconduct, and found plaintiff not to be guilty of contributory negligence. We agree with the conclusions reached by the trial court. That the actions of Adkins constituted willful misconduct admits of no doubt. They were intentional and willful. The circumstances were such as to render it probable that an accident would result from

interference with plaintiff's control of the car. The speed of the car, the grade, the turn in the road, of which Adkins was aware, all pointed toward danger. Without being able to slacken the speed of the car and to control the steering wheel, it was inevitable that plaintiff would be unable to negotiate the curve, and no reason is advanced why Adkins did not realize the danger, although his intoxication may furnish a reason for his not giving heed to it.

There was ample proof of an intent and purpose to do the thing that probably would result in injury, and this is sufficient to prove willful misconduct. *Walker v. Bacon*, 132 Cal. App. 625, 23 P.(2d) 520; *Manica v. Smith*, 138 Cal. App. 695, 33 P.(2d) 418. The defendant will be held to have intended the consequences which would naturally result from his deliberate acts. Without the semblance of excuse for his misbehavior, he placed his companion in a position of imminent danger. It is useless for him to contend that he did not thereby court disaster.

[2] A point is made of the fact that the findings show both negligence and willful misconduct, and it is claimed that these findings are inconsistent and hence cannot support the judgment. The point seems to be without merit. Since the evidence supports the finding of willful misconduct, the finding of negligence is surplusage and immaterial.

[3] The briefs of counsel discuss the question whether plaintiff was a guest of Adkins, but we think this question is likewise immaterial. Adkins was liable, even though plaintiff was his guest, so it matters not whether she occupied that status. It is assumed by counsel on both sides that plaintiff's right to recover against Adkins is limited by the provisions of section 141½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), in that, if she was a guest, she may not recover without proof of willful misconduct on the part of Adkins. Since the point is not argued, we do not decide whether Adkins belongs in the class of either the "owner, or driver, or person responsible for the operation of such vehicle" so as to require plaintiff to prove either that she was not a guest or that Adkins was guilty of willful misconduct. Plaintiff was entitled to recover under the California Vehicle Act or regardless of the act.

[4] Appellant Adkins relies upon the defense of contributory negligence under the rule that a guest who rides in an automobile

knowing that the driver is intoxicated is guilty of contributory negligence. The cases cited in support of this rule do not apply here because Adkins was not the driver. We are not disposed to enter into a critical analysis of plaintiff's conduct under the circumstances forced upon her by her host. No less do we hesitate to indulge in generalities as to what would be prudent conduct for a female under such conditions. What we say has reference only to the particular facts of this case. The trial judge found plaintiff to be free from negligence, and we see no good reason for disturbing that finding. If, as appears to be the case, plaintiff believed the better course was to continue on the journey, notwithstanding the inebriated condition of her companion, we will not substitute our judgment for hers and hold that she should have done otherwise. She was alone with the defendant and far from home. Until the moment when he seized her in an amorous embrace, his conduct, while no doubt distressing, was not alarming. After her peril became known to her, she was powerless to extricate herself therefrom. It is said by appellant Adkins in support of his defense that "it would shock the moral senses" to permit a recovery by plaintiff. We entertain a contrary view, and consider that the law would be inadequate if it did not afford plaintiff a right to recover damages under the admitted facts of the case.

The point raised by this defendant that the damages, \$9,840, are excessive, does not require particular discussion. There was no error in the rulings in the admission of expert testimony. An objection to the question asked Adkins by his counsel whether he intended to injure plaintiff was properly sustained. No sufficient reason is presented for disturbing the judgment against defendant Adkins.

[5] Numerous points are presented in support of the appeal of defendant Eymann, only one of which requires decision. Under section 1714½, Civil Code, the owner of a motor vehicle is liable for injuries to person or property "resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner," etc. The judgment against defendant Eymann was erroneous. No liability of this defendant results from the facts of the case. The injury in question did not result from negligence in the operation of the car. Plaintiff was operating the car—Adkins was not

operating it. Plaintiff was not guilty of negligence, and the negligence and the willful misconduct of Adkins were distinct and separate from the operation of the car or any attempt to operate it. Reliance is placed upon the case of *Bosse v. Marye*, 80 Cal. App. 109, 250 P. 693, in support of the argument that Adkins should be held to be the operator of the car, even though he was not engaged in driving it. The case is not in point. In that case, a parent, who had assumed liability for the negligence of a minor daughter, in signing her application for an operator's license, was held liable for the negligence of a friend whom the daughter allowed to drive the car. In that case there was negligence in the operation of the car, and the daughter, who was seated beside the driver, was held to be the operator on the theory that the driver was acting for her.

Section 1714 $\frac{1}{4}$ of the Civil Code does not make the lender of an automobile an insurer against the wayward and delinquent tendencies of the borrower. The law limits the liability of the owner of the automobile to responsibility for negligence in its operation. The facts of the present case show the wisdom of the limitation. The statutory liability not having been established and there being no other, the case falls as against defendant Eymann.

The judgment against defendant Adkins is affirmed; the judgment against defendants Eymann and Eymann Motor Company is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 215

STANKEY v. PALMER.

Civ. 9345.

District Court of Appeal, Second District,
Division 2, California.

April 16, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

Witnesses $\hookrightarrow$ 178(3)

In action against administrator to recover on deceased's note, plaintiff's incompetency to testify regarding matters antedating maker's death held waived by cross-examining plaintiff concerning such matters (Code Civ. Proc. § 1880, subd. 3).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Susie H. Stankey against William Fleet Palmer as administrator with the will annexed of the estate of Edward H. Boden, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jones, Stephenson, Palmer & Moore and C. Arden Gingery (by Wm. Fleet Palmer), all of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

CRAIL, Justice.

This appeal is from a judgment in favor of the plaintiff in an action on a promissory note against the administrator with the will annexed of the estate of her deceased father, the maker of said note, a claim having previously been filed in the estate.

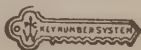
The defendant's first contention is that the court committed prejudicial error in allowing the plaintiff (respondent) to testify as to matters and facts occurring before the death of the decedent. By reason of section 1880, subdivision 3, Code of Civil Procedure, the plaintiff in such an action cannot be a witness as to any matter or fact occurring before the death of such deceased person. We have examined the record and we find that the court recognized the rule and followed it, sustaining objections made thereunder, until the defendant, by cross-examining the plaintiff as to matters and facts occurring before the death of the decedent, waived the incompetency of the plaintiff as a witness. Such incompetency may be thus waived. *Deacon v. Bryans*, 88 Cal. App. 322, 263 P. 371; *McClenahan v. Keyes*, 183 Cal. 574, 206 P. 454; *Kinley v. Largent*, 187 Cal. 71, 200 P. 937; *Booth v. Friedman*, 82 Cal. App. 174, 255 P. 222. The defendant contends, using the text of 40 Cyc. 2351, that "a party who objects to the competency of a witness introduced on behalf of his adversary does not, where his objection is not sustained, waive the incompetency of the witness by cross-examining him about matters as to which he has testified on direct examination." This rule has no application to the situation before us. The defendant's objections were sustained on direct examination and the defendant cross-examined the witness about matters as to which she had not testified on direct examination.

Defendant's final contention is that the court erred in admitting secondary evidence

as to the contents of a certain written instrument. We believe that there was a sufficient foundation laid for the introduction of such oral testimony. We find no merit in the defendant's contentions.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



6 Cal.App.2d 162

ARUNDEL v. TURK et al.
Civ. 9004.

District Court of Appeal, Second District,
Division 1, California.
April 12, 1935.

Hearing Denied by Supreme Court
June 10, 1935.

1. Automobiles ☞170(2)

Statute requiring motorists driving upon right half of highway to drive as closely as practicable to right edge of highway held inapplicable to motorist who had completed left turn into highway and was proceeding on right when colliding with automobile coming from opposite direction, since statute was enacted for benefit of motorists traveling in same direction (St. 1931, p. 2124, § 122 (b)).

2. Evidence ☞588

Evidence of speed of colliding automobiles held not to show that testimony of reputable eyewitnesses that plaintiff's automobile was on right side of road at moment of impact and came to rest almost entirely on left side was incredible.

3. Trial ☞142

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence proper value and indulging in every legitimate inference which may be drawn therefrom, evidence is insufficient to support verdict for plaintiff.

4. Automobiles ☞245(13, 79)

In action for damages sustained when defendant's automobile collided with plaintiff's automobile, which was making a left turn, questions of negligence and contributory negligence should have been submitted to jury.

Action by Sarah Arundel against L. A. Turk and others. From judgment for defendants entered upon directed verdict, plaintiff appeals.

Reversed and remanded.

Ernest M. Torchia, of Los Angeles, for appellant.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for respondents.

ROTH, Justice pro tem.

This appeal is from a judgment entered upon a directed verdict. The evidence shows that appellant, Sarah Arundel, plaintiff in the trial court, driving a Dodge six sedan, had completed a left turn from Ocean Park boulevard into Main street, public streets in the city of Ocean Park, Cal., and proceeded in a southerly direction on Main street in second gear for approximately 50 to 75 feet, at a speed between 12 and 14 miles per hour. According to her testimony, and that of two eyewitnesses, her automobile was proceeding on her right side of the street parallel and a few feet to the west of a mythical center line in the street, when a Durant coupé, which respondent was driving at a speed of 20 to 25 miles per hour from the south to the north on the same street, angled to the west of said mythical center line, whereupon the left front sides of the automobiles in question collided. Appellant and the two eyewitnesses mentioned testified that the actual impact took place on the appellant's part of the roadway, that is, west of the center. The testimony is undisputed, however, that when the cars came to rest the Durant was 8 to 10 feet east of the center of the street, and the whole of appellant's Dodge with the exception of the right rear wheel, was east of the center and impacted at an angle of five degrees, using the center of the street as a base, left front to left front with the Durant. The evidence also showed that there were no automobiles to the right of appellant, and that she could have operated her Dodge closer to the curb.

[1] Respondent persuaded the trial court and reiterates now that because of the undisputed physical evidence showing the positions of the two cars when they had come to rest after the impact, any testimony to the effect that the actual collision took place west of the center of the street was opposed to the laws of nature and is so incredible that such testimony is unworthy of belief by any reasonable person, and is therefore no evidence at all. *Waizman v. Black*, 101 Cal.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

App. 610, 281 P. 1087; *Keyes v. Hawley*, 100 Cal. App. 53, 279 P. 674; *Uhl v. Fertig*, 56 Cal. App. 718, 206 P. 467. Respondent further argued at that time and urges now that the single physical fact referred to indicates that the appellant was on the wrong side of the street, but even though she was not, that she was guilty of contributory negligence as a matter of law, because, assuming that she was on her right side of the road, she operated her automobile too close to the center line when there was plenty of room to the right. This latter contention is based upon section 122 (b) of the California Vehicle Act (St. 1923, p. 557, amended by St. 1931, p. 2124): "In driving upon the right half of a highway the driver shall drive as closely as practicable to the right hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in position to make a left turn."

If plaintiff was on the right side of the highway, we fail to see the application of the section mentioned. We believe, and we have been cited no authority to the contrary, that the section in question was enacted for the benefit of motorists traveling in the same direction. No motorist traveling in an opposite direction has a right to leave the portion of the roadway fixed for such travel on the blind assumption that vehicles coming in a single stream from the opposite direction will hug either the curb of a street or the edge of a highway. If application of section 122(b) is made as contended for by respondent, any motorist could, with impunity, use more than one-half of the highway, on the theory that the motorists driving from an opposite direction not only did not need the half allotted to them, but were violating the law in an attempt to use it.

[2] Neither can we agree with the contention of respondent that the evidence of the eyewitnesses as to the place and manner of the collision is incredible. The physical facts showing the positions of the two automobiles is undoubtedly of marked significance, especially when weighed with the evidence that respondent was driving between 20 and 25 miles per hour and appellant 12 or 14 miles per hour immediately prior to the impact. These two facts, however, are not of such finality as to stamp the testimony of two eyewitnesses, who—so far as the record shows—are wholly unprejudiced and of good repute, as totally incredible. There is no evidence as to the weight of the respective cars at the time of the collision. The witnesses, other than appellant, had a clear and unobstructed view of the accident and were close enough

to see it, and their testimony is not impeached in any respect. Furthermore, while respondent testified his rate of speed was 20 to 25 miles per hour, the jury did not have to believe respondent's testimony in this regard. If respondent was traveling at a lesser speed than appellant, or at the same speed and in a car of less weight than appellant's, the physical fact upon which so great reliance is placed loses much of its importance. Furthermore, one of the eyewitnesses, standing approximately 50 feet from the point of collision, testified, after he had definitely fixed the point of collision on appellant's side of the street, "You could see where one car pushed the other car back, by reason of the skid marks that was there after the accident." The Dodge, according to his testimony, was the car that did the pushing. The other eyewitness testified: "From the way it looked to me * * * his car (referring to the Durant) was hit on the right hand side of the center line of the street (appellant's side of the street), on the left side of the car, and her car (the Dodge) was hit on the right hand side of the street." The same witness testified: "* * * there was an impact * * * and this car (the Dodge) shoved the other car back, like that, and when the cars stopped they were bumper to bumper * * *."

[3] Although the cases upon analysis do not seem to be in agreement as to what principle should govern the trial court on a motion for directed verdict (*In re Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579; *Robbiano v. Bovet*, 218 Cal. 589, 599, 24 P.(2d) 466; *In re Estate of Baldwin*, 162 Cal. 471, 473, 123 P. 267), it seems that a court should be governed by the same rules which control its action upon motion for nonsuit. *In re Estate of Flood*, supra.

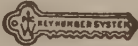
In the *Flood* Case, 217 Cal. at page 768, 21 P.(2d) 579, 580, it is said: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'"

[4] We adopt and affirm the principles with reference to a directed verdict, as enunciated

In the Flood Case. In order, therefore, to affirm the judgment in this case, we must say as a matter of law that no reasonable conclusion or inference can be made or drawn from the evidence, except that the negligence or contributory negligence of appellant directly caused or contributed to the collision, or we must say that the evidence adduced in favor of appellant is so incredible or so lacking in support that, if appellant had recovered a judgment, we would be compelled to reverse it upon appeal. The facts, as briefly outlined, do not permit us to say either the one or the other, and would not permit us to do the latter.

The judgment is reversed, and the cause remanded for a new trial.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 205

CRONIN v. COYLE et al.
Civ. 9673.

District Court of Appeal, Second District,
Division 2, California.

April 16, 1935.

Rehearing Denied May 16, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Insurance ⇨94

Insurer may not absolve itself from liability for contract which it has authorized or ratified, although contract may have been secured by person not an insurance agent or solicitor in full meaning of statutory definition (Pol. Code, § 633).

2. Insurance ⇨76

Evidence as to authorization of insurer's representative and of powers exercised by him *held* to show that representative was general agent of insurer for California, authorized to do anything in respect to soliciting, writing, extending, or canceling of liability policy which company itself might do (Pol. Code, § 633).

3. Insurance ⇨87

Generally, powers of agent for insurance company are governed by general law of agency, but are varied by character of functions agent is employed to perform (Pol. Code, § 633).

4. Insurance ⇨87

Agent for insurance company possesses such powers as have been conferred by com-

pany, or as third persons have right to assume he possesses under circumstances and generally his powers as to those dealing with him are determined by nature of business intrusted to him, and are *prima facie* coextensive with its requirements (Pol. Code, § 633).

5. Insurance ⇨88

Ordinarily "general agent" of insurance company is one who has all the powers of his principal as to business in which he is engaged, except as limited by company, but in absence of notice, actual or constructive, to insured, of any limitation upon agent's authority, general agent may bind company by any acts, agreements, or representations that are within ordinary scope and limits of insurance business intrusted to him, although they are in violation of private restrictions upon his authority (Pol. Code, § 633).

[Ed. Note.—For other definitions of "General Agency or Agent," see Words & Phrases.]

6. Insurance ⇨145(2)

Where insurance agent has power to issue policy in first instance, he has power also to renew such policy, and to extend its term (Pol. Code, § 633).

7. Insurance ⇨129

Acts of insurer's general agent in notifying city board of public utilities, prior to date of taxicab accident, of cancellation of public liability policy issued to taxicab company, and thereafter notifying board of extension of policy to date after that of accident, and informing taxicab company that policy would remain on records until another policy was approved by board, *held* acts of insurer, and binding on it as respects board and injured passenger (Pol. Code, § 633).

8. Insurance ⇨247

Insurer's general agent in notifying city board of public utilities, prior to taxicab accident, of cancellation of public liability policy issued to taxicab company, although no written notice of cancellation had been given taxicab company, and in thereafter notifying board of extension of policy to date after that of accident, and informing taxicab company that policy would remain on records until another policy was approved by board, *held* not to have effected cancellation of policy prior to accident, as respects rights of passenger (Pol. Code, § 633).

9. Appeal and error ⇨1008(1)

In action by taxicab passenger against insurer of taxicab company for injuries, findings based on substantial evidence that no policy of a second insurer had been issued or received by taxicab company prior to date of accident was binding upon appellate court.

10. Insurance **336(1)**

Where general insurance agent, representing two companies, had upon refusal of first to approve issuance of public liability policy to taxicab company, arranged for issuance of policy by second insurer but second policy had not been filed with city board of public utilities at time taxicab passenger was injured, and policy of first insurer, which was still on file at that time, was only authorization for taxicab company's license to operate, passenger's right of recovery against first insurer could not be denied on basis of alleged issuance of second policy (Pol. Code, § 633).

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Esther Cronin against John P. Coyle, receiver of the General Cab Company, individually and doing business under the fictitious firm name of Red Top Cab Company, the Mercer Casualty Company, and another. From a judgment for plaintiff, and from an order denying a motion for new trial, the Mercer Casualty Company appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Elbert E. Hensley, of Los Angeles, for appellant.

Martin Forrest, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Plaintiff in this action secured judgment against defendants for the sum of \$3,062, as damages for injuries sustained by her as a result of the negligent operation of a taxicab in which she was a passenger and being transported over a street in the city of Los Angeles. Defendant Mercer Casualty Company alone appeals from the judgment, and also attempts to appeal from an order denying a motion for new trial.

In a rather formidable and voluminous opening brief appellant states six questions as those involved in the appeal, and specifies as error: (1) The admission and retention in evidence, over objection and against a motion to strike, of Exhibit 1, being the policy of public liability insurance upon which plaintiff founded appellant's liability; (2) the denial of appellant's motion for nonsuit; (3) the making of findings contrary to evidence in respect to issuance of the policy, its continued existence in force and effect at the time of the accident herein, its cancellation as pleaded in the answer, and its annulment

by issuance of a policy by another company as pleaded in the answer; and (4) in denying appellant's motion for a new trial.

[1] There was no error in admitting the policy in evidence nor in denying the motion to strike the same from evidence. Upon examination of the pleadings and the testimony of Arthur R. Groocox, a motor vehicle inspector for the city of Los Angeles in charge of the motor vehicle division records of the board of public utilities, we find a prima facie basis for its reception in evidence founded on admissions of appellant in its first answer and upon such testimony, which sufficiently identified the policy as one issued by appellant company on September 8, 1931, and filed September 18, 1931, with the board, in whose possession it had remained up to the time of trial. These conclusions apply with equal force to the claim of error in denying the motion for nonsuit and require a determination of that claim adverse to appellant's contention. And for the same reason the claim that the court's finding (No. VII) that such policy was duly issued is contrary to the evidence is not well taken. While there is a denial of execution and issuance of this policy by appellant in its amended answer and evidence that it was signed by a subagent of the legally appointed agent, there was in evidence before the court testimony and documentary proofs showing recognition of the policy by appellant sufficient to sustain the finding that such policy was duly issued by it. The company may not absolve itself from liability for a contract which it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of section 633 of the Political Code. *Frasch v. London & Lancashire F. Ins. Co.*, 213 Cal. 219, 2 P.(2d) 147.

This brings us to the more serious and difficult question as to the sufficiency of the evidence to support the finding that such policy was in full force and effect on December 6, 1931, on which date the accident herein complained of occurred. This question is brought sharply into issue by the special defenses, and was the center around which much evidence, both oral and documentary, was introduced. Upon the evidence the court found that the policy was in force at the time of the accident, that it had not been previously canceled by appellant, and that it had not been annulled and rendered void by reason of the assured taking out a policy of insurance with another company prior to the accident with-

out having permission of appellant so to do indorsed on said policy.

The probative facts, established without apparent dispute, upon which the court made its findings of these ultimate facts are substantially as follows: B. K. Elgin, residing in Indianapolis, Ind., from July 1, 1931, to June, 1932, was the agent in California of appellant company, a foreign corporation, and was licensed as such under the provisions of section 633 of the Political Code as it then existed. He had one George O'Hara of San Francisco acting in California as his subagent, who, on September 8, 1931, executed as agent of appellant the policy here in question, bearing number 80070, and the same was filed with the board of public utilities of the city of Los Angeles on September 18, 1931, in accordance with provisions of an ordinance regulating passenger carrying vehicles. The issuance of this policy being reported by O'Hara to Elgin at Indianapolis, the latter wired to the board on September 28th that the policy was issued without permission of the company or of Elgin, and that such issuance was not acceptable. On September 29th, by direction of the secretary of the company, Elgin sent a telegram to the board, signing the company's name thereon, stating: "Please cancel Mercer policy 80070, issued September eighteenth favor Red Top Cab Company Los Angeles cancellation effective as of noon October thirtieth cancelled account of hazardous risk and on prohibitive list of this company confirmation by air mail." This telegram was followed by air mail letter of September 29th copying and confirming the telegram.

On October 30th, while in Los Angeles, Elgin delivered a letter to the board in which he stated in reference to the cancellation of the Mercer policy: "I readily understand that you are right in the premises in not accepting a wire cancellation and agree that you have a right to insist upon a confirmation of such wire by letter, which I failed to give you. This letter, however, will serve as a cancellation notice of said policy effective thirty days from date. However, I am insuring the Red Top Cab Company in the Prudential Casualty and Surety Company of St. Louis, Missouri, effective as of November 1st and I trust you will permit me to take up the Mercer policy as soon as the Prudential policy is approved by your Board." This letter was signed "Mercer Casualty Company of Celina, Ohio, By B. K. Elgin, Special Representative." Elgin was at the same time the agent of Prudential Casualty & Surety Company in California, and on November 1,

1931, he issued a similar policy of the latter company, numbered A U 38951, covering the same risks and in favor of the same assured, although at that time the latter company was not on the approved list of insurance carriers of the board of public utilities of Los Angeles, authorized to write insurance covering public liability risks as provided in the city ordinance. The policy does not appear in evidence herein. The assured continued to pay the premiums to Elgin, who occupied the dual capacity of agent for both companies, from November 1, 1931, no part thereof having been paid to the appellant company by its agent, Elgin, after November 1, 1931.

On November 30th Elgin sent the following letter to the board of public utilities: "This will be your authority to extend the present Mercer Casualty Co. policy and/or Binder until January 1, 1932, for John P. Coyle, Receiver for General Cab Co. DBA Red Top Cab Company. In the meantime I anticipate having the Prudential Casualty & Surety Company approved and will file their policy, thereby relieving the Mercer Casualty Co. from any liability whatsoever in connection with this risk." It was signed "Mercer Casualty Company by B. K. Elgin, Representative." On December 6th the accident herein occurred. On December 10th appellant, from its office in Celina, Ohio, wired to the board requesting advice as to the effective date of termination of its policy No. 80070, to which the board replied on December 11th that the policy had been extended to January 1, 1932, by B. K. Elgin. On December 14th the Prudential Casualty & Surety Company filed with the board its application to write insurance under the ordinance, and on December 29th a license so to do was granted, and on December 30th policy No. A U 38959 of such company was countersigned by B. K. Elgin as agent, covering the same risks of the same assured, and was filed with the board.

The policy issued by appellant contained provisions allowing cancellation thereof by the company upon five days' previous notice in writing to the assured, if cancellation is sought on the ground of failure to pay premiums or for extra hazardous conditions due to conduct of the assured, and for other causes upon thirty days' previous notice in writing to the assured and the filing of a duplicate thereof within said time limit with the board of public utilities of the city of Los Angeles, stating the reasons therefor and the effective date thereof. We find no evidence herein of delivery of any notice of cancellation by appellant to the assured, but it appears in the testimony of B. K. Elgin that in

the latter part of October, 1931, he had a conversation with Coyle, the assured, at the latter's office in Los Angeles, in which conversation Elgin stated to Coyle that until the Prudential Casualty & Surety Company was approved by the board of public utilities he would let the Mercer Casualty Company's policy remain on record as a matter of accommodation to the assured so as not to deprive him of his right to carry on the taxicab business in the interim before the Prudential Company would be approved and its policy accepted by the board of public utilities. He further stated to the assured that the Mercer Company would not accept his business of insurance. Subsequent to November 1, 1931, claims for losses were reported by the assured to the adjuster of the Prudential Company and were adjusted and claims were paid by draft drawn on the Prudential Company during November and December, 1931. The claim of plaintiff herein against the assured was among those reported to such adjuster, and receipt thereof was acknowledged by the Prudential Company on December 18, 1931, and listed on its records by number.

On March 31, 1931, appellant company made application to the board of public utilities of Los Angeles to write all claims of insurance within the jurisdiction of that board. On the same date it applied to the insurance commissioner of California to approve and license the appointment of B. K. Elgin as its agent in California under the provisions of section 633 of the Political Code as it then existed. On July 1, 1931, a license was issued to B. K. Elgin by the insurance commissioner reciting that Elgin had complied with the provisions of section 633 of the Political Code. That section required as a condition precedent to the issuance of a license to an insurance agent or solicitor that he present a duplicate power of attorney from the company authorizing him to act as such agent or solicitor. Under this appointment Elgin proceeded to act as such agent from his home office in Indianapolis, through subagents residing in California. He handled all public vehicle insurance business in California, accepted or rejected applications for policies submitted by his subagents, collected premiums and extended and canceled policies, apparently having and freely using authority in all these respects. Appellant's application to the board for permission to do business recited that the general agents of the company were "Rutherford & Elgin." By a written agency contract executed in January, 1931, the company had appointed Elgin as its agent

in Indiana and in any part of the country in which the company was licensed, to receive applications for insurance and as agent to perform such other acts as he might be authorized to do. On October 28, 1931, appellant company, by its secretary, sent its letter to Elgin, while he was in Los Angeles, directing him to inform all his subagents in California and elsewhere that in the future no public passenger carrying business shall be "bound" by them for the Mercer Casualty Company unless the same has first been referred to the company and accepted by them.

[2] From all this and other evidence in the case it is made to clearly appear that Elgin was the general agent of appellant company for California, authorized to do anything in respect to the soliciting, writing, extending, or canceling of liability policies which the company itself might do. *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 111 P. 507.

[3-6] The powers of an agent for an insurance company are, as a general rule, governed by the general law of agency. His powers are varied by the character of the functions he is employed to perform. He may be a general agent with general powers, or his powers may be limited by the company. He possesses such powers as have been conferred by the company or as third persons have a right to assume he possesses under the circumstances of the case; and as a general rule his powers, as to those dealing with him, are determined by the nature of the business entrusted to him and are prima facie coextensive with its requirements. *Frasch v. London & Lancashire F. Ins. Co.*, supra. Ordinarily a general agent is one who has all the powers of his principal as to the business in which he is engaged, except as limited by the company to whatever it deems expedient. But in the absence of notice, actual or constructive, to the insured of any limitations upon such agent's authority, a general agent may bind the company by any acts, agreements, or representations that are within the ordinary scope and limits of the insurance business intrusted to him, although they are in violation of private instructions or restrictions upon his authority. 32 C. J. 1066; *Cooley*, *Briefs on Law of Insurance*, vol. 1, p. 345. And it may be stated as a rule that where an agent has power to issue a policy in the first instance he has the power also to renew such policies (*Cooley*, *Briefs on Law of Insurance*, vol. 1, p. 348); and as a corollary proposition he has power to extend the term of such policies.

[7] Measured by these rules, applied to the probative facts above stated, we are satisfied that the court did not err in finding the ultimate fact of noncancellation as of a date prior to the accident herein. Elgin, as general agent, gave to the board a notice of cancellation on September 29, 1931, gave another written notice of cancellation to the board on October 30, 1931, but gave no written notice of cancellation at any time to the assured. On November 30, 1931, he gave to the board a written notice of extension of appellant's policy to January 1, 1932, and informed the assured that such policy would remain on record until the Prudential policy was approved by the board. In so far as concerns the board of public utilities and Coyle, the assured, and plaintiff herein, who was one of the potential beneficiaries under the policy and for whose benefit and protection it was required, approved and accepted, these acts of the general agent, Elgin, were the acts of the company and binding on it. Thereon the trial court correctly found that the policy issued by appellant had not been canceled prior to the date of the accident herein.

[8-10] This leaves for solution the problem presented by the evidence relating to the issuance and use of the Prudential policy. The policy issued by appellant contained a provision to the effect that, with permission indorsed thereon, the assured may carry other insurance against loss or damage covered by such policy, in which case such loss should be prorated among the policies. Appellant in its answer alleged that the Prudential policy was issued to the assured without permission of appellant, and thereby rendered the policy of the Mercer Company "null and void." The court found upon conflicting evidence that it was not true that the Prudential policy was issued to or received by the assured, and that it was not true that the Mercer policy was null and void because of the issuance of any such policy.

It is patent that the claim asserted by appellant in its special defense, that issuance and acceptance of another policy on the same risk would render appellant's policy null and void, is not well founded. The terms and language of the policy do not support such defense. However, on this appeal the appellant has transmuted the claim thus presented by its answer into a claim that the issuance to and acceptance by the assured of the Prudential policy operated as a matter of law to release appellant from the obligations on its policy, under the general rule announced in some cases to the effect that an insurance pol-

icy is in effect canceled when another policy is substituted for it. This rule cannot of course operate without the necessary facts showing a substitution. The court below, on a conflict of evidence, found that no policy of the Prudential Company was issued to or received by the assured prior to the date of the accident herein. There is ample and substantial support for such finding in the evidence. This court may not go behind that finding, nor substitute another of its own. Furthermore, we are not unmindful of the fact that the Prudential Company had no license to furnish public liability insurance in Los Angeles until December 29, 1931, and that no policy of that company was actually substituted for the Mercer policy in the records of the board of public utilities until this last-mentioned date. In the meantime, respondent had suffered her injuries at the hands of the assured on December 6, 1931, at a time when the Mercer policy was still on file in the office of the board of public utilities, standing as the sole authority for the continued existence of the license of the assured to operate his taxicabs in Los Angeles. The ordinance of the city of Los Angeles in evidence herein required the owner of the taxicabs which he sought to operate in the city as passenger carrying vehicles to file with the board of public utilities and keep in effect a policy of insurance, insuring the public against loss or damage that may result from the operation of such vehicles, or in lieu thereof a bond of certain character and with specified conditions. The policy executed by appellant and filed under this ordinance provided that it shall inure to and be for the benefit and protection of any one who shall sustain damage or injury by reason of the negligence on the part of the driver or operator of the assured's vehicles while being operated as passenger carrying vehicles. Respondent was injured under the circumstances just stated. Regardless of the acts of the assured in respect to the manipulations of the two insurance policies by the agent in his dual capacity as agent of both companies, respondent, as the injured party, is entitled to recover against the insurance company whose policy constituted the subsisting basis on which the assured's license to operate was founded at the date of injury. It follows that the motion for new trial was properly denied.

The appeal from the order denying a motion for new trial is dismissed. The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

6 Cal.App.2d 126

BRAND et al. v. MANTOR et al.

Civ. 9022.

District Court of Appeal, Second District,
Division 1, California.

April 12, 1935.

1. Principal and agent Ⓒ23(1)

In action by purchaser of several parcels of land, brought against alleged agent to recover secret profits made by defendant, evidence held to show that defendant was plaintiff's agent as found by trial court.

2. Principal and agent Ⓒ8

While authority to act as agent can usually arise only at will and by act of principal, that will and act may find expression in great variety of ways, no particular method of expression being essential usually, so that appointment may be by written instrument or orally, or implied from conduct of parties.

3. Principal and agent Ⓒ61(2)

While gratuitous agent cannot be compelled to enter upon performance of agency, nor be mulcted in damages for failure to do so, when he does enter upon such performance he is, in common with all other agents, bound to exercise utmost good faith in dealing with his principal and to obey instructions of principal, and use ordinary diligence in executing what he has voluntarily undertaken to do.

4. Frauds, statute of Ⓒ116(5)

Statute requiring contract of agency to buy real estate to be in writing is for protection of owners against unfounded claims by brokers, and has no application in action by purchaser brought against alleged agent to recover secret profits made by agent (Civ. Code, § 1624, subd. 5).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Lillian Garnett Brand and another against Fred H. Mantor and others. From an adverse judgment, defendant Fred H. Mantor appeals.

Affirmed.

S. S. Hahn, M. C. Spicer, W. O. Graf, and Phi O. Clough, all of Los Angeles, for appellant.

Henry Haves, of Los Angeles (Michael M. Moser, of Los Angeles, of counsel), for respondents.

ROTH, Justice pro tem.

Respondent Brand and her daughter, respondent Cole, met appellant at the home of

a mutual friend on or about October 10, 1928, and thereafter they all met with frequent regularity. During the course of these contacts, appellant learned that respondent Brand was to come into a cash inheritance of approximately \$60,000 from the estate of an aunt. Appellant had been presented to respondent by the mutual friend in good faith as an honorable and reputable person, and one unusually skilled in the handling of real estate transactions, which recommendations appellant modestly reiterated, and added: " * * * that he could give me (respondent Brand) wonderful bargains, because he had the inside track, that I would not otherwise ever have an opportunity to buy at such prices." Respondent Brand had said to appellant that "a lot of people make money on real estate, and I wished I could, and he said 'Well, you can,' and suggested we look at some properties." Appellant offered his services to respondent Brand to assist her in getting distribution of her aunt's estate and wrote several letters to the executor thereof for that purpose. The bequest was shortly obtained, and the parties thereupon proceeded to spend the money. A number of parcels of property were spoken of and looked at and purchases made. The evidence shows and the trial court found as a fact that both respondents were inexperienced in business and real estate matters; that they made no independent investigation and had no appraisals of the parcels purchased, but relied upon the judgment of appellant. It is also shown that of the purchases so made, appellant with reference to four of them caused the properties to be sold to himself, but by means of separate escrows apparently effected a direct sale from the original owners to respondents. In each instance appellant had purchased the property for a substantial sum less than the price paid by respondents, and the difference between the price paid by respondents and the price at which appellant had contracted to buy, through the medium of the separate escrows, would gravitate to the escrow in which appellant was named the purchaser and beneficiary, and thus eventually into his pocket. The judgments of \$23,834.33 in favor of respondents, and of \$9,479.23 in favor of respondent Brand alone represent the aggregate of the secret profits, together with interest thereon from the date of appropriation, which appellant sequestered for himself, although his promise had been to make money for respondents.

Respondents, of course, knew nothing of these secret profits, and did not know that

appellant had already contracted to buy the four parcels in question and that they were, therefore, in legal and practical effect making the purchases direct from him. When the facts were discovered, two separate actions were brought; one for money had and received, and another in a multiplicity of counts sounding in fraud, which second action was eventually amended to state causes of action predicated on the theory of a gratuitous agency existing between respondents and appellant, as result of which relationship the appellant agent and fiduciary, through double dealing and bad faith, had swindled his principals by the method outlined in the amounts already mentioned. Both actions were consolidated and tried at the same time, and a judgment in favor of respondents was rendered on counts 8, 9, 10, and 11 of the second cause of action, as and for a judgment in both actions. From the single judgment thus entered this appeal is taken.

There is no dispute as to the facts which have been already generally summarized. Appellant's sole point seems to be that there is no adequate proof of agency, and if there is no agency there is no fiduciary relationship, from which it follows that the parties dealt at arm's length. This appeal is by the alternative method, the reporter's transcript comprising more than 300 pages of evidence. Under rule VIII of the rules of this court and the law, Code of Civil Procedure 953c, this court is not required to look beyond such testimony as is printed in the briefs or specifically called to our attention by appropriate references to the transcript. We have, nevertheless, made an examination of the transcript, since of the total of all evidence taken, only five pages have been called specifically to our attention. Some of the evidence which has thus been called to our attention is as follows:

"Q. During any of the period that he treated you to dinners and gave you gifts, you never engaged him as your agent to act for you? A. Well, not in any writing; it was generally understood, he told me that he would, if I would leave things in his hands he would do the very best he could for me, and get the best bargains in property. * * *

"A. No. It was generally understood between us that he was taking care of everything for me, and I considered him as my agent. * * *

"Q. Now, you say that you understood that he was your agent, and so forth. Did you pay him for making these transactions for you as your representative? A. He was sup-

posed to be getting his money from the other people. * * *

"Q. What conversation did you have with him when he said he was going to get his money for services from the other side? A. I didn't have any conversation.

"Q. Then why did you tell the court he was to get his money from the other side? A. Well, anybody would know it; I just know when you sell property, somebody pays you a commission. * * *

"Q. You never paid him anything, did you, for anything, for negotiating the sale of this property; you didn't pay him any cash, did you, or anything of value? A. Certainly not, he was selling for other people, he was getting his commission there, why should I pay him?"

The court found as a fact: "That the plaintiffs believing the representations of said defendant, did repose their trust and confidence in said defendant and did appoint such defendant the agent of the plaintiffs for the purpose of purchasing real property, * * * that by reason of said trust and confidence a fiduciary relationship resulted, wherein and whereby the said plaintiffs entrusted said defendant to purchase for the said plaintiffs certain real property in the County of Los Angeles, State of California, as the agent of said plaintiffs." And also: "That the defendant continued to act as the agent of the plaintiffs as hereinabove set forth, for the period commencing on or about October 10, 1928, up to and including on or about the 1st day of January, 1931."

[1] Even a cursory examination of the evidence, if indeed the excerpts printed in the appellant's own brief are not sufficient, satisfies us that there is sufficient evidence in the record to support the court's finding of agency, even though we concede, which we do only for the purpose of argument, that the agency was a gratuitous one. In view of the undisputed evidence that the appellant was expected to receive commissions even if such commissions were paid by third parties, there may be a real question as to whether the agency was in fact a gratuitous one, when the situation is one, such as here, where a sale is not an isolated one to a buyer who is found or comes in to buy, but one which comprises a continued course of dealing involving many sales for a person who has in effect authorized another to buy. *Teats v. Caldwell*, 28 Cal. App. 206, 151 P. 973. However, we are not called upon to decide that question.

[2] Granting to appellant that the burden of proving the acceptance of the agency or

proving the agency is upon the principal (*McCoy v. Weber*, 38 La. Ann. 418), and that in order to charge the agent as trustee, the principal must show the acceptance of the agency (*Amber Petroleum Co. v. Breech* [Tex. Civ. App.] 111 S. W. 668), and that an appellate court is not justified in sustaining a finding "when it has not the support of substantial evidence" (*Monsen v. Monsen*, 174 Cal. 97, 162 P. 90, 93), it seems clear to us that the agency was created, that it was accepted with avidity, and that there is substantial support in the evidence to sufficiently demonstrate these facts. Mechem in his work on Agency (1914 Ed. vol. 1, § 211, pp. 155, 156) says:

"While it is thus true that authority to act as an agent can usually arise only at the will and by the act of the principal, that will and act may find expression in a great variety of ways. Usually, no particular method of expression is essential, and the range of possible forms is ordinarily as wide as the domain of human action. Thus, an agent may, in a given case, be appointed by written instrument or by word of mouth. His appointment may be implied from the conduct of the parties and that conduct may often be active or inactive, and consciously or perhaps unconsciously directed to that end. * * *

"Notwithstanding the fact that in the ordinary case the law does not insist upon any particular form and concerns itself rather with the fact than with the method, there are two classes of cases—one arising under the rules of the common law and the other under statutes—in which the authority *must* be conferred in a particular way."

[3] In 1 California Jurisprudence, p. 790, it is said: "While a gratuitous agent cannot be compelled to enter upon the performance of an agency, nor be mulcted in damages for his failure to do so, when he does enter upon such performance he is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. He is bound, not only to exercise good faith, but also to obey the instructions of his principal, and to use ordinary diligence in executing what he has voluntarily undertaken to do. * * * No man can be compelled to don the yoke of special, unremunerated duty to another, but when that yoke is voluntarily assumed, the wearer will not be permitted to lay down his burden when profit results from detriment suffered by the other party. * * *" *Teats v. Caldwell*, supra; *Samonset v. Mesnager*, 108 Cal. 354, 41 P. 337; *Lem v. Wilson*, 27 Cal. App. 512,

150 P. 641; *McPhetridge v. Smith*, 101 Cal. App. 122, 281 P. 419.

[4] The only other point made by appellant is that if he was the agent of respondents to buy real estate, then such contract of agency is void, since there was no written contract, as required by section 1624, subdivision 5, of the Civil Code. The section in question is for the protection of owners against unfounded claims by brokers, and has no application here. *Kennedy v. Johnson*, 109 Cal. App. 662, 293 P. 698; *Johnston v. Porter*, 21 Cal. App. 97, 131 P. 69; *Gorham v. Helman*, 90 Cal. 346, 27 P. 289.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 373
FARMERS' & MERCHANTS' NAT. BANK
OF LOS ANGELES v. STOWELL et al.
 Civ. 5252.

District Court of Appeal, Third District,
 California.
 April 22, 1935.

1. Estoppel ⇐32(3)

Corporation president, delivering deed of his realty to bank as security for loans, held not estopped to claim that he intended it to apply only to his personal indebtedness and not corporation's obligations to bank.

2. Pledges ⇐22

Banker holding securities, pledged for payment of particular debt, has no lien thereon for payment of other claims against debtor.

3. Mortgages ⇐37(2)

Bank president's testimony in bank's mortgage foreclosure suit that he relied on mortgage deed, executed by corporation president and his wife in making loans to corporation, held inadmissible on theory that corporation president was estopped to claim that he intended deed solely as security for personal loans to him; bank's right to apply security to all obligations of makers and corporation depending solely on parties' agreement, terms of which were disputed.

4. Mortgages ⇐578

Erroneous admission of bank president's testimony in bank's mortgage foreclosure suit

that he relied on defendant corporation president's mortgage deed to bank in making loans to corporation *held* harmless to such defendant, though he denied that he delivered deed except as security for personal loans to him, where he did not challenge sufficiency of evidence to support trial court's finding that deed was delivered as security for grantor's obligations as guarantor of corporation's indebtedness; assumption being that trial court disregarded such testimony.

5. Evidence ⇨222(1)

Corporation president's agreement to maintain with bank all securities deposited to satisfy his and other party's liability under guaranty of bank's loans to corporation until released by bank, to which such president had delivered deed as security for his and corporation's obligations to bank, *held* admissible in bank's mortgage foreclosure suit as admission against interest by such president, though other party to agreement was not party to pledging of deed.

6. Evidence ⇨222(1)

Party's extrajudicial admissions or declarations against his own interest as to matter in issue are admissible in evidence, though uttered to third person not party to cause.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Suit by the Farmers' and Merchants' National Bank of Los Angeles against N. W. Stowell, his wife, and others, in which Florence B. Whittam and others intervened. From a judgment for plaintiff, defendants Stowell appeal.

Affirmed.

Davis & Thorne, of Los Angeles, for appellants.

Lawler & Degnan, of Los Angeles, for respondent.

WOODWARD, Justice pro tem., delivered the opinion of the court.

This is an appeal by the defendants N. W. Stowell and Mary J. Stowell, husband and wife, from a judgment and decree of foreclosure wherein the indebtedness of said defendants to plaintiff was determined by the trial court to be the sum of \$514,787.15, and costs. The real property affected by the decree may be generally referred to as the Stowell Hotel, situated on Spring street, between Fourth and Fifth streets, in the city of Los Angeles.

Before stating the comparatively simple legal questions involved, we will briefly examine the factual background of the controversy. At all times herein mentioned N. W. Stowell was president of the Whitlock Manufacturing Company, a corporation. On or about December 7, 1929, Stowell, jointly and severally, with E. D. Reiter, H. G. Haffer, and H. P. Usher executed a guaranty to respondent bank covering existing and future loans to said Whitlock Manufacturing Company up to the aggregate sum of \$350,000. Thereafter the corporation, from time to time, borrowed various amounts from respondent, totaling \$438,000. During the same period, it seems that Stowell negotiated a number of personal loans from respondent bank, aggregating approximately \$305,000, of which amount there remained unpaid at the time of the trial the sum of \$27,603.12. On or about April 7, 1930, appellants executed and delivered to the bank a deed to the property involved in this controversy. As to the purpose for which this deed was delivered, the evidence is conflicting, although all parties concede that the instrument was intended as a mortgage. Respondent contended that in March, 1930, the Whitlock Manufacturing Company had exhausted its credit and that said deed was executed and delivered with the understanding and for the explicit purpose of securing existing and future loans, both to said corporation and to appellant Stowell individually. Appellant Stowell, on the other hand, urged that the deed was given solely to secure his personal loans, and had no reference whatsoever to the obligations, present or future, of said corporation.

The trial court found that said grant deed was delivered to respondent "as security for the then existing personal indebtedness of said N. W. Stowell to the said Farmers' & Merchants' National Bank of Los Angeles, and security for the then existing obligations of said N. W. Stowell as guarantor of the indebtedness of Whitlock Manufacturing Company, a corporation, to plaintiff, as security for all future personal indebtedness of said N. W. Stowell to said plaintiff, and as security for all future obligations of said N. W. Stowell, as guarantor of any future obligations or indebtedness of Whitlock Manufacturing Company, a corporation; the Farmers' & Merchants' National Bank of Los Angeles requested said deed from defendant N. W. Stowell for the purpose of securing the aforesaid obligations and indebtedness; that the defendants N. W. Stowell and Mary

J. Stowell executed and delivered said deed to said plaintiff with the intention that it should secure the said aforesaid obligations and indebtedness, and consented and agreed that said deed and the conveyance evidenced thereby should be held by said bank as security for the aforesaid obligations and indebtednesses."

Appellants make no claim that there was not substantial evidence upon which to base the finding from which the foregoing is an excerpt. On the contrary, for reversal, they rely on two rulings of the trial court in the admission of evidence. These rulings, as epitomized in appellants' opening brief, are: (1) "The court committed prejudicial error in admitting oral testimony to the effect that the bank relied upon the deed given to them by Mr. Stowell, in making further additional loans to the Whitlock Manufacturing Company; (2) the court erred in the admission of certain documentary evidence."

[1-3] We will discuss the challenged rulings in the order presented. Victor H. Rossetti, president of the respondent bank, was permitted to testify, over the objection of defendants' counsel, that he relied on the Stowell deed in making loans to the Whitlock Manufacturing Company after April 7, 1930. The testimony was offered, it seems, on the theory that appellant Stowell, having admittedly delivered the deed to respondent bank as collateral security, was estopped from claiming that he intended it to apply to a particular indebtedness. We find ourselves in accord with appellants' position that estoppel was inapplicable to the transaction. In some circumstances "an estoppel may be said to arise when a person executes some deed, or is concerned in or does some act, either of record or in pais, which will preclude him from averring anything to the contrary." 10 R. C. L. 675. The terms of the agreement in question were disputed; and if appellant Stowell delivered his deed to the bank for a particular purpose and so informed the witness Rossetti at the time, he was not estopped from relying upon his defense. A banker, holding securities pledged for the payment of a particular debt, has no lien upon them for the payment of other claims. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 P. 415; *Bell v. Bank of California*, 153 Cal. 234, 238, 94 P. 889. The conclusion seems inescapable, therefore, that the bank's reliance on the deed as constituting an estoppel was immaterial, its right to apply the security to all, rather than parti-

cular, obligations of appellants depending solely upon the agreement of the parties.

[4] The triviality of the error, however, is obvious when the agreement is examined in the light of all the evidence. The witness Rossetti testified that he first saw the deed on April 7, 1930; that on March 28, 1930, he had a conversation at the bank with Stowell concerning the necessity for additional collateral. "Mr. Stowell," he went on to testify, "made application for a loan of \$25,000 for the Whitlock Manufacturing Company. I replied to Mr. Stowell that he was indebted to us at that time in the amount of \$245,000, and the Whitlock Manufacturing Company in the amount of \$350,000; that I would not entertain an application for a loan of \$25,000 unless he deposited with us additional security to cover his personal indebtedness, then existing, his obligation of indebtedness as evidenced by his guarantee of the indebtedness of the Whitlock Manufacturing Company in the amount of \$350,000, and any subsequent advances we might extend to him personally, or to the Whitlock Manufacturing Company. Mr. Stowell replied that he did not have any additional collateral available. Whereupon I asked him to deposit with us a deed to some one parcel of his real estate holdings, which his statement filed with us evidenced he possessed. Upon reviewing the statement, in his presence, I suggested to him that he give us the Main (Mayan) hotel property, this suggestion following his indication that he would be very happy to do so. On my selection of the Mayan property he stated that he did not believe that that would suit us, as the improvements covered two parcels in separate ownership, one in himself and the other parcel in some other individual. Whereupon, I asked him to give the bank a deed to the Stowell hotel. This he agreed to do; and, on the terms to deliver the deed to the Stowell hotel, we extended an additional loan of \$25,000 to the Whitlock Manufacturing Company; and any delay, he stated, would be due to the time necessary to prepare the instrument and obtain the signature of his wife and also of his own." This testimony was corroborated by Fred V. Gordon, one of the directors of the Whitlock Manufacturing Company. Stowell, it is true, denied that he had delivered the deed to respondent except as security for his personal borrowings; in fact, he claimed that he presented the deed as a voluntary act and without any previous demand having been made therefor. Counsel for respondent char-

acterizes his testimony as "unreasonable," caused by "uncertainty and faulty recollection." Be that as it may, the fact remains that his denial merely caused a conflict in the evidence; the sufficiency of which to support the finding, as we have already pointed out, is not challenged by appellants. It would seem, therefore, that the testimony of Rossetti to the effect that he relied on the deed was entirely harmless. In these circumstances, it will be presumed that the trial court disregarded the incident in the determination of the case. *Ericson v. Steiner*, 119 Cal. App. 305, 6 P.(2d) 298; *Watt v. Copeland*, 92 Cal. App. 161, 267 P. 928; *Roth v. Thomson*, 40 Cal. App. 208, 180 P. 656.

[5, 6] The second specification of error is directed to the admission in evidence, over the objection of defendants, of a certain agreement executed between appellant Stowell and one H. P. Usher, bearing date of August 21, 1930. It was received in evidence on the theory that it constituted an admission against interest by Stowell. It is urged that, since Usher was not a party to the pledging of the deed in question, any private agreement he may have had with appellant concerning the original guaranty had no bearing on the case, and was therefore inadmissible in evidence. This contention cannot be sustained. The agreement provided, among other things, that Stowell "further agreed to maintain with said bank at all times, until first party shall have been fully discharged and released by said bank from any liability under said guaranty, all collateral or securities heretofore deposited by him with, or as and when hereinafter required by, said bank, to fully satisfy and discharge all liability of the guarantors under such guaranty, including the liability thereunder of first party (Usher)." Since this agreement was entered into after the delivery of the deed to the bank by appellant, it seems to have been the contention of respondent that said agreement contained an implied admission against interest, namely, that the deed had been delivered as security for the obligations of the Whitlock Manufacturing Company. If appellants' liability depended solely upon this alleged admission against interest, made in a collateral transaction, the contention of appellants would be entitled to more serious consideration. We believe, however, that the agreement, although constituting rather weak evidence, was admissible for the purpose stated. The fact that Usher was not a party to the transaction in question did not,

as appellants seem to think, render the agreement inadmissible. "There is no more familiar or better understood rule of evidence than that which authorizes proof of the extrajudicial admissions or declarations of a party against his own interest as to the matter or question in issue." *Scragg v. Sallee*, 24 Cal. App. 133, 140 P. 706, 709. And the fact that an admission against interest was uttered to a third person not a party to the cause is immaterial. 2 Wigmore on Evidence, 2d Ed., p. 517.

From an examination of the voluminous record in this case, we are convinced that the trial court made no prejudicial error, and that the findings are fully and adequately supported by substantial evidence. The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.



6 Cal.App.2d 356

HIMES v. CLUB RUSTICO DE LA PLAYA,

S. A., et al.

Civ. 9756.

District Court of Appeal, Second District,
Division 2, California.

April 22, 1935.

Judgment 185

Defendant corporation's bare assertion in affidavits, in action on \$10,000 note alleged to have been executed by corporation, that corporate records did not show receipt and disbursement of \$10,000 held insufficient defense to prevent summary judgment, where plaintiff's affidavits disclosed that president of corporation received \$10,000 from plaintiff, and gave plaintiff note signed with name of corporation by president and assistant secretary, and that corporation received valuable gambling concession from Mexican government which did not show on its face any consideration therefor (Code Civ. Proc. § 437c, as added by St. 1933, p. 1848).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. H. Himes against the Club Rustico De La Playa, S. A., and others. From

a summary judgment against the named defendant, the named defendant appeals.

Affirmed.

U. S. Fitzpatrick, of Los Angeles, for appellant.

H. A. Andrews, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff was awarded summary judgment on a promissory note against defendant Club Rustico De La Playa, from which the latter appeals.

The complaint set out the note, dated December 27, 1929, in the sum of \$10,000, payable at Los Angeles, signed by two comakers and with the name of appellant corporation by J. M. Danziger, "president," and Alda Faulkner, "asst. secy.," and its corporate seal was thereunto affixed. The answer of appellant contained general denials and special defenses (1) to the effect that the note was not signed until after August, 1932, that Danziger was not president after August, 1930, and that Faulkner was never assistant secretary and held no office when the note was executed; (2) that since under the law of Mexico the domicile of appellant, the articles of incorporation and by-laws of a corporation control the powers of its officers, and since in this case they require consent of two-thirds of the stockholders to borrow money, and since no such consent was given, such loan was unauthorized; and (3) that it was not doing business in California when the summons was served on its president, and the trial court had no jurisdiction.

The suit was filed in November of 1933, and motion that the answer of defendant club be stricken out and judgment entered for plaintiff was heard on February 16, 1934, said motion being on the ground that there was no defense to the action and being based on the pleadings and certain affidavits. The motion was made under section 437c of the Code of Civil Procedure, as added by St. 1933, p. 1848, which provides, in part, that "in superior courts * * * when an answer is filed in an action to recover upon a debt or upon a liquidated demand * * * if it is claimed that there is no defense to the action, on motion of the plaintiff * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out and judgment may be entered. * * *" The nature of the affidavits required is described in the same section.

In support of plaintiff's motion the affidavit of Danziger stated that he had been president of appellant corporation in December of 1929, and was such president until August 2, 1930; that as such officer he had borrowed \$10,000 from plaintiff to purchase a permit from the Mexican government for the corporation to operate a casino in their buildings located in Mexico; that the money was so used and that he as president and Faulkner as assistant secretary had executed the note on behalf of appellant prior to January 13, 1930. The affidavit of Faulkner related the details of making the loan and that it was used and the note was executed as related by the affidavit of Danziger, and that she was assistant secretary of the corporation. An affidavit of plaintiff described the making of the loan, receipt of the note, and nonpayment. A photostatic copy of the instrument was introduced in evidence in the trial court and the original has been filed in this court.

In opposition to the motion two affidavits were filed on behalf of appellant. I. E. Muller in his affidavit stated: That at all times since its incorporation he has held all of the stock of appellant corporation as president and legal representative of I. E. Muller & Co., Limited, a California corporation (as security for a loan), that he now holds all the official records of said appellant corporation, and that he and his associates constitute the board of directors. He asserts that Faulkner never was assistant secretary or any official of appellant corporation and that the records of the corporation show no such transaction with plaintiff, and the permit shows no consideration paid. Certain of the financing and incorporation activities of appellant and the other makers of the note are included in the affidavit. Louis Wagner's affidavit gives general support to the affidavit of Muller.

From the affidavits it appears to be undisputed that Danziger was the president of appellant corporation in December, 1929, and for several months thereafter; that about that time he got \$10,000 from Himes and gave the latter a note signed with the name of appellant corporation by himself as president and Faulkner as assistant secretary, with the corporate seal affixed; that about that time appellant received a valuable permit or concession from the Mexican government, which did not show on its face any consideration paid therefor. In opposition to Danziger's express declaration that he paid the money and got the permit for the corporation, we find the bare assertion that the records do not show

the receipt and disbursement of the money in question. Such a denial was not effectual to constitute a defense. The determination and ruling of the trial court was correct. *Cowan Oil & Refining Co. v. Miley Petroleum Corporation*, 112 Cal. App. (Supp.) 773, 295 P. 504; *Krieger v. Dennie*, 123 Cal. App. (Supp.) 777, 10 P.(2d) 820, and cases cited therein.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 324

LOSSMAN v. CITY OF STOCKTON.

Civ. 5207.

District Court of Appeal, Third District,
California.

April 20, 1935.

1. Automobiles ⇨6

Statute providing that vehicle driver, exceeding speed limit, shall not be deemed negligent as matter of law in civil action, but that burden shall be on opposing party to establish that operation of vehicle at speed shown constituted negligence, was rule of evidence on trial, commenced after effective date of act, in action for death of motorist in accident occurring before such date (St. 1931, p. 2120, § 113(d)).

2. Appeal and error ⇨1002

Appellate court cannot disturb jury's finding on conflicting evidence in death action that decedent was not negligently driving automobile at speed exceeding that permitted by statute at time of fatal accident (St. 1923, p. 553, § 113).

3. Municipal corporations ⇨64

Municipalities have only legislative authority expressly conferred or delegated by state, and powers not so delegated are reserved in state.

4. Municipal corporations ⇨661(1)

Regulation of street traffic is not "municipal affair" within constitutional provisions authorizing chartered cities to make and enforce laws and regulations respecting such affairs, subject only to charter limitations (Const. art. 11, §§ 6, 8).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

5. Statutes ⇨233

General language of statute must not be construed to apply to government or its agencies, unless expressly included by name.

6. Courts ⇨92

Decision of Court of Appeal that statute, imposing on municipal corporations liability for damages caused by their employees' negligent operation of motor vehicles and permitting injured persons to sue them, does not apply to chartered municipality in operation of its police cars, *held dicta*, in view of court's holding that plaintiff in such case was guilty of contributory negligence barring recovery from city (Civ. Code, § 1714½).

7. Automobiles ⇨187

Statute, expressly excusing members of city fire or police department from liability for damages arising from their operation of motor vehicles in line of duty, *held* not to exempt city from such liability (St. 1929, p. 568; Civ. Code, § 1714½).

8. Statutes ⇨225

Statutes on same subject-matter should be read together and each given full force and effect, as far as possible.

9. Automobiles ⇨187

State, waiving right of itself and its governmental agencies to subrogation against their employees by statute excusing members of city fire and police department from liability for damages arising from their operation of motor vehicles in line of duty, did not thereby deny right of action against itself or city for such damages (Civ. Code, § 1714½; St. 1929, p. 568).

10. Subrogation ⇨1

"Subrogation" is substitution of one in place of another, and no one can complain of waiver of such privilege for any reason by one in whose favor subrogation runs.

[Ed. Note.—For other definitions of "Subrogation," see Words & Phrases.]

11. Subrogation ⇨1

Subrogation is creature of equity and so administered as to secure real and essential justice, without regard to form.

12. Municipal corporations ⇨65, 661(1)

Internal affairs of organization and maintenance of police or fire department by chartered city are "municipal affairs" within constitutional provisions authorizing such cities to make and enforce laws and regulations respecting such affairs, subject only to charter limitations, but use of city streets by police and fire equipment is matter of public concern, amenable to general law (Const. art. 11, §§ 6, 8).

13. Constitutional law ⇨70(3)

Whether courts approve of statute applying general traffic regulations to operation of municipal police and fire vehicles is immaterial; such matter being exclusively within scope of legislative authority (Civ. Code, § 1714½; St. 1923, p. 563, § 144).

14. Automobiles ⇨187

Statute imposing liability on municipal corporations for damages caused by their employees' negligent operation of motor vehicles and permitting injured persons to sue them held applicable in action against chartered city for death of driver of automobile struck by city police car driven by city police officer while being used as emergency ambulance (Civ. Code, § 1714½; Const. art. 11, §§ 6, 8).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Clemens A. Lossman against the City of Stockton. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Leroy Johnson, City Atty., and Len H. Honey, both of Stockton, for appellant.

Bradford S. Crittenden and George M. Hench, both of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff sued the city of Stockton for the death of his minor son. Upon the verdict of a jury, judgment was entered in his favor, from which the municipality appeals.

The action arose out of a collision between an automobile driven by the son of plaintiff, a youth of sixteen years, who was duly licensed to operate an automobile, and a police car then being used as an emergency ambulance driven by a police officer of the city of Stockton.

The accident occurred about 6:30 a. m. on the morning of March 29, 1931. Shortly before the collision the police department of Stockton had received a call to the effect that a woman was suffering from the effects of poison and requested that an ambulance be sent to take her to the emergency hospital. The police ambulance was sent to the address and there found an unconscious woman. She was placed in the police car and it then started for the emergency hospital. The route taken by the ambulance made it necessary to cross the east and west highway known as Charter way, which way is what is known as

a through highway or boulevard, and by a local ordinance all cars are required to stop before entering this thoroughfare. The collision occurred within the intersection of these two streets. The intersection was properly signed requiring all cars to come to a stop before entering Charter way. As to whether the police siren was actually sounding while approaching the intersection and while crossing, there was a sharp conflict in the evidence, and we may assume from the implied finding of the jury upon this point they held contrary to the contention of appellant. The evidence also shows the ambulance was traveling in excess of 45 miles per hour at the moment of the impact. The ambulance struck the car of plaintiff, hurling the boy to the street, causing his death, and without stopping, sped on to its destination. The car being driven by deceased was traveling westerly along Charter way, and when one of the occupants of the car was asked as to the speed they were traveling, stated they were going from 17 to 20 miles an hour and as they approached the intersection where the accident occurred they slowed down a bit. There is testimony also by an eye-witness that the car reached the intersection before the police car.

As grounds for reversal appellant contends that the deceased was traveling at a rate in excess of 15 miles an hour at the time of the impact and therefore was guilty of contributory negligence as a matter of law, and, secondly, that section 1714½ of the Civil Code, under which plaintiff claims his right to sue the city, does not apply to a municipality operating under a freeholder's charter.

[1, 2] The first question to be determined is whether plaintiff's son was guilty of contributory negligence as a matter of law. The accident occurred March 29, 1931. The trial commenced March 7, 1934. The Legislature of 1931 (Stat. 1931, c. 1026, p. 2120) amended section 113 of the California Vehicle Act (St. 1923, p. 553, as amended) by adding subdivision (d) thereto. This amendment was effective in August, 1931, and then became and was a rule of evidence in this case under the authority of *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P.(2d) 58, and *Randall v. Evans* (Cal. App.) 41 P.(2d) 561. Under the amendment plaintiff would not have been guilty of negligence as a matter of law and the burden of proof would have been on the defendant to establish the operation of the vehicle at the speed shown by the evidence constituted negligence. The rule as declared in

Pilcher v. Tanner Motor Livery, supra, was, however, not adopted in the case of Morris v. Pacific Electric Railway Co. et al., (Cal. Sup.) 43 P.(2d) 276, the court there holding that the Legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or substantial defense which existed theretofore. Matter of Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082. Nevertheless under the evidence here the jury would have been justified in finding that deceased was not exceeding 15 miles an hour. This issue of fact having been determined adversely to defendant upon a conflict in the evidence, we cannot disturb the finding of the jury that the plaintiff was not guilty of negligence at the time of the accident.

As to the second point, if respondent has a right of action against appellant such right must be found in section 1714½ of the Civil Code, enacted in 1929 (St. 1929, p. 565).

[3] The city of Stockton is a municipal corporation created under the provisions of section 6 and 8 of article 11 of the State Constitution, which provides that cities of a specified class may organize under a charter, and when so organized, may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in the charter, and in respect to other matters they shall be subject to and controlled by general laws. Municipalities have only such legislative authority as may have been expressly conferred or delegated by the state, and powers not so delegated are reserved in the state. Simpson v. Payne, 79 Cal. App. 780, 251 P. 324.

By section 11 of article 11 of the Constitution, it is provided that "any * * * city * * * may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Stockton is governed by a freeholder's charter. Stat. 1923, p. 1321, c. 7.

[4] The regulation of street traffic is not a municipal affair. Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172. In the latter case it will be recalled the court, considering that portion of the Constitution quoted above, held that where there is a doubt as to whether or not such regulation

is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state.

[5] A fundamental rule of construction declares that general language shall not be construed to apply to the government or its agencies unless expressly included by name. Blackstone, Commentaries, book 1, p. 261; Kent's Commentaries, p. 460. Therefore, following the decision in Balthasar v. Pacific Electric Railway Co., 187 Cal. 302, 202 P. 37, 39, 19 A. L. R. 452, decided in 1921, which held the general restrictions as to speed and turning at street intersections in the Motor Vehicle Act of 1917 did not apply to fire apparatus, because neither the state nor municipality were expressly included therein by name, the Legislature in 1923 enacted section 144 of the California Vehicle Act (St. 1923, p. 563). The act of 1917 contained various provisions governing the operation of vehicles upon the highway, but contained only one express provision on the subject of police and fire department vehicles as follows: "Police patrol wagons, police ambulances, fire patrols, fire engines and fire apparatus in all cases while being operated as such, shall have right of way with due regard to the safety of the public; but this provision shall not protect the driver or operator of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of this right or for injuries wilfully inflicted." Stat. 1917, c. 218, p. 402, § 20(m).

It is therefore readily seen that the vehicle act in effect when the court decided the Balthasar Case, supra, did not contain any specific exemption of police and fire equipment as to speed limits, and the following language in the Balthasar Case was entirely appropriate and justified: "We have only to consider the utter absurdity of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to make manifest that the Legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire." Balthasar v. Pacific Electric Railway Co., supra.

As we have pointed out, the Legislature in 1923 enacted the present California Vehicle Act (St. 1923, p. 517), which definitely and in language not susceptible of misunderstanding, made its provisions applicable to the state and its agencies, particularly in section 144 thereof, stating, "The provisions of this

act applicable to drivers of vehicles upon the public highways shall apply to the drivers of all vehicles operated by the state or any political subdivision thereof, or of any incorporated city, subject to such specific exceptions as are set forth in this act," a declaration of legislative intent that the provisions of California Vehicle Act should apply to governmentally owned and operated vehicles. Thereafter, the Legislature in 1929 further amended the California Vehicle Act by adding section 8½ (St. 1923, p. 517, § 8½, as added by St. 1929, p. 509), defining "authorized emergency vehicle," and also amended sections 120 and 132 thereof (St. 1923, pp. 556, 560, §§ 120, 132, as amended by St. 1929, pp. 539, 542), by striking out direct reference to such vehicles by name and substituting the words "authorized emergency vehicles as defined in this act," and exempted such emergency vehicles from the provisions of the act limiting the speed of vehicles, and granting such vehicles the right of way. At the same session the Legislature waived its immunity from suits and enacted section 1714½ of the Civil Code. At the same time the Legislature amended the California Vehicle Act by exempting fire, police, and ambulance cars from the speed limits applicable to other vehicles (section 120), granted them the right of way by section 132, and required street cars and other vehicles to stop upon the approach of such vehicles (section 133 [St. 1923, p. 560, § 133, as amended by St. 1929, p. 542]), and by sections 95 and 111 (St. 1923, pp. 545, 552, §§ 95, 111, as amended by St. 1929, pp. 531, 536), gave to police, fire, and ambulance vehicles the exclusive use of sirens and red lights visible from the front.

Such general legislation as is expressed in section 1714½ of the Civil Code and section 144 of the California Vehicle Act is a departure from the common-law rule of nonliability for damages against the sovereign arising out of performance of strictly governmental functions, and clearly expresses in the broadest terms possible, the comprehensive scope of the legislative intent.

The first paragraph of section 1714½ of the Civil Code imposes upon the state, every county, city and county, municipal corporation, irrigation district, etc., a liability to every person who sustains any damage by reason of the negligent operation of any motor vehicle by an employee of such agency, acting within the scope of such agency; and permits such injured person to sue such state, municipal corporation, etc., in any court of competent jurisdiction in the manner direct-

ed by law. The second paragraph provides that where a recovery is had, then the state, county, municipal corporation, etc., as the case may be, shall be subrogated to the rights of the person injured, against such officer or employee.

In 1929, section 8½ was adopted defining "authorized emergency equipment," and then substituted "authorized emergency vehicles" for the words "police or fire department vehicles" where those words were used in the act. The purpose of defining "authorized emergency vehicles" in section 8½ was obviously to permit the use of this collective term as a matter of convenience and to avoid the necessity of a repetition in each successive section of a detailed enumeration of those vehicles subject to special privileges, making for simplicity in draftsmanship, and in case of the necessity of legislative amendment the class referred to in section 8½ could be increased or diminished and the desired purposes accomplished without amending several other sections at the same time.

[6] The case of *Armas v. City of Oakland*, 135 Cal. App. 411, 424, 27 P.(2d) 666, 28 P.(2d) 422, is cited by appellant as authority for their contention that section 1714½ of the Civil Code is not applicable to a chartered municipality in the operation of its police cars. What is said in that case however, as to the effect of section 1714½ of the Civil Code, must be considered as dicta, for the holding by the court that plaintiff therein was guilty of contributory negligence, is a full and complete answer as to the issues raised therein; in view, however, of the full consideration there given by court and counsel to the questions here involved, we have carefully studied the *Armas Case*, *supra*, as an aid in solving the present problems.

It is suggested in the *Armas Case*, *supra*, that the failure to include the words "authorized emergency vehicles" in section 144 of the California Vehicle Act indicates a legislative intent to exclude such vehicles from the provisions of that act. This we doubt. The effect of such a conclusion would be to leave police and fire vehicles using the streets and highways without regulation, except such as a city or county might itself impose, and we find no such regulation either by the city of Oakland nor in the city of Stockton. To deny the application of the provisions of the act to police and fire equipment would also be to deprive those departments and the general public of the benefits of the exclusive use of a siren (section 95 (b) of the California Vehicle Act), the right of way (section 132 California

Vehicle Act), and exemption from speed limits (section 120 California Vehicle Act).

[7] It is also advanced in that opinion as a further indication of the legislative intent that when the Legislature in chapter 263 (Stat. 1929, p. 568) expressly excused from liability members of a fire or police department operating a motor vehicle in their line of duty it did not intend to place a liability upon a city for damages arising therefrom by the enactment of section 1714½ of the Civil Code. The statute just mentioned provides that "no member of a fire department or police department maintained by a county, * * * city, town or district, shall be liable in any civil action for damage to persons or property occasioned by any act of such member arising out of the operation, in line of duty, of a motor vehicle of such department while responding to an alarm of fire or an emergency police call." To us however, such legislation indicates a clear intention on the part of the Legislature to attach liability to the governmental agency.

[8] Section 1714½ of the Civil Code was added by chapter 260 (Stat. of 1929, p. 565) and approved by the Governor May 11, 1929; on the same day chapter 263, quoted above, was also approved and both enactments became effective at the same time. It is a well-recognized rule that statutes upon the same subject-matter should be read together and each given full force and effect as far as possible. The Legislature recognized that members of the police and fire departments in the performance of their duties are often called upon to exceed the ordinary speed limit and take the right of way. If such employees were compelled to weigh the chances and assume a personal responsibility, speed and efficiency would be affected. The Legislature, however, realized that such operation of motor vehicles on the streets did create a hazard to the general public and therefore provided that the city should be held liable when the exercise of governmental functions resulted in injury to its people. The Legislature also at the same time authorized its governmental agencies to obtain insurance to indemnify itself against loss by such actions. If, too, an employee is unduly reckless or careless in the operation of the vehicle under his control the municipality still retains its rule-making and disciplinary powers and can, as any private concern, under similar circumstances, exercise restraint over its employees.

[9-11] It cannot be argued that because the state deemed it expedient to waive its right

of subrogation against its employees, that it thereby denied a right of action against itself. Subrogation is the substitution of one in the place of another, and if for any reason the one in whose favor such subrogation runs cares to waive such privileges, no one can complain. Subrogation is considered as the creature of equity and is so administered as to secure real and essential justice without regard to form. *Brown v. Rouse*, 125 Cal. 645, 58 P. 267; *Randall v. Duff*, 107 Cal. 33, 40 P. 20.

[12] There is no question but what the internal affairs of the organization and maintenance of a police or fire department by a chartered city is a municipal affair, but such matters relate to the fixing of compensation and providing for a pension system (*Klench v. Board of Pension Commissioners*, 79 Cal. App. 171, 249 P. 46; *Popper v. Broderick*, 123 Cal. 456, 56 P. 53; *Jackson v. Wilde*, 52 Cal. App. 259, 198 P. 822), also the removal of a chief of police (*Dinan v. Superior Court*, 6 Cal. App. 217, 91 P. 806), removal from office, recall, etc. (*Scheafer v. Herman*, 172 Cal. 338, 155 P. 1084), but when police and fire equipment make use of the streets of a city, it affects not only the citizens of that city but frequently endangers the safety of visiting motorists and pedestrians as well, and it then becomes a matter of public concern and amenable to general law. *Ex parte Daniels*, supra; *In re Murphy*, 190 Cal. 286, 212 P. 30; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 P. 334; *Lindenbaum v. Barbour*, 213 Cal. 277, 2 P.(2d) 161; *Helmer v. Superior Court*, 48 Cal. App. 140, 191 P. 1001. There is nothing in any of the statutes under consideration that attempts the supervision or control of any employee of a police and fire department; it merely requires that in regard to the public use of the streets and highways, such employees shall make use thereof with due regard to the safety of all persons thereon.

This contention seems to be emphasized by section 144 of the California Vehicle Act, which directly and positively makes applicable the provisions thereof to the drivers of all vehicles operated by the state or any political subdivisions thereof, or any incorporated city, subject to such specific exceptions as may be found in the act itself.

The Legislature would scarcely intend to surrender the safety of the public to the arbitrary operation of police and fire vehicles subject only to such control or regulation as a county or municipality might care to impose,

and to destroy the uniformity of the regulations of the California Vehicle Act; and not only is this regulation removed from the city streets, but in these days when our rural counties maintain fire apparatus, the highways are open to fire vehicles speeding toward some grain or timber fire without restriction on the drivers or protection to the traveling public, and not only vehicles operated by a police or fire department or a traffic officer or a publicly owned ambulance but also to the privately owned emergency repair vehicles of a public utility corporation.

[13] The court in *Armas v. City of Oakland*, supra, advanced as a further ground for its decision that if the Legislature intended to apply the general traffic regulations to the operation of police and fire vehicles, then to that extent the statute must be held unreasonable and void. However, whether the courts may approve or disapprove of such a regulation by the Legislature, is of no judicial concern, that being a matter exclusively within the scope of the legislative authority. Furthermore, in several decisions of our courts of review it has in fact been recognized that the provisions of the vehicle act are applicable to police and fire department vehicles. *Byers v. Spicer*, 116 Cal. App. 219, 2 P.(2d) 479; *Boyle v. Stewart*, 116 Cal. App. 714, 3 P.(2d) 326; *Spencer v. Schiffman*, 119 Cal. App. 746, 7 P.(2d) 361; *City of Sacramento v. Hunger*, 79 Cal. App. 234, 249 P. 223. In these opinions the provisions of the California Vehicle Act were before the court and considered, and it was nowhere suggested that the operation of such vehicles was a municipal affair.

[14] We are of the opinion, therefore, that section 1714½ of the Civil Code is here applicable, and plaintiff is entitled to maintain his action.

From the facts in the instant case the jury were justified in finding the deceased was not guilty of contributory negligence, and also upon conflicting evidence the jury impliedly found that the police car was not sounding its siren as required by section 132 (b) of the California Vehicle Act (St. 1923, p. 560, § 132 (b), as amended by St. 1929, p. 542). So, also, the jury found upon sufficient evidence that the police car here involved was not at the time of the collision then being driven with due regard for the safety of persons using the highway, and particularly as regards to deceased.

The judgment should therefore be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



6 Cal.App.2d 425
Ex parte SIMONIELLO.
Cr. 2720.

District Court of Appeal, Second District,
Division 1, California.
April 25, 1935.

Contempt ☞54(3)

Affidavit initiating contempt proceeding on which order to show cause was issued, stating facts entirely on information and belief and failing to show source of information, held sufficient to support commitment for contempt.

Petition by James Simoniello for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

Arthur Rosenblum, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, Presiding Justice.

In a civil action wherein the petitioner, Simoniello, was defendant, the court appointed a receiver of certain property of the defendant. Thereafter the receiver filed in said court an affidavit charging the defendant with contempt of court, in that he had committed certain acts calculated to interfere with and destroy the value of the property in the hands of the receiver. An order to show cause was issued, and at the hearing thereon the defendant was present in person and with counsel. Witnesses were sworn and testified and evidence received, and the matter having been submitted for decision the court found the defendant guilty of contempt, and ordered that the defendant be imprisoned in the county jail for a period of five days and pay a fine in the sum of \$500, with the usual alternative of imprisonment until the fine be paid. Thereupon the defendant applied to this court

for a writ of habeas corpus and the writ was issued. This matter is now submitted for decision upon the petition, the writ, and the return thereto.

Petitioner's attack upon the commitment is based upon the single proposition that in the affidavit upon which the order to show cause was issued, the facts are stated entirely upon information and belief, and that the source of the information is not shown or alleged. The facts contained in the affidavit are in themselves sufficient to constitute a contempt of court. But it is true that they were stated only on information and belief, and that they did not contain a statement of the source from which the information had been received.

In support of his petition, the petitioner relies upon a recent decision entitled *Ex parte Roth* (Cal. App.) 39 P.(2d) 490, 495. In that decision the court, reviewing extensively the decisions bearing upon the question at issue, arrived at the conclusion that "an affidavit based wholly on information and belief, and without stating any authentic source of such information, is not an affidavit of the facts prescribed by section 1211 of the Code of Civil Procedure and is insufficient as a basis of jurisdiction to support a warrant or order to show cause or a judgment in a proceeding in constructive contempt." The decision, however, does not refer to one very important decision of the California Supreme Court, and we assume that that decision was not brought to the attention of the court in the *Roth* Case.

The case of *Golden Gate Consolidated Hydraulic Mining Company v. Superior Court*, 65 Cal. 187, 3 P. 628, 630, was a proceeding on writ of review of three orders by which the petitioner had been adjudged guilty of three several contempts in violating an injunction order in an action in which petitioner was defendant. Although the affidavits by which the contempt proceedings were initiated stated the facts wholly on information and belief, it was held that they were sufficient to give the court jurisdiction of the proceedings, and the orders were affirmed. The court said: "The facts are set out showing a clear violation of the injunction by the defendant, petitioner here. It is true, they are stated on information and belief; but the jurisdiction of the court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceedings in motion. Here an order to show cause was made, and, if it was served, the defendant had an opportunity to appear and answer any contempt alleged against it. The omis-

sions in the affidavit upon which the order was made may have been irregularities, but *the commitment was not based upon such affidavits*, but upon the oral testimony of witnesses, and documentary evidence given and introduced on the return-day of the order to show cause. In each case the superior court found that the defendant on a certain day, in violation of said injunction, and in contempt of the order of the court, did operate its mine, etc., and deposit and flow its debris, etc. It is not our province to inquire whether the court below was justified in finding the existence of the facts which constituted the contempt." (Italics ours.)

If it be true, as said by the Supreme Court in the *Golden Gate* Case, supra, that every court has inherent jurisdiction to punish a contempt, then the rules of procedure should be so interpreted as reasonably to permit the exercise of that jurisdiction. It does not appear that the Supreme Court has at any time overruled the decision of that court as set forth in the foregoing quotation from *Golden Gate*, etc., Co. v. Superior Court, 65 Cal. 187, 190, 3 P. 628. We think that the more reasonable rule is there stated, and that it should be followed in the instant case.

The writ is discharged, and the petitioner is remanded to custody.

We concur: HOUSER, J.; YORK, J.



6 Cal.App.2d 80

HOLOPOFF v. MALLETTA et al.
Civ. 9788.

District Court of Appeal, Second District,
Division 2, California.
April 10, 1935.

Hearing Denied by Supreme Court
June 6, 1935.

I. Automobiles ⇐226(1)

Motorcyclist held contributorily negligent barring recovery for injury sustained when his motorcycle and sidecar collided with automobile and motortruck going in opposite directions on wet street, where motorcyclist attempted to pass automobile traveling 25 miles per hour less than four feet from center of road and veering to center of road, and motortruck was 200 feet away and traveling 35 miles per hour two feet from center of road.

2. Automobiles ⇨227(4)

Motorcyclist, injured in collision with automobile and motortruck traveling in opposite directions on wet street, *held* not entitled to recover against driver and owner of truck on doctrine of last clear chance, where motorcyclist with sidecar attempted to pass automobile traveling 25 miles per hour, and truck traveling 35 miles per hour toward automobile was only 200 feet away and motorcyclist could see that automobile, although four feet from center of road, was veering to left and that truck was two feet from center of road.

3. Negligence ⇨83

Doctrine of last clear chance does not apply so as to place liability for loss on other party, where injured party, being aware of and able to escape danger by exercise of ordinary care, neglects to avoid danger, or where injury results from their mutual carelessness which continues to time of injury.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by William Holopoff against H. P. Malletta and others. From a judgment on a directed verdict for defendants, plaintiff appeals.

Affirmed.

Frankley & Spray, L. W. Frankley, and Joseph A. Spray, all of Los Angeles (W. H. Abrams, of Los Angeles, of counsel), for appellant.

Binford & Binford, Howard M. Binford, and L. B. Binford, all of Los Angeles, for respondents Malletta.

George L. Greer, of Los Angeles, for respondents T. G. Olson and Coca-Cola Bottling Co.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment rendered by a jury pursuant to direction of the trial court.

He was operating a motorcycle with a sidecar on a rainy day, going west on East Ninth street in the city of Los Angeles. That street consists of an asphalt center strip 45 feet wide, with a concrete strip at each side 20 feet wide. Viewing the testimony in the light that appears most favorable to appellant, we find the motorcycle came up behind a sedan going in the same direction, attempted to pass it to the left, and collided with the sedan and with a truck going in the opposite direction on the same street. The sedan was operated by the Mallettas, and

the truck by the other defendants. Plaintiff testified that he had been following the sedan and was going 20-25 miles per hour. He increased his speed to 25-30 miles per hour, sounded his horn, and attempted to overtake and pass it on the left. The side of the sedan was four feet from the center line, and it swerved slightly further toward the left, but did not increase its speed. The truck was 200 feet away when plaintiff started to pass the sedan, and it was coming at 35 miles per hour. Evergreen street intersected Ninth street at a point midway between the location of the sedan and the truck when plaintiff started to pass. The left edge of the truck was two feet from the center line when plaintiff first saw it as he started around the sedan, and continued in the same relative position with reference to the center of the street as it approached. Plaintiff declared he was squeezed between the two vehicles.

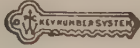
[1] It is evident from the testimony as advanced by appellant as supporting his claim, that the trial court did not err in directing the jury to return a verdict for defendants. Even though either or both sets of defendants might have been negligent, yet appellant was guilty of contributory negligence as a matter of law. He entered a lane six feet wide between the courses being traveled by the two vehicles operated by defendants as they came together, and did this even though he observed that the lane was growing narrower because the sedan had swerved to the left. At the rate of speed then traveled by the truck and sedan they would come together in 2 to 2½ seconds. An intersecting street was but 100 feet away. The street was wet. The conclusion that such conduct on the part of appellant was negligence proximately contributing to the accident is inescapable.

[2, 3] As to the defendants who were respectively driver and owner of the truck, appellant suggests that the doctrine of the last clear chance should apply. That rule does not apply to place the burden of loss upon the other party where the plaintiff, being aware of the danger and able to escape from it by exercising ordinary care, neglects to do so, and it has no application to a situation where by their mutual carelessness an injury ensues to one of two parties both of whom are contemporaneously and actively in fault down to the very moment of injury. *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36. Under the facts, either construed as appellant would

have us or otherwise, we conclude that the doctrine would not apply.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 64

TOUHY v. OWL DRUG CO.

Civ. 8969.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1935.

1. Negligence ⇨44

Proprietor directly or impliedly inviting others to go into his buildings owes to such persons duty to have premises in reasonably safe condition and to give warning of latent or concealed perils.

2. Negligence ⇨32(1)

Proprietor is not insurer of invitees on his premises.

3. Negligence ⇨121(2)

Mere injury to invitee creates no presumption of proprietor's negligence.

4. Negligence ⇨32(1)

Proprietor's responsibility for safety of invitees on his premises is not absolute, but he is only required to use ordinary care for invitees' safety.

5. Negligence ⇨66(2)

Where danger is obvious or is as well known to injured invitee as to owner or occupant, latter is not liable for injury.

6. Negligence ⇨134(5)

Finding of drug store proprietor's negligence in maintaining platform 7 inches above rest of floor for soda fountain patrons, of same color and design as remainder of floor, thereby presenting deceptive appearance of common level, *held* sustained by evidence.

7. Negligence ⇨134(5)

That only one or two out of thousands entering drug store over period of months fell because of deceptive appearance of floor on two different levels appearing to be on same level, because of use of tiles of same color and design, *held* not to affect proprietor's liability, but merely furnished some proof respecting camouflaging effect of use of same color or design on different levels.

8. Pleading ⇨290(3)

No affidavit denying genuineness and due execution of release, pleaded in *hæc verba* in answer, having been filed, genuine status of release was deemed admitted (Code Civ. Proc. § 448).

9. Pleading ⇨166

Affirmative matter pleaded in answer is deemed denied (Code Civ. Proc. § 462).

10. Pleading ⇨374

Where no evidence was offered or received in support of affirmative allegations in answer, trial court was justified in finding allegations were not true (Code Civ. Proc. § 462).

11. Release ⇨57(2)

Where, though evidence showed that both injured invitee in drug store and claim adjustor were ignorant of nature and extent of injuries and that apparent gross inadequacy of consideration for release was result of mistake and not to deliberate purpose of adjustor to secure unconscionable advantage, court found that release was invalid and did not constitute defense to plaintiff's right to recover for injuries.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Mary Touhy against the Owl Drug Company. Judgment for plaintiff, and defendant appeals.

Modified and, as so modified, affirmed.

George L. Greer, of Los Angeles, for appellant.

Jensen & Jensen, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Respondent recovered judgment in the court below for injuries alleged to have been sustained on August 31, 1930, by reason of her falling to the floor in one of appellant's drug stores as the result of alleged negligent construction and maintenance of a platform and stools thereon along a soda fountain counter therein. The evidence is brief and without substantial conflict. Appellant contends it does not support the finding of negligence and that therefore the judgment based thereon is contrary to law.

Respondent, aged 66 years, entered appellant's drug store as an invitee. She made a purchase and then sat on a stool at the soda fountain and drank a soda. Arising, she stepped and fell to the floor, injuring her hip.

The stool on which she was seated was 22 to 24 inches high, set on a platform 7 inches above the floor level and which extended 24 inches from the base of the soda counter. The platform and floor were both covered with the same design, size, and color of tiles, of an alternating color checkered type. Respondent testified that as she turned around to get off the stool she "thought she was stepping on the floor, and my foot went, and that is all I know until I fell." When asked, "Did you notice the floor or the platform as you stepped off?" she replied: "No sir, I just went to get off, and I thought I was getting on the floor. I thought I was just going to step on the floor, and I didn't know anything more. * * * I didn't notice it." On cross-examination she was asked: "Well, did you step upon the step when you got on to the stool?" And her answer was: "I don't know how I got up there. I got up some way to the counter and got a soda, and just as I was getting off I tumbled off."

Respondent contends that the negligence of appellant consisted in the maintenance of the platform above the floor level with the same kind of tiles on both, arguing that such arrangement produced an appearance of a common level of the platform and floor and thus produced the effect of confusing and deceiving the ordinary person into the belief that they were on the same level. The court below found that respondent was caused to fall by reason of the negligent and careless manner in which said stool was constructed and maintained. This finding can be supported on no basis other than that of inference of deception and camouflaging effect due to the use of the checkerboard tiling of the same type on both platform and floor.

[1-5] The proprietor of buildings who directly or by implication invites others to go therein owes to such persons who thus enter a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils. He is not an insurer of such persons, nor does the mere occurrence of injury on such premises to such invitee create any presumption of negligence on the part of the proprietor. His responsibility is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee. Where such danger is obvious, or is as well known to the injured invitee as to the owner or occupant, there is

no liability. *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462; *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793; *Mautino v. Sutter Hospital Ass'n*, 211 Cal. 556, 296 P. 76.

[6, 7] That respondent was deceived by the appearance of the platform and floor into an assumption that they were on a common level, and received her injuries as a direct result thereof, appears clear and uncontrovertible. To maintain such platform and floor in that condition constituted a potential danger to ordinary humanity which might be deceived thereby into a false step with resultant injury, of which danger the proprietor must be presumed to have knowledge superior to that of a casual invitee entering his premises. Being under duty to maintain such premises in a reasonably safe condition in respect to use thereof by invitees, the owner or occupant is bound by the same duty to take into consideration all the classes and grades of such invitees as they go to make up the ordinary public which enters upon such premises. That only one or two of thousands entering such premises in a period of months fell because of such deception does not affect the rule of liability, but goes to furnish some proof of the camouflaging effect of the use of the same color or design on different levels, especially on floors having platform elevations maintained for the use of patrons. We are of the opinion that the finding of negligence is sustained by the evidence.

[8-10] The complaint alleged that the accident happened on August 31, 1930, and nothing to the contrary appeared in the evidence at the trial. Appellant in its answer pleaded a written release executed by respondent on August 29, 1930, releasing appellant from all liability to respondent for injuries suffered on or about August 22, 1930, and alleged that on August 29, 1930, respondent released appellant from all claims that had accrued or that might accrue by reason of her claim "for the injuries and damages set forth in her complaint." No affidavit denying the genuineness and due execution of the release, which was pleaded in *hæc verba* in the answer, was filed by respondent, and hence such status of the instrument is deemed admitted. Section 448, Code Civ. Proc. But the affirmative matter pleaded in the answer as above stated was deemed denied. Section 462, Code Civ. Proc. No evidence was offered or received at the trial in support of such affirmative allegations, and the trial court was therefore justified in finding that such allegations were not true.

[11] After this cause was submitted for decision on this appeal, it became obvious that there existed some error in the date alleged in the complaint as to the time of accident or in the dates contained in the release pleaded; for the complaint alleged that the accident occurred on August 31, 1930, whereas the release pleaded recited that it covered an accident occurring on August 22, 1930. Upon this discovery, and by consent of counsel for both appellant and respondent, under authority of section 956a of the Code of Civil Procedure this court ordered the taking of additional evidence in respect to the date of the accident described in the complaint and of the date of the execution of the release pleaded and of the accident therein described; and also evidence in avoidance of or sustaining the validity of such release, should the evidence connect it up with the accident on which the complaint was founded. Such evidence has been taken and considered by this court, and therefrom it was made to appear without dispute that the accident in question occurred on August 22, 1930, instead of August 31, 1930, as alleged, and that the release pleaded related to that accident and none other. The testimony of plaintiff and her son, on the one side and of Elwood A. Adamson, a claims adjustor representing the appellant in securing the execution of the release, on the other, was given and has been considered and weighed by this court. It is not necessary to herein repeat the same, but it will suffice for the purpose of this decision to announce that we find that owing to mental weakness, inexperience and intense suffering of respondent at the time of signing the release and accepting the \$25 in consideration thereof, she was caused to believe and understand that she was signing a receipt for money advanced by appellant to pay for medicines and a doctor, and that she was not conscious of the fact that she was signing a full release for compensation for her injuries. The evidence also shows that both respondent and the claims adjustor were in ignorance of the nature and extent of respondent's injuries at that time, and that the apparent gross inadequacy of consideration for the release was the result of this mutual mistake as to such injuries and not to any deliberate or intended purpose on the part of the adjustor to secure an unconscionable advantage. Such, however, would be the result in the light of the facts should this release be sustained. Under the proofs we cannot permit such result. We therefore find

that the release pleaded is invalid and does not constitute a defense to the right of respondent to recover. We further find that in June, 1931, prior to commencing this action, respondent gave notice of rescission of the release and tendered the sum of \$25 to appellant, and that such tender was refused. We conclude, therefore, that the judgment herein should be modified by deducting the sum of \$25 therefrom and that as so modified and without further proceedings the same should be affirmed.

The judgment is reduced to \$975, and as so modified is affirmed; the costs to be paid by defendant.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 337
ANGLO CALIFORNIA NAT. BANK OF SAN
FRANCISCO v. RASMUSSEN et al.
Civ. 9669.

District Court of Appeal, First District,
Division 2, California.
April 22, 1935.

Sales ⇨ 472 (5)

Where evidence showed conditional sale and delivery of automobile to another, assignment of seller's interest to bank, and subsequent temporary permission to seller to use the automobile, automobile held not subject to attachment by seller's creditor on transaction arising long after sale and assignment (Civ. Code, § 3440).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by the Anglo California National Bank of San Francisco against Carl Rasmussen and others. From a judgment for defendants, plaintiff appeals.

Reversed.

Raymond Perry, of San Francisco, for appellant.

Gilbert D. Ferrell and Fred W. Comba, both of Redwood City, for respondents.

NOURSE, Presiding Justice.

On September 7, 1932, one Saltzman executed a conditional sales contract to his

brother-in-law, Allen Janow, for the sale of a Hudson sedan; \$350 was paid at the time, and the contract called for additional payment of \$528.74 in monthly installments of \$29.93. Janow took immediate delivery of the car and kept it in his continuous possession for at least four weeks. On the day the contract was executed Saltzman sold and assigned all his interest to the plaintiff bank, and received from the bank \$400 in full payment. Certificate of ownership was thereupon registered with the motor vehicle department showing Janow to be the registered owner and the bank to be the legal owner. Janow continued to pay the monthly installments to the bank, but returned the car to Saltzman upon an agreement that latter could use it temporarily and pay the cost of the upkeep. While Saltzman had the car in his possession, it was attached by defendant Rasmussen for an indebtedness arising long after the transactions referred to. Both the bank and Janow filed third-party claims protesting the attachment. The car was sold on execution. The other defendants sued herein are the sureties on the indemnity bond given in response to plaintiff's claim, and the action is to recover on the bond for the loss due to the execution sale.

At the close of the trial, judgment was announced for the plaintiff, but thereafter the trial court made findings and entered judgment for the defendants. One of these findings requires preliminary comment—the finding of nondelivery of the car to Janow. All the evidence without the slightest conflict proves actual delivery and continuous possession. Janow had exclusive possession of the car in San Francisco for at least four weeks. Saltzman was a resident of San Mateo county, and did not control or operate the car during any of that time. Hence there was a completed sale to Janow within all the restrictions of the Code relating to fraudulent conveyances.

The transaction between Saltzman and the bank was separate and distinct. It was a simple assignment of the legal title to the car and of all interest which the vendor had reserved through the sales contract. It is a transaction of increasing frequency in the sales of motor vehicles and one which has always been recognized as a valid transfer of the vendor's interest. It is not within the provisions of section 3440 of the Civil Code, since the assignor is not the "person having at the time the possession or control of the property" sold.

The undisputed evidence shows a completed sale to Janow within all the provisions of the Civil Code. All the requirements of the California Vehicle Act relating to transfer and registration were followed. The assignment to the bank left no title or interest in Saltzman subject to attachment or execution. The respondents' argument that there might have been some fraud in the transaction is based upon suspicion alone, but it is but a commonplace observation that fraud may not rest on mere suspicion or conjecture.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.



6 Cal.App.2d 395

PEOPLE v. ZINN et al.
Cr. 2678.

District Court of Appeal, Second District,
Division 1, California.
April 23, 1935.

Rape ☞19

In rape prosecution, defendant who aided and abetted in commission of rape by co-defendant held properly charged as principal, and information was not objectionable because charging defendant and codefendant jointly with committing rape (Pen. Code, §§ 31, 971).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Howard Zinn and another were convicted of rape, and they appeal.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

The defendants were jointly charged with the crime of rape upon a thirteen year old girl, accomplished by force and violence overcoming the resistance of the victim. Upon trial each was found guilty. They appeal upon the ground that the information charg-

ing them jointly with having committed the crime does not charge a public offense in that the crime of rape can involve only two people, the offender and the victim, and, also, that the evidence does not show that the offense was accomplished.

The appeal is entirely without merit. The evidence shows that the act of intercourse was accomplished by the defendant Zinn, and that the defendant Potter aided and abetted in its commission. The latter was therefore, properly charged as a principal with the former (People v. Young, 132 Cal. App. 770, 771, 23 P.(2d) 524; People v. Burdg, 95 Cal. App. 259, 267, 272 P. 816), and there is abundant evidence to sustain the conviction of each. Sections 31, 971, Penal Code.

The judgments are, and each of them is, affirmed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 389

YATES v. TAFT LODGE NO. 1527, BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA et al.

Civ. 1371.

District Court of Appeal, Fourth District,
California.

April 22, 1935.

1. Master and servant ☞302(1)

Master is liable for wrongful act committed by servant in scope of employment, but is not liable for servant's unauthorized wrongful act outside scope of employment.

2. Master and servant ☞302(3)

Where benevolent lodge rented picnic grounds from landlord, who reserved concessions for sale of refreshments, and placed agent at gate to collect admission charges from public, lodge was not liable for gatekeeper's assault upon landlord within picnic grounds in argument between gatekeeper and landlord whether certain musicians should be admitted free of charge, since gatekeeper had no implied authority to engage in controversy over nature of his duty to employer or manner of performance thereof.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Suit by Charles E. Yates against Taft Lodge No. 1527 Benevolent and Protective Order of Elks of the United States of America and others. From a judgment, plaintiff appeals.

Affirmed.

Hubert Starr, of Los Angeles, and Edward West, of Bakersfield, for appellant.

J. R. Dorsey and Clafin & Dorsey, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

A demurrer to an amended complaint filed by the defendant Dear was overruled, but a demurrer filed by the other defendants was sustained without leave to amend, and the plaintiff has appealed from a judgment then entered in favor of such other defendants.

The complaint alleged that the defendant lodge rented from the plaintiff a certain picnic grounds known as Fort Tejon for the purpose of giving a benefit picnic and barbeque on a certain day, to which admission was charged; that in said contract of rental the plaintiff reserved to himself concessions for the sale of refreshments; that a concession for dancing was transferred to a benevolent association subsidiary to the defendant lodge, called "The Antlers," and it was agreed that the said Antlers should furnish and bring into the grounds musicians for the dance; that on the date in question the defendant lodge designated and employed the defendant Dear as gatekeeper and instructed and empowered him to take charge of the entrance to the grounds and to collect the charges for admission from the general public; that Dear entered upon these duties as such gatekeeper and while so engaged certain musicians employed by the Antlers to furnish music for the dance appeared at the gate and requested admittance; that Dear refused admittance to them; that demand was made upon the plaintiff by the said Antlers that said musicians be admitted in conformance with the contract; that thereupon the plaintiff accosted Dear at the entrance gate and demanded from him admittance for the musicians; and that said Dear "refused and continued to refuse such admittance wrongfully and contrary to the terms of agreement hereinabove set out, and that the plaintiff remonstrated with him and continued to demand the admittance into said grounds of the said musicians, and that thereupon the said de-

fendant, R. C. Dear, the agent, servant and gate-keeper of the said defendant, Taft Lodge No. 1527, Benevolent and Protective Order of Elks of the United States of America, an unincorporated association, and in the due course of his said employment, violently, maliciously and wilfully assaulted and beat the plaintiff about his face and body."

[1] It is well settled that a master is liable for an assault committed by his servant where the act is done within the scope of the servant's employment, and that he is not liable where the wrongful act is one which the servant was not authorized or empowered to do under the nature of his employment, but where the servant has, for some purpose of his own, departed from his master's business. *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, 29 P. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223; *Rahmel v. Lehndorff*, 142 Cal. 681, 76 P. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154; *Johnson v. Monson*, 183 Cal. 149, 190 P. 635; *Ruppe v. City of Los Angeles*, 186 Cal. 400, 199 P. 496. While the general rules are well settled, difficulty often arises in applying them to the facts of a particular case.

[2] The only allegation in this complaint with respect to the duty of the defendant Dear is that he was directed, instructed, and empowered by the defendant lodge "to take and to keep charge of the gate and entrance into said picnic grounds, and to collect the charges of admission from the general public requesting admission into said picnic and entertainment grounds." The appellant argues that it must be implied from this allegation that the defendant Dear was authorized and empowered by the defendant lodge to use such force as was reasonably necessary to prevent persons from entering the picnic grounds without payment of the requisite charge of admission. Assuming that he had such implied authority and that he was thus empowered, the force which was here used by Dear was not used to prevent any one from entering the grounds. So far as appears from the complaint, no force was necessary or was used to keep out the musicians who applied for admission. Instead of being used for any such purpose, the force here employed was directed against the landlord who was already in the grounds, and this not in connection with his entrance or presence, but because of an argument which arose over a mat-

ter of a concession under the contract, with which matter the employee was neither authorized to use force, reasonable or otherwise, nor to act at all.

The appellant had nothing to do with the dancing concession or with the musicians, except that he claimed they were entitled to admission under the contract. He was acting in his capacity as landlord and was insisting upon a certain interpretation of the leasing agreement. On the other hand, Dear's only duty was in connection with collecting admissions from such of the general public as requested admission, and he had nothing to do with any concession or with any interpretation of the contract. If it be assumed that he was authorized and empowered to use any reasonable force necessary to keep out any one attempting to crash the gate, it cannot be assumed that he was authorized to use any force in connection with the interpretation of the contract or in connection with the way in which any concession should be handled. The only force that can be assumed to have been authorized is force used in the performance of his duty and not otherwise.

The force here used was not used in the performance of his duty, in keeping some one out who insisted upon coming in, but was used in a controversy with the landlord over the manner in which he was performing his duty. The plaintiff was an outsider in so far as regulating the duty of this employee is concerned. Dear had no implied authority to fight with an outsider or to resort to force in an altercation over the nature of his duty to his employer or the manner in which he was performing the same. While it may have been more or less natural that he should resent this interference on the part of an outsider, it was no part of his duty to his employer, express or implied, to punish such interference. In engaging in this controversy with the landlord over the interpretation of this contract, with which he was not concerned, we think he stepped aside from his duty and entered into a personal controversy, allowing his own resentment to lead him into an act which was outside the scope of his employment and beyond any express or implied authority conferred upon him by his employer.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

6 Cal.App.2d 320

Ex parte HAAS.
Cr. 2721.District Court of Appeal, Second District,
Division 1, California.

April 20, 1935.

1. Habeas corpus ☞21

Where justice of the peace presiding at preliminary examination and committing defendant for attempted robbery was qualified to act upon proper request of justice before whom complaint had been filed, whether proper written request had been made could not be inquired into on defendant's application for writ of habeas corpus (Code Civ. Proc. § 105, as amended by St. 1933, p. 1813).

2. Habeas corpus ☞21

Whether preliminary hearing was conducted without regard to defendant's right to be represented by counsel could not be inquired into on defendant's application for writ of habeas corpus.

Application by Conrad Haas for a writ of habeas corpus.

Petitioner remanded to custody.

Barry Sullivan, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, Presiding Justice.

On writ of habeas corpus. In the justice's court of Belvedere township, in the county of Los Angeles, on April 5, 1935, a complaint was filed against petitioner Conrad Haas, charging him with the commission of a felony. April 10th was appointed as the day for the preliminary examination before Myer B. Marion, justice of the peace of that township. On April 8th defendant filed an affidavit in which he asserted that for certain stated reasons said Marion was prejudiced against affiant and for that reason affiant believed that he could not have a fair and impartial trial before said Marion. Thereupon, Justice Marion made a request, which does not appear to have been a written request, calling upon H. Leonard Kaufman, justice of a neighboring township, to act in place of Justice Marion in that proceeding. Kaufman complied with that request, heard the evidence, and committed the defendant to be prosecuted for the crime of attempted robbery. By said order the defendant was held

to bail, which has not been given, and consequently he is committed to the custody of the sheriff until he gives such bail.

[1] The principal contention upon which petitioner rests his demand for release from custody is that the record does not show any written request made by Justice Marion calling upon Justice Kaufman to act in the matter of said preliminary examination; and that under the provisions of section 105 or the Code of Civil Procedure, such written request was necessary to confer jurisdiction upon Justice Kaufman. That section, as amended in 1933 (St. 1933, p. 1813), contains the following provision for the calling of a "substitute justice" to hear a case: "*Justice may call substitute justice to hold court.*" At the written request of a justice of the peace, another justice of the peace within the same county, who possesses the legal qualifications prescribed for the court of the requesting justice, may attend such court, and thereupon is vested with the power, and may perform all the duties, and issue all the papers or process of the justice making such request.
* * *

In view of the fact that Justice Kaufman was a justice of the peace qualified to act in Belvedere township upon proper request therefor, and since at the time of the hearing and commitment he was acting as such justice, he thereby became, at least de facto, a justice and magistrate acting in the case. This being so, we are of the opinion that his right to so act may not be questioned in this proceeding. Upon this particular question we have found no decision in this state, but the subject was discussed very thoroughly in Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374. The court said: "Upon well settled principles, it would be inconsistent with the convenience and security of the public, and with a due regard to the rights of one acting in an official capacity under the color of, and a belief in, lawful authority to do so, that the validity of his acts as a justice should be disputed, * * * in this proceeding to which he is not a party." After stating the substance of several English decisions, and others in this country, the court concluded: "The case of this petitioner being within the jurisdiction of the Police Court, the warrant of commitment, under the seal of the court, and signed by its clerk, was a complete justification of the jailor to whom it was addressed. When the court has jurisdiction of the case and of the party, and the warrant is sufficient to justify the officer, and the pris-

oner has no special privilege or exemption, his imprisonment is legal, and the law does not allow the authority of the judge, by whom the court was held and the warrant issued, to be disputed in a summary manner by writ of habeas corpus."

[2] Upon the additional point that the preliminary hearing was conducted without regard to the defendant's right to be represented by counsel, it is a sufficient reply that this is a right which may be waived and the denial of which does not impair the jurisdiction of the magistrate.

The petitioner is remanded to custody.

We concur: HOUSER, J.; YORK, J.



6 Cal.App.2d 421

**OLSON et al. v. MARYLAND CASUALTY
CO. et al.**
Civ. 9933.

District Court of Appeal, Second District,
Division 2, California.
April 24, 1935.

Rehearing Denied May 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Receivers $\hookrightarrow$ 215

That receiver had complied with all orders of court on current accounts did not relieve surety of liability on receiver's bond for failure of receiver to pay sums ordered paid on final accounting, where bond was conditioned upon compliance with all orders.

2. Judgment $\hookrightarrow$ 495(1)

Judgments of superior court are presumed to be valid, and, although subject to direct attack such as by appeal or by motion to set aside because entered against party by party's mistake, inadvertence, surprise, or excusable neglect, where attack is collateral, to be successful, lack of jurisdiction to make order must appear upon face of judgment roll (Code Civ. Proc. § 473).

3. Receivers $\hookrightarrow$ 216

In suit upon receiver's bond, condition of which was to obey all lawful orders of court, for failure of receiver to obey an order, surety could not go behind order to inquire into merits of controversy, since purpose of surety was apparent on face of bond to submit to all lawful orders of court as conclusive.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Culbert L. Olson and another, trustees of O. C. Julian Oil Wells 1, 2, 3, 11, and 12, and oil wells 16 and 17, Santa Fé Springs Oil District, Los Angeles County, and another, against the Maryland Casualty Company, and another. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

Everett H. Smith, of Los Angeles, for appellant.

Olson & Olson, of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment against the defendants in an action upon a bond wherein the defendants agreed to pay a specified sum, upon condition, however, that if defendant Allison faithfully executed the duties of his office as receiver according to law and obeyed all lawful orders of the court made in the receivership action, then the obligation should be void. The plaintiffs were the successors of defendant Allison as receivers for the oil company. It was alleged in plaintiffs' complaint that in the receivership action in which the bond was given the court had ordered defendant Allison upon his final accounting to pay to plaintiffs three certain sums of money. That he had failed to do so, although demand had been made upon him therefor. These and other allegations were made, sufficient to entitle the plaintiffs to judgment on the pleadings in the absence of a denial or a special defense. For answer the defendants admitted the allegations of the complaint and set up four separate defenses as follows: (1) That the receiver had complied with all of the orders of the court on the current accounts, which said compliance made it impossible for said receiver to comply with the order made on the final account; (2) that all of said orders on the current accounts of the receiver were made upon notice to or upon stipulation of all of the parties litigant in said action, and that the final account and the order thereon was heard and made, respectively, without notice to or the right to appear in anywise or at all, to the surety company; (3) that its principal, Charles F. Allison, had fully and fairly complied with all of the orders of the court; and (4) that the order of the judge, hearing the final account, violated section 1, Amendment 14, of the Constitution

of the United States, in that said order was made and entered without service of process, papers, notices, etc., upon defendant surety company, and that this defendant was deprived of the equal protection of the laws.

Upon motion of the plaintiffs, all of these defenses were stricken, and judgment on the pleadings was entered against the defendant, because of which the defendants complain.

[1] None of the defenses was of any validity, for the following reasons, among others: Number (1) because it was immaterial that defendants had complied with other orders of the court; the bond was conditioned upon compliance with all orders; compliance with former orders did not make it impossible to comply with the final order which was for the payment of money merely. Numbers (2) and (4) because again it was immaterial about former orders and because the surety company was not entitled to notice of the hearing on the final account of the receiver. Number (3), while the defendants alleged by way of mere conclusion that Allison had fully and fairly complied with all the orders of the court, yet they admitted in the same sentence of the answer "that said, or any moneys, referred to by plaintiffs in said amended complaint, have not been paid by Charles F. Allison to plaintiffs," i. e., that they had not complied with the order on the final account.

[2] It will be observed and should be remembered that the defendants made no claim in the trial court that the order on the final account was unlawful, nor was any claim made that said order was a nullity. Judgments of our superior court are presumed to be valid. They are subject to direct attack, such as by appeal or by motion to set them aside under section 473, Code of Civil Procedure. But where the attack is a collateral one, to be successful the lack of jurisdiction, if any, to make the order must appear upon the face of the judgment roll. The judgment rolls of the several orders are not before this court.

The defendants make four contentions on appeal which they present in the form of questions. We will state them in the language of the defendants and answer them so far as seems necessary.

[3] "Is a surety bound by the order of the court ruling [i. e., made] upon a final account of a receiver?" We believe that where, as in this case, the condition of the bond is to obey all lawful orders of the court there is apparent on the face of the bond the agreement and purpose on the part of the surety to submit to all lawful orders of the court as conclusive, and in a suit upon the bond the surety cannot go behind the order of the court to inquire into the merits of the controversy which the order has already determined. *Irwin v. Backus*, 25 Cal. 214 [85 Am. Dec. 125]; *Chaquette v. Ortet*, 60 Cal. 594; *Pico v. Webster*, 14 Cal. [202], 203 [73 Am. Dec. 647]; *Harter Co. v. Geisel*, 18 Cal. App. 282, 122 P. 1094; *Brodrib v. Brodrib*, 56 Cal. 563; *Titus v. Fairchild*, 49 N. Y. Super. Ct. 211; *State v. Abbott*, 63 W. Va. 189 [61 S. E. 369].

"Is the receiver and his surety protected by orders of the court made approving said receiver's current accounts?" Where the condition of the bond is that the receiver will obey all lawful orders of the court, he may not select some orders to obey and some to disobey. If the final order was unsatisfactory to the receiver he should have appealed in the receivership case, or moved to set it aside under said section 473. In the absence of any claim or any showing that the final order is a nullity he must obey it.

"In the absence of an express finding of fraud by the receiver, is the surety entitled to defend a suit upon the receiver's bond for noncompliance of the terms of the order settling the final account, when the terms of the orders approving current accounts make such compliance impossible?" We have already adequately answered this contention.

"Does the denial of the right of the surety to defend an action upon a receiver's bond amount to a violation of the Fourteenth Amendment of the Constitution of the United States?" The surety company was not denied the right to defend the action. It did defend. But it developed at the trial that its defense was neither a valid nor a successful one.

Judgment affirmed.

I concur: STEPHENS, P. J.

5 Cal.App.2d 688

CASE et al. v. McCONNELL & FORRESTER et al.

Civ. 8548.

District Court of Appeal, Second District,
Division 2, California.

March 29, 1935.

Hearing Denied by Supreme Court
May 27, 1935.**1. Joint-stock companies and business trusts**
⌚15(1)

Beneficiaries under trust agreement involving sale of real estate *held* not entitled to be relieved of liability for commissions earned by advertising and sales managers appointed by executive committee of trust, on theory that they had constructive notice of provisions of trust agreement limiting liability to be incurred by agents to the trust assets, where substantial sums were received by beneficiaries from sale, and they acquiesced in arrangement by which security of trust property was impaired by subjecting it to a trust deed (Civ. Code, § 2318).

2. Joint-stock companies and business trusts
⌚15(1)

Beneficiaries under trust agreement involving sale of real estate *held* individually liable for commission earned by advertising and sales managers appointed by executive committee of trust, although trust agreement provided that beneficiaries could not be personally obligated, where neither advertising manager nor sales manager knew of limitations and rendered services in belief that executive committee had full authority to employ them.

3. Joint-stock companies and business trusts
⌚17

Executive committee of trust created for sale of real estate, which hired advertising manager and sales manager under actual authority of trust agreement, had ostensible authority to render trust beneficiaries liable for commissions earned by managers, where terms of trust agreement limiting beneficiaries' liability to assets of trust were not disclosed to managers and they relied on committees' authority (Civ. Code, § 2317).

4. Joint-stock companies and business trusts
⌚17

Bank holding land in trust *held* liable to sales and advertising manager of real estate subdivision for commissions on purchase price of lot paid to bank, where, at time purchase price was placed in bank, executive committee of trust had ordered bank to pay managers commissions as fast as selling prices of lots were collected.

Action by John R. Case, Jr., and another against McConnell & Forrester, copartners and others, and against the Bank of America National Trust & Savings Association. From a judgment for plaintiffs, the last-named defendants appeal.

Affirmed.

For prior opinion, see 37 P.(2d) 190.

Freston & Files, of Los Angeles, for appellants.

Janeway, Beach & Hankey, of Los Angeles, for respondents.

PER CURIAM.

[1] On rehearing complaint is made that the trial court in its findings and this court in its opinion on appeal failed to give complete consideration to the provisions of Civil Code, § 2318, relating to constructive notice of the restriction upon the authority of an agent. It is urged that appellants, who were the beneficiaries of the trust, are entitled to the safeguard of the provisions in the trust agreement which limited liability to be incurred by their agents Forrester and McConnell to the trust assets.

The commissions here sued on and for which judgment was recovered amounted to \$8,399.22 plus interest for sales to parties named Morris and Jervis. By their answer to plaintiff's amended complaint, appellants admitted receiving at least \$10,000 from Morris on account of these sales and there is evidence that certain other substantial sums were received from Jervis. It further appears that these beneficiaries acquiesced in an arrangement by which the security of certain of the trust property was materially impaired by permitting the purchaser to subject it to a first trust deed payable to an outsider and taking back a second trust deed for the balance of the purchase price.

Under the views we have heretofore expressed and the cases we have cited, we are not persuaded that the appellants would have benefited by a finding or more explicit expression by us on the question of constructive notice. Such beneficiaries, who are principals in this case, cannot receive the fruits of the labor of subagents hired on their behalf which exceed the amount they have agreed to pay these subagents, divert these collections (as the trial court found they had done) toward payment of other obligations, impair the corpus of the trust by permitting it to be subjected, without any sufficient consideration to an encumbrance superior to their own

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

and then, on the theory of constructive notice, deprive their subagents of their pay for their work. All of this happened while the real estate market was strong and we have no doubt of the entire good intentions of the beneficiaries. Like so many ventures this one would in all likelihood have resulted in profits to all had the market not turned. These facts, however they may absolve the parties from personal blame, cannot affect their legal liabilities.

We here append our opinion and decision, the same being unchanged from that heretofore filed:

Plaintiffs recovered judgment for commissions earned by them in sale of certain lots in a real estate subdivision. Appellant bank held the land in trust for the purpose of assisting the parties in carrying out their project. The other four appellants were among the beneficiaries of the trust. The beneficiaries constituted themselves in effect a voluntary, unincorporated association known as "Monte Mar Vista Syndicate," and under the trust agreement they had possession of the land for the purpose of improvement and sale. By this same agreement they appointed appellant Forrester and defendant McConnell as selling agents and also as an "executive committee," and granted them an "irrevocable power of attorney to do any and all acts on behalf of the beneficiaries which they themselves could do," with the sole exception that they could not obligate beneficiaries personally but only as to trust assets. The executive committee in turn employed plaintiffs, Case as advertising manager and Brockett as sales manager, to sell the property.

Appellants contend that the judgment against the four who were beneficiaries should not have been against them personally but should be recoverable only out of trust property, by reason of the provisions in the trust agreement.

[2] 1. The court found that: "Neither of the plaintiffs has ever read said Amended Declaration of Trust of date March 15, 1927 (in which these matters were set out), and neither of plaintiffs, prior to the filing of the answer in this action, knew of any limitation upon the authority of said W. R. McConnell and/or of said Fred W. Forrester, and plaintiffs rendered such services as were rendered by them during their said employment believing that said Fred W. Forrester and W. R. McConnell as such executive committee and exclusive sales agents had full and unlimited authority to employ them respectively as ad-

vertising manager and sales manager for said trust and the beneficiaries thereof." The evidence is sufficient to support this finding.

2. It was admitted at the trial that "all the beneficiaries knew who the executive committee was," and that the latter were acting as their agents. It is apparent that it was within the scope of their employment for this executive committee to hire plaintiffs, and the latter knew that the executive committee were agents for the beneficiaries under the trust. Sales were made by plaintiffs, and were accepted by the beneficiaries and the bank. When the sales had been completed but the commissions were not paid, plaintiffs were told about a "pool" that was to be formed by the "syndicate"; i. e., an assessment which was to be levied upon the beneficiaries for the purpose of paying the commissions which had been earned.

3. Having entered into their mutual relationship by virtue of the trust agreement, each beneficiary was liable for debts incurred during the period that he occupied such relationship and which was necessarily contracted for the purpose of carrying out the objects for which such trust was formed, except as to persons who dealt with them on the basis of agreement limiting their liability. *Leake v. City of Venice*, 50 Cal. App. 462, 195 P. 440.

[3] 4. Plaintiffs having been employed by the executive committee acting as agents of the beneficiaries, appellants are precluded from asserting the undisclosed limitation on their agents' authority in defense of this action. Since their agents had actual authority to employ plaintiffs to sell the land and ostensible authority (Civ. Code, § 2317) to render appellants liable for the commissions they thus earned, appellants cannot accept the benefits of such sales and then seek by virtue of their agreement with the executive committee, which was not disclosed to plaintiffs, to avoid payment of the commissions earned. *Fairbanks v. Crump, etc., Co.*, 108 Cal. App. 197, 291 P. 629, 292 P. 529. "The question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, and not upon the instructions given. Or in other words, the principal is bound to third persons who have relied thereon in good faith, and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent, and this, too, whether the agency be a general or a special one." *Whitton v. Sullivan*, 96 Cal. 480, 483,

31 P. 1115; *Browning v. McNear*, 158 Cal. 525, 111 P. 541; *Thomas v. Fursman*, 39 Cal. App. 278, 178 P. 870.

[4] 5. Judgment against defendant bank was for the commission on sale of one lot. The lot had been sold for cash, and the purchase price was in the hands of the bank when the executive committee ordered it to pay plaintiffs their commissions as fast as the selling prices on said sales were respectively collected. The money was therefore held by the bank, subject to such order of the executive committee, and it was its duty to pay it over to plaintiffs. Upon its failure to do so, the trial court properly held it liable to plaintiffs for that amount.

No question is raised on this appeal as to misjoinder of either parties or causes of action.

Judgment affirmed.



6 Cal.App.2d 54

SECURITY BUILDING & LOAN ASS'N OF CALIFORNIA v. SEIBERT et al.
Civ. 8764.

District Court of Appeal, Second District,
Division 1, California.
April 9, 1935.

Rehearing Denied May 8, 1935.

Hearing Denied by Supreme Court
June 6, 1935.

Appeal and error ⇨ 1010(1)

Whether guaranties signed by officers and having seal of corporation were executed by corporation was fact question for court trying case, where there was evidence rebutting prima facie evidence of execution under statute, and court's finding was beyond power of district court of appeal to review (Civ. Code, § 374).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Security Building & Loan Association of California against Anna L. Seibert and Durex System, Limited. From a judgment for plaintiff, defendant Durex System, Limited, appeals.

Affirmed.

For prior opinion, see 41 P.(2d) 556.

E. T. Young, of Los Angeles, for appellant.

Julius V. Patrosso, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Durex System, Limited, a corporation, appeals from a judgment rendered against it in an action brought on its alleged guaranties of three promissory notes. Appellant contends that the evidence is insufficient to sustain the findings and judgment that the guaranties were executed by it.

During the time of the transactions in controversy the controlling capital stock interest in the plaintiff corporation was owned by Metropolitan Capital Corporation, formerly known as Metropolitan Guaranty Corporation, and some of its officers under an executory contract for the purchase of capital stock. Furthermore, by contract the Metropolitan corporation had the controlling interest in the capital stock of the Durex corporation, which, however, although subscribed for, was never actually issued. At all times material herein C. T. Owen was president of the plaintiff corporation, vice president of the Metropolitan corporation, and vice president of the Durex corporation; and M. M. Hurford was vice president of the plaintiff corporation, an officer and director of the Metropolitan corporation, and secretary of the Durex corporation.

The notes in controversy were made by Anna L. Seibert to the order of the Durex corporation and each of them bears the following: "Los Angeles, Cal. Sept. 4, 1930. For value received we hereby assign and transfer to the Metropolitan Capital Corporation the within trust deed note together with all rights accrued or to accrue by virtue of deed of trust securing said note and do hereby guarantee payment of principal and interest and waive demand protest and notice of protest covering said note. Durex System, Ltd, C. T. Owen, Vice-President, M. M. Hurford, Secretary. (Seal)" The notes were thereafter transferred by the Metropolitan corporation to the plaintiff, which has sued upon these contracts of guaranty.

Mr. Hurford's remembrance of the execution of the guaranties was exceedingly hazy. He remembered having signed them at Mr. Owen's request. He was the secretary of the Durex corporation and was charged with responsibility for the seal, but Mr. Owen kept it. He had no recollection of affixing the corporate seal to the notes but expected Mr.

Owen to affix the seal to any papers where it was necessary. He did not know of any consideration received by the Durex corporation for the assignments or the guaranties nor the purpose of the transfers, and he never heard the subject of the notes discussed. The minute book of the Durex corporation contains no resolution authorizing or ratifying the assignments or guaranties or any mention of them whatever.

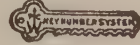
Mr. Von Stein testified that the notes were turned over by him, as general manager of the Durex corporation, to Mr. Gates and Mr. Owen, as officers of the Metropolitan corporation, for safe-keeping by them for the Durex corporation. According to his testimony nothing was ever said to him by any one on the subject of transferring the notes and trust deed, and the first time he knew that the notes had been transferred or attempted to be transferred was some months later when a settlement of the affairs of the Metropolitan corporation and the Durex corporation was worked out. In a contract executed by the two corporations in March, 1931, for the purpose of adjusting their accounts Durex corporation assigned and delivered to Metropolitan corporation "all right, title and interest which it now has or may hereafter at any time have in and to a second trust deed made, executed and delivered by Anna L. Seibert." No mention of any guaranty is made in this contract nor is any previous transfer of the notes referred to. At that time, Mr. Von Stein testified, he thought all three notes sued upon were still in the possession of the Durex corporation.

None of the other officers or directors of either the Durex corporation or the Metropolitan corporation testified, and the evidence concerning the execution and delivery of the guaranties sued upon consists of the instrument, with the signatures of the officers of the Durex corporation and the seal of that corporation on the one hand, and the testimony of Hurford and Von Stein on the other. Under these conditions it was for the trial court to determine the fact as between the testimony of the officers of the corporation, and the presumption arising from a contract purporting to be executed by the corporation under its corporate seal. Such contract, according to the provisions of section 374 of the Civil Code, shall be deemed prima facie evidence that any such instrument is the act of the corporation. As to the effect of a presumption as evidence, see *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Keating v. Morrissey*, 6 Cal. App. 163, 91 P. 677;

Gray v. Fred B. Neuhooff Co., 124 Cal. App. 567, 578, 12 P.(2d) 1036. The finding of the trial court that the guaranties were executed and delivered by the Durex corporation is, therefore, beyond our power to review.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 409

FURZE v. WRIGHT.

Civ. 9696.

District Court of Appeal, First District,
Division 2, California.

April 24, 1935.

Rehearing Denied May 24, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. New trial ☞102(5)

In automobile collision case, denial of plaintiff's motion for new trial for newly discovered evidence of alleged eyewitnesses who had stated to both parties' agents that they did not see accident, if motion was denied because of insufficient diligence, *held* not abuse of discretion, where no witness was asked to name any one else present at scene of accident.

2. New trial ☞107

In automobile collision case, denial of motion for new trial for newly discovered evidence, if denied because proposed testimony was incredible, *held* not abuse of discretion under evidence.

3. New trial ☞99

In automobile collision case, denial of plaintiff's motion for new trial for newly discovered evidence which was merely cumulative or designed to contradict defendant *held* not abuse of discretion, notwithstanding fact that, where conflict in parties' testimony is extremely marked, disinterested witnesses' evidence should not necessarily be deemed cumulative.

Appeal from Superior Court, Alameda County; E. O. Robinson, Judge.

Action by Thomas E. Furze against Robert H. Wright. Judgment for defendant, and plaintiff appeals.

Affirmed.

Philander B. Beadle, of San Francisco, for appellant.

L. R. Weinmann and Weinmann, Quayle & Berry, all of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff and the defendant, while driving their automobiles, met with a collision at the intersection of California street and Alcatraz avenue in Berkeley. For injuries sustained in the accident, the plaintiff commenced this action. The jury returned a verdict in favor of the defendant. The plaintiff made a motion for a new trial, but his motion was denied. From the judgment entered in favor of the defendant, the plaintiff appealed and has brought up a bill of exceptions.

The plaintiff contends that the trial court abused its discretion in denying the plaintiff's motion for a new trial upon the ground of newly discovered evidence. This contention he divides into several different arguments. The defendant replies that the ruling of the trial court may not be disturbed on appeal except that the trial court did abuse its discretion and that an abuse of discretion is never presumed but must be shown by the record. *Wilder v. Wilder*, 214 Cal. 783, 785, 7 P.(2d) 1032; *Olson v. Ranker*, 93 Cal. App. 124, 126, 269 P. 175. Continuing, the defendant claims the trial court did not abuse its discretion for several different reasons which he proceeds to set forth. If any one of those several reasons is sound, the order must be affirmed, and it is not necessary that every reason assigned by the defendant should be discussed.

[1] The first reason assigned by the defendant is that the order was properly denied because the plaintiff did not make a sufficient showing that he had used reasonable diligence to discover the evidence which, on his motion for a new trial, he claimed to be newly discovered evidence. An understanding of that point requires a brief statement of facts.

The accident occurred on the 6th day of January, 1934, at about 11:20 a. m. The complaint was filed February 16, a little over one month thereafter. On the 17th of May the trial commenced in the city of Oakland, and continued during the three days following. The record discloses that the intersection in which the accident occurred is located in closely built-up territory. On the southwest corner of the intersection stands a building that is occupied in part as a bakery. A glass door is set in diagonally at the street corner. There are windows on the side adjacent to Alcatraz avenue. The bakery is conducted by the Kulik family. On the trial the plaintiff called as witnesses Herman

Kulik, Henry Corke, H. C. Spitze, and Henry Rogers. Each lived in the immediate neighborhood and, excepting Herman Kulik, went to the scene immediately after the accident happened. Herman Kulik testified that at the time of the accident he was on the sidewalk outside of the bakery with his back turned to the street washing the window of the bakery. He did not see the cars until he heard the crash and then looked around. In the very nature of his work Kulik was looking through the glass and into the bakery. No witness was asked to name any person that he saw at the scene of the accident. Kulik was not asked to name who was in the bakery as he stood looking through the windows. No deposition of any witness or party was taken, but both the plaintiff and the defendant relied on the examinations made and the reports received from their respective investigators. The alleged newly discovered evidence consisted of the claim that Hattie Kulik and Lucella Cummins were eyewitnesses to the accident; that they were in the bakery looking out, that Mrs. Kulik was looking through the glass door and directly at the intersection, and that Miss Cummins was looking north through the window which Herman was washing. Both women were interviewed by the agents of the plaintiff and also by the agents of the defendant before the trial. To all of those agents both women stated they were in a back room and did not see the accident. Neither was called as a witness by either party. In support of the judgment, we must assume the trial court held that the plaintiff did not show he had exercised due diligence in preparing his case. If the trial court did so hold, we cannot say that such holding was, under the facts, an abuse of discretion. To so hold is to lay a foundation for the same claim to be made in every automobile collision case and all similar controversies—civil or criminal.

[2] The defendant also asserts that the showing made by the plaintiff was such that the trial court may have held, and should have held, that the testimony of Mrs. Kulik and Miss Cummins as shown in the affidavits was incredible. In addition to the facts above stated, it should be noted that on the evening of the day the jury returned a verdict both Mrs. Kulik and Miss Cummins notified the plaintiff that they witnessed the accident and on a new trial would appear as witnesses. At that time the plaintiff had testified. In giving his testimony, among other things he testified as follows: "I was driving south on California street. The other car involved was an Auburn cabriolet driven by the

defendant. It was traveling toward the east on Alcatraz avenue. In the block north of Alcatraz my speed was approximately 15 or 20 miles per hour. * * * As I approached Alcatraz avenue I slowed down. * * * When my front wheels were about at the north property line I saw the Auburn for the first time. It was about 40 to 50 yards to my right. * * * I continued through the intersection. My left wheels were about one foot east of the westerly south bound rail as I passed through the intersection. My speed through the intersection was about 10 to 12 miles per hour. * * * When my front wheels were about 5 feet south of the middle line of Alcatraz I could observe the approximate speed of the Auburn for the first time. It was traveling about 45 miles per hour. It was in the middle of Alcatraz avenue. It was coming straight toward me. The front end of my car was in the path of the Auburn at that time. The front of the Auburn was then about 30 feet toward my right. * * * The Auburn did not swerve before the accident. I did not swerve my car to either the right or the left. * * * The front of the Auburn hit the right side of my car. It hit my car at about the middle."

The defendant Wright testified: "In approaching California street from the west on Alcatraz avenue I was traveling at a speed of approximately 25 miles per hour. As I approached the intersection I was compelled to assume the course within a foot or two of the center line of Alcatraz because of a car parked along the southerly curb line of Alcatraz avenue west of California street. As I continued to approach the intersection I reduced my speed and entered the intersection at a rate not greater than 12 to 15 miles per hour. * * * When I was approximately 30 feet from the intersection plaintiff was approximately 100 feet therefrom. * * * I entered the intersection well in advance of the plaintiff. When the front of my automobile had reached the westerly car rail of the south bound car tracks I again noticed the plaintiff's automobile. At that time it was about 10 feet north of the northerly curb line of Alcatraz avenue I observed that it was traveling at a speed of 40 to 45 miles per hour and was not slowing up. * * * I immediately applied my brakes. * * * Plaintiff continued into the intersection and swerved sharply to his left to cut in front of me. * * * Plaintiff's automobile crashed against the left front corner of mine and dragged my automobile in a southeasterly direction. As soon as the plaintiff's automobile released the load of my car it turned over on

its side. I was barely moving at the time of the impact. At the time of the impact I was headed directly east and was not angled to either my right or left."

The defendant and other witnesses testified to "skid" marks and "scuff" marks on the street. Several witnesses testified to hearing two distinct reports. A. L. Bowlsby, the mechanic who repaired the plaintiff's car, testified that the front end of the chassis was bent six inches to the left. In her affidavit Mrs. Kulik averred that she was looking through the glass door of the bakery diagonally across the intersection of California and Alcatraz. Miss Cummins averred that she was looking north through the glass window across Alcatraz avenue. Thus the two affiants covered the entire case—Mrs. Kulik the movements of the plaintiff, and Miss Cummins the movements of the defendant. Both together stated a set of facts that completely and meticulously covered and corroborated every fact testified to by the plaintiff. Certain marks on the ground, positions of the cars after the accident was over, and indentations of the cars squared with the testimony of the defendant and not with the testimony given by the plaintiff. If, as testified by the plaintiff, the defendant's car hit the plaintiff's car on the right door, the plaintiff's chassis might have been bent, but it would have bent to the right and not to the left. On the other hand, if plaintiff's car hit defendant's car a slanting blow on the left front corner, interlocked with that car, and, while the brakes of the latter were set, dragged it toward the southeast, such forces might bend the chassis of the plaintiff's car as described above, and might cause all of the "skid" marks and "scuff" marks described by the witnesses. If, under these circumstances, the trial court held the affidavits incredible, it was not an abuse of discretion.

[3] Finally, the defendant contends that the newly discovered evidence was " * * * simply cumulative or designed to contradict the witness" Wright, and was not sufficient to support a motion for a new trial. People v. Anthony, 56 Cal. 397, 399. That contention is sound. In the case of People v. Granillo, 140 Cal. App. 707, at page 719, 36 P.(2d) 206, 211, the court said: "It is clear that the testimony of these two affiants, if admitted, would have been contradictory of that of Mrs. Loya and Willie Loya, and cumulative as to that of Mrs. Granillo and Henry Varella. Evidence which is designed to contradict a witness or is merely cumulative is not justifi-

fication for a new trial. *People v. Anthony*, 56 Cal. 397; *People v. Weber*, 149 Cal. 325, 86 P. 671; *People v. Loveless*, [140 Cal. App. 291] 35 P.(2d) 574." But the plaintiff contends when, as here, the conflict in the testimony given by the immediate parties is extremely marked, then the evidence of disinterested witnesses is desirable and therefore their evidence is not cumulative. He cites and relies on *State v. Evans*, 98 Or. 214, 192 P. 1062, 193 P. 927; *Shuman v. Dolan*, 24 S. D. 32, 123 N. W. 72; *State v. Wiley*, 106 S. C. 437, 91 S. E. 382; *Webster v. Ek*, 62 N. D. 44, 241 N. W. 503; and *Houston, etc., Railway Co. v. Forsyth*, 49 Tex. 171. That in this state in making its ruling on a motion for a new trial the trial court should have considered the distinction to which the plaintiff points will be freely conceded. There is nothing in the record showing that it did not do so. But if after doing so in the instant case the trial court ruled against the offer, we think it may not properly be said that such ruling was therefore an abuse of discretion. In any contested case the respective witnesses purport to state the facts as they saw and heard them. To carry the contention of the plaintiff out to its full length would be to impose on the trial court the duty of ascertaining whether the witnesses to produce the newly discovered evidence were more disinterested, saw with better eyes or from a better viewpoint, or heard from a better position or with better ears. But such is not the rule defined by the courts of this state. Evidence solely tending to contradict a witness who testified at the trial falls within the rule, *People v. Weber*, 149 Cal. 325, 350, 86 P. 671; *Rath v. Bankston*, 101 Cal. App. 274, 288, 281 P. 1081; evidence to be given along the same general lines testified to by witnesses who testified at the trial also falls within the rule, *Patterson v. San Francisco, etc., Ry. Co.*, 147 Cal. 178, 186, 81 P. 531; *Proctor v. Smith*, 214 Cal. 227, 234, 4 P.(2d) 773. If a litigant desires that his case should be presented on the best and soundest evidence to be had, he should see to that before going to trial and during the trial. A failure to do so is not, standing alone, grounds on which to base a motion for a new trial.

In the defendant's brief the point was made that the record does not show that the plaintiff served and filed a notice of intention to move for a new trial. In response the plaintiff served and filed a motion to augment the record. While the original record is not a model, we think it may not be said it is insufficient to present the points made

by the plaintiff, and we have treated it accordingly. Therefore the motion to augment is denied.

For the reasons hereinabove stated, the judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



6 Cal.App.2d 322

CATELLA v. NEGRO.

Civ. 9704.

District Court of Appeal, Second District,
Division 2, California.

April 20, 1935.

Hearing Denied by Supreme Court
June 16, 1935.

Appeal and error ☞ 1010(1)

Findings of trial court based on substantial evidence are conclusive on appeal.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Vito Catella against Fernando Negro. Judgment for plaintiff, and defendant appeals.

Affirmed.

D. Joseph Coyne, of Los Angeles, for appellant.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action upon a promissory note. The promissory note in question was duly executed in favor of Mrs. Vita Negro Arseno, as payee. Shortly before her death, she assigned the note in writing to her brother, the plaintiff herein, and thereafter the note was in the possession of the plaintiff. After the death of the original payee, her husband, who did not have possession of the note, assigned said note to the wife of defendant.

Several defenses were presented by the defendant to the prima facie case made by the plaintiff: That the original payee was incompetent and unable to understand the character of the transaction at the time of her assignment; that said assignment was

without consideration; and that there was constructive fraud in procuring said assignment. Defendant also claimed that the note was the community property of Mr. Arseno and his deceased wife, and that the latter could not make the assignment without the consent of her husband, and that by reason of the later assignment of said note by the surviving husband to defendant's wife the latter and not the plaintiff was the owner of the note. It is sufficient to say that the trial court found against the defendant on all of these issues, and the findings are supported by substantial evidence. This is just another case which is presented to this court on appeal as if this court would try the case *de novo*, the appellant forgetting that the trial court is the fact finder and that under the circumstances of this case this court will not concern itself with the evidence except to see if there is any substantial evidence to support the findings.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



6 Cal.App.2d 142

WEINER et al. v. MIZUTA et al.
Civ. 9432.

District Court of Appeal, Second District,
Division 2, California.
April 12, 1935.

Hearing Denied by Supreme Court
June 10, 1935.

1. Trial ☞133(6)

In automobile accident case, where defendant told plaintiff he saw him too late, and then directed plaintiff to go to doctor with injured wife and stated that "we are insured," reversal could not be had on ground of improper introduction of insurance question, since words "we are insured" were inextricable part of an admission against interest, and court, at defendant's request, instructed jury to disregard testimony.

2. Appeal and error ☞1068(4)

In automobile accident case, instruction permitting jury to award money to husband and wife for same item of damage, if error, was cured by elimination of all damages awarded husband.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Etta Weiner and another against D. Mizuta and another. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants.

Kemper Campbell, of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiffs for damages received in an automobile accident. Appellants base their claim for reversal almost entirely upon the contention that the trial court erred in denying defendants' motion for a mistrial based upon the improper introduction of "the insurance question."

[1] The following is a short résumé of what occurred at the trial in this respect. The plaintiff testified upon direct examination: "I asked Mr. Mizuta how it was that he didn't see my car parked there, and his answer to me was, 'I am sorry, I seen you too late.'" The parties then pulled their cars over to the east side of the street and immediately continued with the conversation. "A. * * * I told him that my wife was hurt. Q. What did he say? A. His reply was, 'You go get any doctor,' or 'your doctor, that we are insured, and I hope the lady will be better.' * * * Q. Do you recall any further conversation that you had at that time on the east side of the street immediately after you arrived there with Mr. Mizuta. * * * A. He said to me, 'I am sorry. I seen you too late.' Mr. Betts: We object to that as already asked and answered. Q. He said that in addition to what you have already testified to? A. Yes, sir. Q. (By the Court): You mean while you were on the east side of Wall Street, while you were on the sidewalk? A. Yes, sir."

Appellants say in their closing brief, "We * * * admit that as the law now exists it establishes a right upon the part of a plaintiff to repeat to the jury conversations which may be taken to be admissions of liability, and that there can be no error predicated upon the fact that such conversations include a reference to insurance. May we, therefore, in fairness to ourselves and to this court, admit that if the words referred to by appel-

lants were joined together, they could be interpreted to be an admission against interest and there could be no error predicated upon them." In making this contention about the improper intrusion of the insurance question, the appellants seem to have overlooked the fact that the second time the words, "I am sorry, I seen you too late," were said by Mr. Mizuta, they were said immediately at the time he said, "You go get any doctor," or "your doctor, that we are insured, and I hope the lady will be better." The words "we are insured" were not only a part of an admission against interest, but an inextricable part thereof. Furthermore, at the time the above incidents occurred, the following transpired: "Mr. Betts: I assign the statement as error and ask the court to grant a mistrial, and in lieu thereof, in the event the motion is denied, to instruct the jury to entirely disregard the statement of the witness, and to further instruct the jury that there is no insurance company a party to this suit. The Court: The motions will be denied. I will instruct the jury to pay no attention to that testimony. I will further instruct the jury that no insurance company is a party to this suit." It is apparent, therefore, that the record would not justify a reversal of the judgment on this point.

[2] Appellants next contend that prejudicial error was committed by respondents' attorney in the argument to the jury. Here again we see no merit in the contention. Appellants complain that one of the instructions "permitted the jury to award monies to each of plaintiffs for the same item of damage." We see no merit in this contention, but in any event the modification of the judgment hereinafter directed, which eliminates all damages awarded to the husband, disposes of this point. Appellants complain of the amount allowed in favor of the husband (in the sum of \$250) because it includes the loss of the "comfort, society and companionship of his wife, * * * for the loss of which there is no California cause of action." Respondents reply that the question is one of first impression in California, but they are willing to have the judgment reduced from \$5,250 to \$5,000, thus taking out of it all damages awarded the husband. The judgment is so modified, costs to be assessed against appellants.

Judgment affirmed as modified.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

FREEMAN et al. v. RIVER FARMS CO. OF CALIFORNIA et al.*

Civ. 9582.

District Court of Appeal, First District,
Division 2, California.

April 23, 1935.

Rehearing Denied May 23, 1935.

Hearing Granted by Supreme Court
June 21, 1935.

1. Frauds, statute of § 1489(1)

Where plaintiffs performed work for levee district for about \$7,000 payable in warrants, defendant landowner's oral agreement to purchase such warrants at 5 per cent. discount held unenforceable under statute of frauds, where defendant had never received or accepted any of such warrants and paid no part of purchase price (Civ. Code, § 1624, subd. 4).

2. Frauds, statute of § 144

Where plaintiffs performed work for levee district for about \$7,000 payable in warrants, defendant landowner who allegedly agreed orally to purchase such warrants held not estopped to set up statute of frauds; there being nothing to indicate representation by defendant of intention to stand by alleged agreement and not to invoke statute, nor that plaintiffs had incurred injury or loss (Civ. Code, § 1624, subd. 4).

3. Frauds, statute of § 129(1)

Performance by one party of alleged agreement does not necessarily remove case from operation of statute of frauds, and ordinarily only such performance as is specified in statute itself is sufficient to do so (Civ. Code, § 1624, subd. 4).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by George R. Freeman and another, copartners doing business under the firm name and style of Freeman & Murch, against the River Farms Company of California and others. Judgment for plaintiffs, and defendant named appeals.

Reversed.

John E. Truman, of San Francisco, for appellants.

George R. Freeman, of Willows, for respondents.

John L. McNab and Robert Littler, both of San Francisco, amici curiæ, in support of contentions of appellant James S. McCandless and McCandless & Co., Limited.

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 55 P.2d 199.

SPENCE, Justice.

Plaintiffs brought this action upon a contract alleged to have been made by the defendant company. Upon a trial by the court sitting without a jury, plaintiffs had judgment, and from said judgment defendant appeals.

The defendant company was the owner of certain land in the Sacramento River West-side Levee District. In August, 1930, plaintiffs entered into a contract with the district whereby they agreed to do certain levee work for the sum of approximately \$7,000. The contract price was to be paid in warrants of the district. Said work was completed and the warrants were issued and delivered to plaintiffs. Plaintiffs sought by this action to enforce an alleged agreement on the part of the defendant company to purchase said warrants at a discount of 5 per cent.

It was alleged in the complaint that the defendant company had agreed with the district to purchase said warrants at such discount and that said agreement was made expressly for the benefit of plaintiffs. Upon the trial plaintiffs were permitted to amend their complaint and allege that the defendant company had agreed with plaintiffs to purchase said warrants. Plaintiffs' claims were based upon an alleged telephone conversation with Dr. E. L. Dow, who was then president of the defendant company. Dr. Dow died in December, 1930, and prior to the commencement of this action. The defendant company took the position that Dr. Dow did not make the alleged agreement, that if Dr. Dow purported to make such an agreement on behalf of the defendant company, he had no authority to do so, and also that the alleged oral agreement was unenforceable under the statute of frauds. The trial court nevertheless found in favor of plaintiffs, and entered a judgment awarding plaintiffs the full alleged contract price and providing for the delivery of the warrants concurrently with the payment of the judgment.

[1] Appellant seeks a reversal of the judgment upon several grounds, but we deem it necessary to consider only one of them. Appellant contends that the alleged agreement was unenforceable by reason of the statute of frauds and in our opinion this contention must be sustained. At the time the alleged agreement was made, section 1624, subd. 4, of the Civil Code was the Code section governing such agreements. While the provisions governing such agreements were incorporated into section 1624a in 1931 (St. 1931, p. 2261), the last-mentioned section is sub-

stantially the same for the purposes of this discussion as the section in effect prior to 1931. Giving full effect to the testimony adduced by respondents, it showed an oral agreement to purchase warrants for the sum of approximately \$7,000. It is conceded that appellant had never received or accepted any of said warrants and had not paid any part of the purchase price, and we are therefore of the opinion that said agreement was unenforceable under the terms of the statute.

[2, 3] Respondents contend that appellant is estopped to set up the statute of frauds as a defense, but we have found no authority to support respondents' contention under the facts presented here. Respondents take the position that as they had performed the work under their contract with the levee district, appellant is estopped from relying upon the statute. We believe this position to be untenable. Assuming, as do respondents, that under their alleged agreement with appellant, respondents agreed to do said work for the levee district (which assumption appears to be contrary to the fact), performance by one party of an alleged agreement does not always remove the case from the operation of the statute and ordinarily only such performance as is specified in the statute itself is sufficient for that purpose. *O'Brien v. O'Brien*, 197 Cal. 577, 241 P. 861; *Baker v. Bouchard*, 122 Cal. App. 708, 10 P.(2d) 468; *Forbes v. City of Los Angeles*, 101 Cal. App. 781, 282 P. 523; *Trout v. Ogilvie*, 41 Cal. App. 167, 182 P. 333; *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 131 P. 1062. "Furthermore, it is clear that, in order to take a contract out of the operation of the statute of frauds, the acts relied upon as establishing part performance must be unequivocally referable to the contract. If such acts, though in truth done in performance of a contract, admit of an explanation without supposing a contract, they do not generally constitute such part performance as to remove the case from the operation of the statute." *Baker v. Bouchard*, supra, 122 Cal. App. page 711, 10 P.(2d) 468, 469; see, also, *O'Brien v. O'Brien*, supra; *Trout v. Ogilvie*, supra.

In order to establish an estoppel, proof must be made of factors other than mere part performance. The rule as set forth in *Browne on Statute of Frauds* (5th Ed.) § 457a, has been cited with approval in several cases. *Zellner v. Wassman*, 184 Cal. 80, 87, 193 P. 84; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; *Keller v. Gerber*, 49 Cal. App. 515, 523, 193 P. 809. Said rule is as follows: "A plaintiff, * *

must be able to show clearly not only the terms of the contract, but also such acts and conduct of the defendant as the court could hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur 'an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense.'" The evidence here fell far short of establishing an estoppel. It is sufficient to state, first, that there was nothing to indicate a representation on the part of appellant that it proposed to stand by the alleged agreement and not avail itself of the statute, and, second, that it did not appear that respondents had done anything which would cause them to incur injury or loss of any kind. In short, we find no pleading, proof, or findings of fact giving rise to an estoppel, and therefore conclude that respondent may not urge the doctrine of estoppel in support of the judgment.

The judgment is reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



6 Cal.App.2d 194

LACK v. AKINS et al.

Civ. 8605.

District Court of Appeal, Second District,
Division 1, California.

April 15, 1935.

Bills and notes Ⓒ443(3)

Where maker and guarantors of note payable to bank obtained money in the amount represented by such note from individual to whom bank later assigned the note, assignee, as real owner of note, held entitled to recover thereon.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by F. S. Lack against William Akins, D. M. Cuthbert, R. E. Clapp, and others. From a judgment for plaintiff, defendants Cuthbert and Clapp appeal.

Affirmed.

W. A. Martin and Leland S. Bower, both of Los Angeles, for appellants.

John L. Schaefer, of Los Angeles, for respondent.

YORK, Justice.

Appellants' statement of the questions involved in this appeal is as follows:

"1. The maker and guarantors of a promissory note delivered it to a party, to borrow from the named payee, the money therein recited, to pay a debt to a third party, and the party receiving it, being neither maker, endorser, nor guarantor thereof, but a record stranger thereto, borrowed nothing thereon, but without the knowledge, consent or request of the maker or guarantors, paid said third party from his personal funds, and left the note with the payee for collection from the maker and guarantors, and never advised them that he had paid the debt, or that the loan was not procured from the payee; subsequently, and after maturity of said note, taking an assignment thereof from payee, without any consideration; Query—Can assignee recover in an action upon said note against the maker or guarantors?

"2. Under above status, can assignee recover in such action, when supplemented by either of the following additional facts: (a) When the assignee was primarily jointly liable for said obligation to said third party; and, or (b) Was a stockholder in the corporation maker; and, or (c) when he had stated to the maker and guarantors, prior to, and/or, at the time of the making and guaranty of it, that he would pay it and hold them harmless thereon, which was the procuring cause of them so executing said note."

It will be noted that the "and/or" is in the quotation and is not this court's language.

We think that the questions involved, as stated by appellants, are answered completely by the fact that this is an action for money due on a promissory note, brought by plaintiff, assignee of the payee, against the guarantors and endorsers of the note. The undisputed evidence shows that the defendants and the Paramount Motors Corporation of the Pacific, a corporation, maker of the note, were anxious to raise the amount of money named in the note, and that plaintiff paid the money by drawing his check on the bank, named payee of the note, and that he (the plaintiff) was the real owner of the note at all times, although it may have been held as security by

said association, either as security for an obligation of the plaintiff, or as trustee for the plaintiff, or possibly both, but this would not, as we view the matter, make any change in the situation. It seems to be a very simple transaction. The defendants and the Paramount Motors Corporation of the Pacific were desirous of obtaining the money for a definite purpose, the money was obtained by the plaintiff for them, and they actually used it for such purpose, and two of the defendants are now appealing from a judgment for the balance unpaid of that same money. Therefore, as we view the situation, it would make no difference as to the judgment herein whether the plaintiff stated in detail the exact conditions under which he secured the money (even if in writing—which it was not), so long as the money was actually secured and used in accordance with the desires of all of the defendants.

The endorsement signed by defendants is as follows:

"For Value Received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof, and I hereby waive presentation, demand, protest, notice of protest and notice of nonpayment,

"[Signed] D. M. Cuthbert,
"[Signed] William Akins,
"[Signed] N. E. Bliss,
"[Signed] S. S. Smith,
"[Signed] L. W. Coffee,
"[Signed] R. E. Clapp."

The answer of defendants denied that any valuable consideration for the note was received by the Paramount Motors Corporation of the Pacific; they denied endorsements by the defendants in an ambiguous way, using "and/or," and as a further and separate defense, they allege the execution and delivery of the endorsement without any consideration or value passing to the defendants Cuthbert, Akins, Bliss, or either of them. They also allege the obligation of the plaintiff and defendant Clapp, and that the Paramount Motors Corporation of the Pacific executed the note, and that each and every of the endorsers and guarantors of the said note assumed the position only of the liability of an accommodation maker and endorser respectively. They also allege certain agreements between the parties (with no allegation or proof that any of these agreements set up were in writing) which defendants claim would cancel the written instrument as to such appellants. They then allege that the defendants paid the note in ac-

cordance with these oral agreements, and allege that the assignment to the plaintiff by the bank was of no force and effect.

However, the evidence, as shown by the transcript, does not support any of the defenses as set forth in the answer, and there is sufficient evidence in the record to support each and every finding made by the trial court. There was really nothing complicated about the transaction itself, as shown by the record. It was merely the raising of certain moneys which Paramount Motors Corporation of the Pacific had to pay to the city of Azusa in order to obtain certain concessions and in order to obtain certain reductions in amounts due from it. It was to the advantage of appellants to have this money secured. The money that was turned over to the Paramount Motors Corporation of the Pacific, or on its order or at its request, was either the money of the plaintiff or money obtained by him in such a way that it became his money before it was so turned over. This money evidenced by this note sued on was never repaid to any one, and plaintiff is the owner of this note.

The judgment is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.



6 Cal.App.2d 175

SCHROEDER et al. v. DICKINSON & GILLESPIE CORPORATION et al.

Civ. 9668.

District Court of Appeal, Second District,
Division 2, California.

April 13, 1935.

Hearing Denied by Supreme Court
June 10, 1935.

1. Principal and agent ¶156

Vendor held not liable for alleged false representations made by vendor's agents as to improvements that would be made on property without cost to purchasers, where contract of sale provided that purchasers were liable for assessments for improvements, and that vendor was not liable for any representations made by selling agent that were not contained in the contract.

2. Principal and agent ☞156

Under contract containing clause relieving vendor of liability because of any representations made by selling agent that were not contained in contract, purchasers could not maintain action against vendor for alleged false representations made by vendor's agents, where vendor did not participate in and had no knowledge of representations.

3. Limitation of actions ☞100(6)

Purchasers' action against vendor for recovery of money after rescission of contract because of alleged false representations of vendor's agents *held* barred, where purchasers had discovered alleged fraud prior to three years before commencement of action.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Mayme F. Schroeder and another against the Dickinson & Gillespie Corporation, the Security-First National Bank of Los Angeles, and others. From a judgment of nonsuit in favor of the Security-First National Bank of Los Angeles, the plaintiffs appeal.

Affirmed.

Edward W. Lloyd, of Los Angeles, for appellants.

Victor Ford Collins, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by the plaintiffs from a judgment of nonsuit in favor of the defendant, Security-First National Bank of Los Angeles, in an action based on alleged false representations made by the agents of the bank's predecessor in interest. For convenience no distinction will be made hereafter in this opinion between the bank and the bank's predecessor in interest. Certain acreage, known as Los Altos Park, located in the Hollywood Hills and owned by the A. B. Crist Company, was conveyed to the bank, as trustee, for the purposes of subdivision and sales. The Crist Company was the beneficiary of the trust, and the Dickinson & Gillespie Corporation was appointed the selling agents. The improvements on the property had not been put in, but the bank required a guaranty from the Crist Company that the improvements would be put in within certain periods of time therein mentioned.

[1] In October, 1926, Mr. Gammon, who was named as a defendant, but was not served

and did not appear, and who was an agent of the Dickinson & Gillespie Corporation, and, as such, a subagent of the bank, met the plaintiffs and interested them in purchasing one of the lots in the tract, and this they finally did. It was alleged in the complaint and it was the contention of the plaintiffs at the trial that prior to the execution of the agreement for the purchase of the lot, Mr. Gammon and an agent named Solomonson falsely and fraudulently represented to plaintiffs: (1) That properly graded concrete streets, curbs, and all improvements usual for a high-class subdivision soon would be placed upon the subdivision; (2) without any expense of any nature whatsoever to the plaintiffs; (3) that all of the money necessary for the purpose was already up and on deposit with the said trustee and was completely provided for; (4) that plaintiffs would be well protected in this connection by virtue of the fact that said trustee was handling and responsible for said funds and improvements; and (5) that said lot was worth \$6,000 or would be. The latter, number (5), is not a representation of an existing fact, but a mere opinion offered in puffing the property for sale. The plaintiffs testified at the trial that they signed the agreement without reading it, but they admitted and admit in the briefs that they received their copy of the written contract within approximately two months after it was executed and that soon thereafter they received a street improvement guaranty signed by the said Crist Company. Under the terms of this contract, which was in the possession of the plaintiffs from that time on, the bank was not in fact contractually responsible for the improvements, either by a direct promise or by a guaranty. On the contrary, the contract provided that as between the bank and the plaintiffs the plaintiffs were liable for assessments for said improvements. It also contained a provision that the bank was not liable for any inducement, promise, representation, or agreement not set forth therein. The contract was signed by the plaintiffs on October 11, 1926. This action was filed on September 11, 1931, after the depression was long under way and almost five years after the contract was entered into. A trial of the action proceeded for approximately three weeks, which time was consumed in the presentation of the plaintiffs' evidence. The plaintiffs having rested, each of the defendants moved for a nonsuit. The motion of the bank for nonsuit was granted, but the motion of the other defendants was

denied. As already stated, it is from this judgment of nonsuit in favor of the bank that the appeal is taken.

We have carefully read the briefs, including the plaintiffs' opening brief, covering 172 pages, and have studied the record, including the reporter's transcript, covering 819 pages. We reach the conclusion that the judgment of nonsuit was properly granted, and that there is no merit in the appeal. Following *Speck v. Wylie*, 1 Cal.(2d) 625, 36 P.(2d) 618, 95 A. L. R. 760, and *Haley v. Santa Fé Land*, etc. (Cal. App.) 42 P.(2d) 1078.

Judgment affirmed.

WILLIS, Justice pro tem. (concurring).

I concur.

The complaint herein consists of three causes of action: First, for the recovery of money after rescission of a contract for sale of real property on the ground of false representations of the seller's agents; second, a cause of action for damages for fraud and deceit in the making of such false representations; third, the common count for money had and received predicated on the implied contract arising as a result of rescission.

[2, 3] The contract in evidence shows that it contained a cautionary clause relieving the principal of liability because of any representations made by any selling agent or other person other than is contained in the contract, and the evidence shows that the representations alleged to be fraudulent were made by agents and codefendants of the seller, the respondent bank, that the bank was innocent of any participation in or knowledge of the alleged false representations, and that the bank executed the contract of sale to appellants. Under the recent decision in the case of *Speck v. Wylie*, 1 Cal.(2d) 625, 36 P.(2d) 618, 95 A. L. R. 760, it is held that under such circumstances, no cause of action against the innocent principal may lie for damages for fraud, but that the sole remedy is by timely rescission and an action to recover moneys paid upon the contract. It therefore appears that the motion for a nonsuit was properly granted on the second cause of action under this authority. As to the statute of limitations pleaded to the first and third causes of action, it is sufficient to say that the evidence clearly reveals that discovery, as a matter of law, was made by the plaintiffs of the alleged fraud prior to the three years before the commencement of this

action. Therefore, the motion for a nonsuit as to the first and third causes of action was properly granted, it being patent that the third cause or common count is nothing but a repetition of the cause of action set forth in the first count.

I concur in both opinions: STEPHENS, P. J.



6 Cal.App.2d 173

FAIR v. ASCHENBRENNER et al.

Civ. 9496.

District Court of Appeal, Second District,
Division 2, California.

April 13, 1935.

1. New trial ☞71

Trial court must set verdict aside and grant new trial where it is convinced that verdict is clearly against weight of evidence or that evidence preponderates against verdict, notwithstanding there is substantial conflict in evidence.

2. Appeal and error ☞979(2)

Action of trial court in setting aside verdict as against weight of evidence or preponderance of evidence and granting of new trial will not be disturbed except where abuse of discretion appears or it is apparent that trial court proceeded upon erroneous hypothesis.

3. New trial ☞70

Setting aside verdict for pedestrian and granting new trial to second motorist, who was alleged to have hit pedestrian as she was crossing intersection at crosswalk where she had statutory right of way after she had been hit by first motorist, held not abuse of discretion under evidence.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Thelma Fair against Charles Aschenbrenner and Helen Aschenbrenner, Dodwell & Company, Limited, and P. S. Newcomb. From an order granting a new trial to Dodwell & Company, Limited, and P. S. Newcomb, the plaintiff appeals.

Order affirmed.

Paul Blackwood and Bingham Gray, both of Los Angeles, for appellant.

Paul Nourse, of Los Angeles, for respondents.

CRAIL, Justice.

This appeal is from an order granting a new trial to defendants Dodwell & Co., Limited, and P. S. Newcomb, after a verdict for the plaintiff (appellant). The order granting a new trial was made upon the ground of insufficiency of the evidence.

The plaintiff says, "The sole question presented is fairly stated on the first page of this brief" as follows: "Where the facts are undisputed that plaintiff who was proceeding across an intersection at a crosswalk where she had the right of way under the Motor Vehicle Act [St. 1923, p. 517, as amended] and was struck in succession by the cars driven by defendants, into the crosswalk, in violation of plaintiff's statutory right of way, is the trial court justified in granting a new trial to the defendant whose car was the second to strike plaintiff, on the theory that the negligence of the driver of the first car was the sole, proximate cause of the accident?"

The defendants who are respondents contend, however (and there is some substantial evidence tending to support their claim), that the plaintiff was a pedestrian crossing Sunset boulevard from south to north in a marked crosswalk of an intersection; that the defendants Helen Aschenbrenner and P. S. Newcomb were driving their respective cars west on Sunset boulevard; that the Aschenbrenner car was near the center of the street and was to the rear of but going much faster than the Newcomb car which was over near the right-hand curb; that when defendant Newcomb first saw plaintiff she was standing still in the marked crosswalk a little south of the center of the boulevard and she was approximately at the same place when he went through the pedestrian zone; that plaintiff was struck by the right front fender of the Aschenbrenner car which was going at a high speed, and was thrown some 20 or 30 feet through the air and struck the rear of the Newcomb car on the left-hand side, after it had entirely cleared the crosswalk.

It is thus apparent that the facts are *not undisputed*. Plaintiff claims that the Newcomb car struck the plaintiff, whereas the said defendants claim that the plaintiff struck the Newcomb car, and that this occurred after the Newcomb car was entirely clear of the crosswalk. It may well be that the trial court believed that the plaintiff received all

her injuries from the terrific impact with the Aschenbrenner car, or it may be that the trial court believed that the defendants' car was no more a contributing cause of the plaintiff's injuries than the inanimate pavement, or it may be that it believed that the defendant Newcomb had in no way interfered with the plaintiff's right of way to the crosswalk and was not guilty of negligence per se.

[1-3] When the trial court is dissatisfied with the verdict and is convinced that it is clearly against the weight of the evidence or that the evidence preponderates against said decision, it is its province and duty to set the verdict aside and grant a new trial on that ground, notwithstanding there is a substantial conflict in the evidence. See cases cited in 20 Cal. Jur. 114. "The exercise of its discretion [in this regard] is not error of law which may be disturbed upon appeal except in extreme cases as where an abuse of discretion appears or where it is apparent that the lower court proceeded upon an erroneous hypothesis." *Idem*. We see no merit in appellant's contention.

Order affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



LEVY v. DREW, *

Civ. 1353.

District Court of Appeal, Fourth District,
California.

April 17, 1935.

1. Judgment $\Leftrightarrow$ 401

As respects right of bankruptcy trustee to recover from judgment creditor money obtained under execution on judgment which was subsequently vacated, trust for money so obtained did not come into being until order setting aside judgment became final, after which time law imposed upon judgment creditor obligation of returning money to bankrupt (Bankr. Act, § 68a, 11 USCA § 108 (a); Civ. Code, §§ 2215, 2217, 2223).

2. Trusts $\Leftrightarrow$ 231(1)

Trustee cannot be permitted to profit by his own wrong.

3. Appeal and error ⇨1208(1)

Money collected by judgment creditor under judgment which is subsequently reversed should be returned (Civ. Code, §§ 2215, 2217, 2223).

4. Trusts ⇨65

Where money is paid by bankrupt debtor to his creditor for specific purpose, and is not used for that purpose, creditor becomes a trustee and holds money in trust.

5. Bankruptcy ⇨154

In suit by bankruptcy trustee against judgment creditor who obtained money under execution on judgment which was subsequently vacated, judgment creditor *held* not entitled to offset his claim for services rendered to bankrupt on ground that collection was made by him more than four months prior to bankruptcy, since judgment creditor held money as trustee and not as creditor when judgment was vacated (Bankr. Act, § 68a, 11 USCA § 108(a); Civ. Code, §§ 2215, 2217, 2223).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

On petition for rehearing.

Petition for rehearing denied.

For prior opinion, see 42 P.(2d) 1040.

Farnsworth, Burke & Maddox, of Visalia (James K. Abercrombie, of Visalia, of counsel), for appellant.

F. C. Huebner and Arthur H. Drew, both of Fresno (W. H. Stammer, of Fresno, of counsel), for respondent.

MARKS, Justice.

In his petition for rehearing, defendant stoutly maintains that we have fallen into error in concluding that he could not offset his bill against the California Olive Growers, Inc., against the money collected by him on the judgment against that corporation. His argument is based upon the fact that the collection was made by him more than four months prior to the bankruptcy of his debtor and the provisions of section 68 of the Bankruptcy Act (11 USCA § 108), which contains the following: "Set-offs and counterclaims. (a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

[1, 2] As a basis for his argument, defendant urges that he did not become trustee of

the funds received by him, and if he did, the trust terminated upon the application of the funds to the payment of the judgment which evidenced the debt. He further argues that as there was no trust proven, because there was no attempt to trace the res of the trust, and as the res of the trust was not proven and identified, the evidence was not sufficient to establish a trust. The vice of this argument lies in the fact that this action need not be construed as one to recover the identical dollars paid defendant under the execution. The trust did not come into being until the order setting aside the judgment became final. *Garrett v. Jensen*, 44 Cal. App. 99, 186 P. 156. Up to that time the possession of the money by defendant was lawful. After that time the law imposed upon him the obligation of returning the money to the California Olive Growers, Inc. When his judgment was vacated, it left defendant with an unliquidated demand for the reasonable value of his services, the amount of which was then in dispute and litigation between the parties. The argument that the beneficiary must identify the res of the trust in the possession of the trustee before he can establish the existence of the trust needs only its statement to demonstrate its fallacy. If money forms the corpus of the trust, an unfaithful trustee would need only to mingle the trust funds with his own to defeat the trust, if defendant's argument were sound. A trustee cannot be permitted to profit by his own wrong.

"A trust is either: 1. Voluntary; or, 2. Involuntary." Section 2215, Civ. Code. "An involuntary trust is one which is created by operation of law." Section 2217, Civ. Code. "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2223, Civ. Code.

Defendant rightfully came into possession of the money here in question. He lost the right of possession and thereafter his detention of the money became unlawful. Under these circumstances, he should be held to be a trustee holding the money for the benefit of the rightful owner after his possession was rendered unlawful by the vacation of the judgment. *Garrett v. Jensen*, *supra*; *Kreutz v. Livingston*, 15 Cal. 344; *Greiner v. Greiner*, 58 Cal. 115.

[3, 4] Where money is collected by a judgment creditor under a judgment which is subsequently reversed, it should be returned. *Bank of the United States v. Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299. Where money

is paid by a bankrupt debtor to his creditor for a specific purpose, and is not used for that purpose, the creditor becomes a trustee and holds the money in trust. *Lehigh Valley Coal Co. v. Maguire* (C. C. A.) 251 F. 581. In this case it was said: "Set-offs are authorized only in cases of 'mutual debts or mutual credits.' Bankruptcy Act, July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1916, § 9652 [11 USCA § 108]). This does not enlarge or change—it only recognizes—what under general law may constitute set-offs. * * * But where a creditor receives money from his debtor, with instructions not to apply it on the debt, but to hold or use it for a specific purpose, the right of set-off does not exist, because the creditor has become, not the debtor of his debtor, but the trustee of a specific trust."

In *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769, and *Alvord v. Ryan* (C. C. A.) 212 F. 83, it was held that the right of set-off under section 68 of the Bankruptcy Act arises in the case of debtor and creditor, and not in the case where the creditor holds money of the debtor as trustee.

[5] As defendant held the money as trustee and not as creditor of the California Olive Growers, Inc., he could not offset his bill against that corporation against the money he held and thereby gain a preference over other creditors. His obligation to return the money could be enforced by suit of the trustee of the estate of the bankrupt corporation.

The petition for rehearing is denied.

We concur: BARNARD, P. J.; JENNINGS, J.



6 Cal.App.2d 256

BROOME v. KERN VALLEY PACKING

CO. et al.

Civ. 1354.

District Court of Appeal, Fourth District,
California.

April 17, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Automobiles ⇨244(36)

In guest's action for injury sustained when automobile in which guest was riding collided with automobile operated by another

with owner's permission, evidence held to support finding that collision was caused by operator's negligence so as to render owner liable to guest (Civ. Code, § 1714¼).

2. Trial ⇨343

Failure to find against one of two defendants is not a finding in favor of such defendant but is merely a failure to find on one of the issues.

3. Trial ⇨426

Any error involved in jury's failure to find on one of issues which relieves one of two defendants from liability will be treated as waived where other defendant does not ask that jury be directed to find on that issue.

4. Automobiles ⇨192(1)

Statutory liability of owner of automobile for injury resulting from negligence of person operating automobile with owner's permission may be secondary as between owner and such operator, but owner's liability is primary as between owner and party injured through operator's negligence, especially since statute provides that operator of automobile need not be made a defendant in all cases (Civ. Code, § 1714¼).

5. Execution ⇨18

Provision in statute imposing liability on owner of automobile for negligence of person operating automobile with owner's permission that on recovery of judgment by injured party recourse shall first be had against property of operator who has been served being for owner's benefit may be waived by owner and applies only where judgment is recovered against operator and owner (Civ. Code, § 1714¼).

6. Automobiles ⇨247

Where operator of automobile whose negligence caused injury to guest in another automobile was made defendant with owner and served with process in guest's action for damages, failure of jury to find against operator in finding owner liable did not excuse owner of statutory liability to guest (Civ. Code, § 1714¼).

7. Indemnity ⇨15(1)

Right of owner of automobile to be subrogated to rights of person injured through negligence of operator of owner's automobile held not limited to case where operator is not made a party defendant, but applies to any recovery under the statute, since owner's right of contribution does not rest on existence of judgment against operator in same action (Civ. Code, § 1714¼).

8. Indemnity ⇨15(1)

Under statute giving owner of automobile right of subrogation to rights of party in-

jured through negligence of operator of owner's automobile, where injured party recovers against owner, owner may bring an independent action against operator and owner is not limited to proceeding against property of operator on judgment entered in action by injured party against owner and operator (Civ. Code, § 1714¼).

9. Indemnity ⇨15(9½)

Where owner of automobile and person operating automobile with owner's consent are sued jointly by person injured through operator's negligence, owner has right to demand that jury be directed to pass on issue of operator's liability in order that owner may have recourse against operator's property, or owner may proceed under subrogation provision (Civ. Code, § 1714¼).

10. Indemnity ⇨15(9½)

Where owner of automobile and person operating automobile with owner's consent were sued jointly by person injured through operator's negligence, owner waived right against operator under recourse clause of statute imposing liability on owner, by failing to ask that jury be directed to also return verdict as to operator's liability, and owner was limited to right to bring independent action against operator under subrogation clause (Civ. Code, § 1714¼).

11. Automobiles ⇨200, 247

Parent signing minor's application for license to operate automobile becomes jointly and severally liable with minor and failure to find against minor in such case does not release parent from direct liability assumed under contract (Civ. Code, § 1714¼).

12. Damages ⇨132(2)

\$5,000 held not excessive to person sustaining fracture of fibula and oblique fracture of right tibia extending downward into ankle joint, loss of earnings, pain and suffering, disability of varying degree over period of eighteen months, in view of evidence of permanent injury.

Appeal from Superior Court, Kern County;
Wm. D. Dehy, Judge.

Action by Howard Broome against the Kern Valley Packing Company and another. From a judgment for plaintiff against named defendant only, named defendant appeals.

Affirmed.

Borton & Petrini, of Bakersfield, for appellant.

Brittan & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff was injured in a collision between an automobile in which he was riding as a guest and another automobile owned by the defendant corporation and driven by the individual defendant. The collision occurred on June 4, 1933, on a mountain road in Kern county. The defendant company had sent one of its employees, William V. Little, after a hundred head of cattle which it had purchased. He took with him two other employees of the company and his son Robert Little, all going in an automobile belonging to the company. The three men mounted three riding horses which had been sent up for the purpose and started to drive the cattle to the packing house, and Robert Little was directed by his father to bring back the automobile. On the way down he was sent back to look for some of the cattle which had left the herd. He drove back 10 miles, and while he was returning to the herd the collision in question occurred.

The complaint sets up two causes of action, the first based upon the theory that Robert Little was at the time acting as an agent of the other defendant, and the second alleging that he was driving the car with the permission of the owner, based upon section 1714¼ of the Civil Code. The jury returned a verdict for \$5,000 against the defendant corporation and rendered no verdict as to the defendant Robert Little. From the judgment entered, the defendant company alone has appealed.

[1] It is urged that the judgment cannot be sustained under either cause of action for the reason that the evidence is insufficient to sustain a finding of negligence on the part of the defendant driver. This is based upon the contention that the other car involved in the accident, while rounding a turn, skidded to its left side of the road and directly into the path of the appellant's car, and that the defendant Little, in order to avoid a collision, drove to his left side of the road at the same time the driver of the other car regained control thereof and pulled over to his right side. The two cars came together slightly to Little's left of the center of the road. Under the familiar imminent danger rule, it is argued that the defendant driver, observing an uncontrolled car approaching him, the course of which was beyond calculation, took every reasonable precaution to avoid a collision and may not be held to have been negligent.

While some of the evidence sustains this theory, other portions lead to a different con-

clusion. There is evidence that the other car skidded to its wrong side of the road about 200 feet back from the place where the accident occurred; that after proceeding from 30 to 40 feet on its wrong side this car was returned to its right side of the roadway; that at that time the appellant's car was about 250 feet away, and coming up a 2.8 per cent. grade; and that Little proceeded on his right-hand side of the road until he was within 30 feet of the point of the collision when he crossed to his left side of the road and directly into the path of the other car. Little testified that he saw the other car when the two cars were 180 feet apart although other evidence shows that this car should have been visible to him for a much greater distance. He also testified that the brakes on the appellant's car were only half efficient. Immediately after the accident, he stated to the driver of the other car that he thought he could get past him on the opposite side and that he could not stop or turn in 200 feet. Other evidence justifies the inference that the defendant driver was going too fast, that he was not paying sufficient attention to the road in front of him, and that he had ample opportunity to avoid the accident regardless of what had previously occurred. Although conflicting, the evidence is sufficient to support a finding of negligence on the part of the driver of the appellant's car.

While the appellant argues that the defendant driver was not acting as its agent at the time here in question, this point is raised indirectly and as a part of its main contention that the failure to bring in a verdict against the operator of a car who is driving the same with the permission of the owner voids a judgment rendered against the owner. Although we regard the evidence as sufficient to sustain a judgment based upon the first cause of action, it will be sufficient here to pass upon the other point which is particularly stressed.

The appellant argues that under section 1714½ of the Civil Code, imposing a liability upon the owner of a motor vehicle for injuries resulting from the negligence of one operating the car with his permission, the liability of such an owner is secondary, that a failure to find against the operator is virtually a finding in his favor, and that such a verdict is inconsistent, self-stultifying, and must be set aside.

[2, 3] It is well settled that a failure to find against one of two defendants is not a finding in favor of such defendant but is merely a failure to find on one of the issues. *Keller*

v. Smith, 130 Cal. App. 128, 19 P.(2d) 541; *Maberto v. Wolfe*, 106 Cal. App. 202, 289 P. 218; *Shippy v. Peninsula Rapid Transit Co.*, 97 Cal. App. 367, 275 P. 515; *Lloyd v. Boulevard Express*, 79 Cal. App. 406, 249 P. 837. And the general rule is that any error involved in such a failure is waived where the other defendant does not ask that the jury be directed to find on that issue. *Benson v. Southern Pacific Co.*, 177 Cal. 777, 171 P. 948; *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017; *Lloyd v. Boulevard Express*, *supra*. The question remains whether this particular statute has a different effect, in this regard.

[4] While the liability imposed by this section of the Code upon the owner of an automobile may be secondary as between such owner and the person operating the car with his permission, it is a primary and direct liability and not a secondary one in so far as the injured party is concerned. It would seem that the main purpose of this section is to make such an owner directly responsible to a person injured through the negligence of an operator driving the car with the owner's permission, although the section also contains provisions calculated to protect the owner from the results of the operator's negligence in so far as this may be done between those parties without interfering with the rights of the injured party. After imposing a direct liability on the owner in favor of the injured person, certain provisions are added. One of these is to the effect that the operator shall be made a defendant when personal service may be made upon him in this state. The fact that the operator need not be made a defendant in all cases strongly indicates that the liability of the owner is primary and is not dependent upon whether or not the operator is made a defendant.

[5, 6] Coupled with the provision last referred to is a subproviso that, upon the recovery of a judgment, recourse shall first be had against the property of an operator who has been served. This must have been intended for the benefit of the owner and not only can it be waived by him but the same can only apply where a judgment is recovered both against the operator and the owner. If the injured party has complied with the terms of the section and has made the operator a defendant in the action and served him, the fact that no judgment is subsequently entered against the operator should not free the owner from the direct liability otherwise imposed by the statute. To give this benefit to the owner in case judgment is entered against

both is far from providing that a judgment against the owner alone, without mentioning the operator, is void and may not be enforced. To thus interpret this clause would, at least in part, nullify the subrogation clause which follows.

[7, 8] The next provision in the section is that in the event recovery is had against such an owner he shall be subrogated to the rights of the injured party and may himself recover from the operator the amount of any judgment which has been recovered against him. This clause is not limited to cases where the operator is not made a party but expressly applies to any recovery under the section. The right of contribution does not rest upon the existence of a judgment against the operator in the same action, but applies in the event a recovery is had against the owner and covers "any judgment and costs recovered against such owner." Where an operator is made a party to the action and no judgment is entered against him, this provision still gives the owner a right of subrogation and a right to "recover from such operator" the amount of any judgment entered against the owner. Under this provision an owner may bring an independent action in the nature of an action for contribution and it may not be said, as argued by the appellant, that the other remedy afforded by this section, that of proceeding against the property of the operator on the judgment entered in the original action, is a complete or exclusive remedy.

[9] While this section is not as clear as could be desired, we think it imposes a primary and direct liability upon such an owner, with secondary provisions to enable him to protect himself as against the operator of the car. Under these latter provisions the owner would have the right to demand that the jury be directed to pass upon the issue as to the liability of the operator, to the end that he may take advantage of the provision that recourse shall first be had against the property of the operator, or he may proceed under the other clause giving him the right of subrogation.

[10] Under the authorities above cited, we think the appellant here waived his right un-

der the "recourse" clause by failing to ask that the jury be sent back to complete its verdict and that he was then limited to his right under the "subrogation" clause.

[11] Where a parent signs a minor's application for a license, he becomes jointly and severally liable and a failure to find against a minor in such a case does not release the parent from the direct liability he has assumed by his contract. *Bosse v. Marye*, 80 Cal. App. 109, 250 P. 693. The effect of the section here in question is to create a joint and several liability, that of the owner being direct and primary as far as the injured party is concerned. There is no good reason why a failure to find against the one should release the other or why a judgment against the operator in such a case should be any more essential under the liability imposed by this statute than it is under the liability assumed by a parent in the other case.

Neither under general rules of law nor under the terms of this statute do we think this verdict was self-stultifying. We therefore hold that the liability of an owner of an automobile under the provisions of section 1714¼ of the Civil Code is primary and does not depend upon a judgment being entered against his codefendant who was operating the car with his permission.

[12] Some contention is made that the amount of the verdict is excessive. The respondent suffered an oblique fracture of the right tibia extending downward into the ankle joint. There was also a fracture of the fibula. There was evidence of loss of earnings, pain, and suffering, incapacity of a varying degree over a period of eighteen months, and some evidence of permanent injury. While the amount of the award may have been liberal, under the familiar rules, we cannot say that it was such as to indicate passion or prejudice on the part of the jury. *Goode v. Wills*, 135 Cal. App. 21, 26 P.(2d) 504; *Hellman v. Los Angeles Ry. Corporation*, 135 Cal. App. 627, 27 P.(2d) 946, 28 P.(2d) 384; *O'Brien v. Edens*, 125 Cal. App. 100, 13 P.(2d) 754.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

6 Cal.App.2d 396

ZEIGLER v. ROSENBERG.**Civ. 9558.**

District Court of Appeal, Second District,
Division 2, California.

April 23, 1935.

1. Money received ⇨17(1)

In action to recover money given defendant to purchase stock for plaintiff, complaint alleging defendant procured money from plaintiff under promise to let plaintiff make a large sum for him in a few days, and that no stock was purchased and that defendant retained plaintiff's money, *held* to state cause of action on common counts.

2. Limitation of actions ⇨177(1)

In action to recover money given defendant for purchase of stock for plaintiff, defendant's plea of limitations to action on common count was not available, where statute was not pleaded as bar and defendant stipulated for, and court granted, motion for diminution of record by striking portions of record setting up defense.

3. Appeal and error ⇨931(1)

In determining sufficiency of evidence to support judgment, reviewing court must view evidence in light most favorable to prevailing party below.

4. Interest ⇨46(1)

In action to recover money given to defendant to purchase stock for plaintiff, allowance of interest from time that specific demand was made for return of money *held* not error.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by Joseph Zeigler against Edward H. Rosenberg. Judgment for plaintiff, and defendant appeals.

Affirmed.

Erwin P. Werner and Hibbard & Klein-dienst, all of Los Angeles, for appellant.

A. Brigham Rose, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff against the defendant. The transaction between the parties occurred at the time the defendant and S. C. Lewis were in New York, where they had gone for the purpose of listing the preferred stock of the Julian Petroleum Corporation on the New York Stock Exchange. The plaintiff's theory

of the case at the trial was that the "defendant procured from the respondent \$10,000 under a promise that he was going to let him in on a big deal; that he was going to make a lot of money for him in a few days and would guarantee that he wouldn't lose any of the \$10,000. The word 'guarantee' as used by the defendant-appellant was used not in the legal sense, but in the sense of common usage frequently considered. * * * Respondent's unequivocal contention is that no stock was at any time in fact purchased, and that appellant pocketed and retained respondent's \$10,000." The findings of the trial court, while they include many unnecessary facts, make it clear that the defendant had taken \$10,000 from the plaintiff for the use and benefit of the plaintiff and that the latter was entitled to its return, with interest.

[1,2] The defendant's first contention is that the amended complaint does not state a cause of action. The complaint is in three counts. We are satisfied that a cause of action is stated on the common count, at least, and we will search no further in this regard. The defendant's next contention is that the cause of action on the common count is barred by the statute of limitations, but we find upon an inspection of the record that the statute was not pleaded as a bar to the cause of action on the common count. Indeed, we find that, when the defendant attempted to set up such a plea as a part of the record on appeal, a motion was made by the plaintiff to strike it on the ground that the same "was wholly synthetic, the same not having been incorporated in the answer actually filed by the defendant," and that upon the hearing of the motion counsel for the defendant stipulated for, and the court granted, the motion for diminution of the record by striking the portions of the record setting up said defense. Under the circumstances, this contention must necessarily be disregarded.

[3] Appellant's next contention is that there is no evidence whatsoever or proof of loss by the plaintiff. It is our duty, of course, to view the evidence in the light most favorable to the party who was successful in the trial court, and, having examined the evidence, keeping in mind this rule, we are satisfied that there is substantial evidence to support the findings of the trial court.

[4] The final contention of the defendant is that the court erred in allowing plaintiff interest on the \$10,000 from the time a specific

demand was made upon the defendant for the return of the money. There is no merit in this contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



6 Cal.App.2d 116

In re BURNETT'S ESTATE.*

BURNETT v. BURNETT et al.
Civ. 1379.

District Court of Appeal, Fourth District,
California.

April 11, 1935.

1. Executors and administrators ⇨314(12)

On appeal from decree of distribution, motion for diminution of record by adding thereto certified copy of petition to probate will should be granted, since petition for probate of will is proper part of record and would be of assistance to court in determining questions presented on appeal.

2. Executors and administrators ⇨314(12)

On appeal from decree of distribution, motion for diminution of record by adding thereto certificate of county clerk that no witnesses were sworn or testified at time of hearing of petition for distribution should be denied, since such certificate is no part of the record (Probate Code, § 1242).

3. Executors and administrators ⇨314(12)

On appeal from decree of distribution, motion for diminution of record by filing certificate of proof of will and facts found should be denied where there was no contest of the will or wills of deceased, since in such case certificate of proof of will and facts found was unnecessary.

4. Executors and administrators ⇨314(12)

On appeal from decree of distribution, motion for diminution of record by adding thereto certified copy of order correcting court's minutes and order admitting will to probate should be granted where such documents would assist appellate court in deciding questions presented.

5. Wills ⇨341

Where no petition was ever filed asking that alleged will be admitted to probate and no notice of any hearing for its probate was

given, but petition and notice concerned previous alleged wills only, order admitting alleged will to probate and decree of distribution based thereon held error (Code Civ. Proc. §§ 1298 to 1310).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding for a decree of distribution in the estate of W. I. Burnett, deceased, to which Lucena Burnett, G. C. Burnett, as executor of the last will and testament of W. I. Burnett, deceased, and G. C. Burnett, individually, and others, were parties. From a decree of distribution, Lucena Burnett appeals.

Reversed.

Robert B. Gaylord, of San Francisco, and W. R. Bailey, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondents.

MARKS, Justice.

This is an appeal from a decree of distribution rendered in the matter of the estate of W. I. Burnett, deceased. At the time of the argument each party made a motion for diminution of the record. It will be necessary to decide these motions first in order that we may determine what record is before us. It may not be out of place to state that the questions involved on this appeal are so novel that on our own motion we ordered up the entire original record so that we might satisfy ourselves on the facts from an inspection of the original files.

[1, 2] Appellant has moved for a diminution of the record on appeal by adding thereto a copy of the petition for probate of the will of deceased and a certificate of the county clerk of Tulare county which is evidently offered to establish the fact, if such it be, that no witnesses were sworn or testified at the time of the hearing of the petition for distribution. The petition for the probate of the will is a proper part of the record and is of value to us in deciding the questions presented. The certificate of the county clerk is no proper part of the record and we know of no law or rule of court permitting us to consider it. Section 1242, Probate Code. The motion for diminution of the record, by adding thereto this certificate of the county clerk, is denied. The motion for diminution of the record by adding thereto a duly certified copy of the petition to probate the will of deceased is granted, and the certified copy thereof presented with the motion is ordered filed and made a part of the record on appeal.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 70 P.2d 991.

Respondents have moved for a diminution by adding a certified copy of the certificate of proof of will and facts found, and a certified copy of an order of the court below made on March 4, 1935, correcting its minutes of September 3, 1929, and its order admitting the will of deceased to probate made and filed on the same day. The order presented here recites that it was made for the purpose of correcting the minutes and order of September 3, so as to make "the same conform to the order as actually made by the court in open court."

[3, 4] There was no contest of the will, or wills, of deceased. Under these circumstances a certificate of proof of will and facts found was unnecessary. In *re Estate of Henderson*, 196 Cal. 623, 238 P. 938. The motion for diminution of the record by the filing of this document is denied. The motion for diminution of the record by adding thereto a duly certified copy of the order of the court below correcting its minutes and its order admitting the will of deceased to probate is granted and the certified copy thereof presented with the motion is ordered filed and made part of the record on appeal. We find the contents of this order valuable to us in deciding the questions presented. The granting of this portion of this motion shall not be construed as holding that the minutes of the trial court form any proper part of this record on appeal or that the court below had authority *nunc pro tunc* to modify its formal order admitting the will to probate after the elapse of more than six years from the date of the original order sought to be corrected. These questions are not properly before us on this appeal. The question of the general power of the court to make such an order in a proper case cannot ordinarily be considered on an appeal from a decree of distribution. An order admitting a will to probate is of itself an appealable order (section 1240, Probate Code), and where not appealed from and where no contest is filed, it becomes final (In *re Estate of Moeller*, 199 Cal. 705, 251 P. 311), where the question of the jurisdiction of the court to make the order is not involved. *Monk v. Morgan*, 49 Cal. App. 154, 192 P. 1042.

[5] W. I. Burnett died on August 5, 1929, leaving property in Tulare county. On August 14, 1929, G. C. Burnett filed his petition seeking probate of what was described in the petition as "a will bearing date the 24th day of December, 1915, and a codicil thereto bearing date the 16th day of October, 1925, which your petitioner alleges to be the last will and testament and codicil thereto of said

decedent." The two documents thus described were filed on the same day and the clerk set the petition for hearing on August 26, 1929, and gave the notice of hearing in accordance with the requirements of section 1303 of the Code of Civil Procedure then in force.

On August 16, 1929, a third document was filed. It was dated May 5, 1927, and purported to be the last will and testament of deceased. The petition to probate the other two instruments was not amended and no petition to probate this last will was filed nor was any notice of any hearing of its probate, other than the one we have mentioned, ever given. The hearing on the original petition for probate of the two testamentary documents of the earlier date was continued on August 26, to September 3, 1929, when it was had. The original order admitting the will to probate contains the following: "Now comes the petitioner, G. C. Burnett, by Messrs. Russell & Heid, his Attorneys, and proves to the satisfaction of the Court that the time for hearing the petition of the Will herein filed on the 14th day of August, 1929, was, by the Clerk, duly set for the 26th day of August, 1929, and was regularly continued to this time and that notice of said hearing has been duly given as required by Law * * *. It is, therefore, hereby ordered, adjudged and decreed by the Court that said W. I. Burnett died on or about the 5th day of August, 1929, leaving Estate in the State of California; that he was then a resident of the County of Tulare, State of California, and that the instruments in writing hereinbefore filed, purporting to be his last will and a codicil thereto, and so alleged to be in said petition, be admitted to probate as such * * *." This order as amended by the *nunc pro tunc* order of March 4, 1935, contains the following: "Now comes the petitioner, G. C. Burnett, by Messrs. Russell & Heid, his Attorneys, and proves to the satisfaction of the Court that the time for hearing the Petition of the Will herein filed on the 14th day of August, 1929, was, by the Clerk, duly set for the 26th day of August, 1929, and was regularly continued to this time and that notice of said hearing has been duly given as required by Law * * *. It is, therefore, hereby ordered, adjudged and decreed by the Court that said W. I. Burnett died on or about the 5th day of August, 1929, leaving Estate in the State of California; that he was then a resident of the County of Tulare, State of California, and that the instruments in writing hereinbefore filed, and dated respectively October 16, 1925, and May 5, 1927, purporting to be his last will

and a codicil thereto be admitted to probate as such * * *."

The three testamentary documents involved here are as follows:

"Tulare December 24 1915

"This is to certify that I, W I Burnett on this 24 day of December 1915 have set my hand & seal do make my last will and Testament do will & set aside $\frac{1}{2}$ one half of all my property both real & personal property to my wife Lacena Burnett to hold & have controle for ever after my Death this is done without any undue influence

"William Isham Burnett."

"Oct 16 1925

"This is to certify that I have this day Willed my $\frac{1}{2}$ one half of lots 15 & 16 in in block 128 also $\frac{1}{2}$ of lots 21 & 22 in block 70 all in Tulare City allso I appoint G. C. Burnett my administrator of my Estate all approved by me this day Oct 16 1925

"W I Burnett"

"Tulare May 5 192

"This is my last will and testament

"I have deeded to my wife lots 14 & 15 in block 135 one half interest in same also one half interest in lots 21 & 22 in block 70 all in Tulare the other half to my Ayers G C Burnett Grace Rosson C L Burnett Roy Burnett C M Burnett also Anne & A. H. Burnett Junor and all other property to be divid-ed Equally between my wife and ayers mentioned in this will

"W I Burnett

"May 5 1927"

The decree of distribution from which this appeal is taken was made in accordance with the construction the court below placed upon the terms of the will of May 5, 1927. The question originally presented on appeal was whether Lucena Burnett, the widow of deceased, was entitled to one-half or one-eighth of the property disposed of by this will. This question has now become one of secondary importance and the main problem before us is whether the will of May 5, 1927, was ever admitted to probate.

In 1929 the provisions governing the admission of wills to probate were contained in sections 1298 to 1310, inclusive, of the Code of Civil Procedure. Under these sections proceedings to probate the estate of one dying testate were initiated by the filing of a petition to probate the will. Section 1303 of this Code contained the following: "When the petition is filed, and the will produced, the clerk of the court must set the petition for hearing by the court upon some day not less than ten

nor more than thirty days from the production of the will." It should be observed that this section did not require the clerk to set a petition for hearing nor to give the notice, until the petition for probate was filed and a will produced. Section 1304 of the same code provided for the notice to be given the heirs of deceased, the devisees and legatees, and the executor named in the will. Section 1306 of that code provided that at the hearing of the petition the court must require proof that notice of hearing had been given, and proof of the will.

It has been said that: "The probate of the will and the administration of the estate is in the nature of a proceeding in rem. *King v. Chase*, 159 Cal. 420, 425, 115 P. 207; 11 Cal. Jur., p. 236. The power to proceed therewith attaches upon the production of the will and the filing of the petition pursuant to section 1300 of the Code of Civil Procedure and the publication of the notice provided for in section 1303 of that Code." *Murray v. Superior Court*, 207 Cal. 381, 278 P. 1033, 1034. In *Re Estate of Edwards*, 154 Cal. 91, 97 P. 23, it was held that a probate court had no power to consider the legality of a will until it was regularly brought before it by a petition for its probate. See, also, *Nicholson v. Leatham*, 28 Cal. App. 597, 153 P. 965, 155 P. 98.

As no petition was ever filed seeking the admission to probate of the will of May 5, 1927, the court below had no power to make an order admitting it to probate. It follows that the portion of the nunc pro tunc order of March 5, 1935, which purported to amend the order of September 3, 1929, and admit the will of May 5, 1927, to probate was void as being beyond the jurisdiction of the court to make. The jurisdiction of the superior court sitting in probate is latent until aroused from dormancy by the filing of a petition to probate a will or appoint an administrator of an estate.

On August 14, 1929, the clerk fixed August 26, as the day for hearing the petition and proving the will. The original record discloses the fact that the notice of proving the will was dated August 14, 1929, and was first published in the Tulare Daily Advance-Register on August 15, 1929. The affidavit of mailing the notice recites that the notices were mailed on August 15, 1929. No other notice of the time of proving the will was given in so far as the original record discloses. The will of May 5, 1927, was not filed until August 16, 1929. The notices published and mailed on the 15th could hardly have been intended to give any notice of the time of proving

a will which was not on file and which was not mentioned or described in the petition.

In *Monk v. Morgan*, 49 Cal. App. 154, 192 P. 1042, 1044, it is said: "The proceeding for the probate of an estate is, under our statutes, in the nature of a proceeding in rem; and, this being so, it has been frequently held that by the giving of the notices directed by the statute the entire world is called before the court, and the court acquires jurisdiction thereby over the estate and over all persons for the purpose of determining their rights to any portion of the estate, and that by virtue thereof every person who may assert any right or interest in said estate is required to present his claim to the court for its determination, and that, whether he appear and present his claim or fail to so appear, the action of the court is equally conclusive upon him. [Citing cases.] On the other hand, it has been held that where, by reason of any defect in the procedure attending the issuance or giving of such constructive notice as is required to be given, either in probate or other cases, to give the court jurisdiction, the parties affected did not receive such constructive notice, all subsequent action of the court based thereon is subject to attack either in that or in a later equitable proceeding. Such are the cases of *Dunlap v. Steere*, 92 Cal. 344, 28 P. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, *Parsons v. Weis*, 144 Cal. [410] 420, 77 P. 1007, and *Doyle v. Hampton*, 159 Cal. [729] 733, 116 P. 39, in each of which cases the procedure for acquiring jurisdiction over the parties affected by such constructive notice as was required to be given was defective."

In what has just been said, we have not overlooked the rule laid down in many cases concerning the presumption that a required notice has been given. In *Re Estate of Twombly*, 120 Cal. 350, 52 P. 815, this rule is announced: "The rule in this respect is that, where the record recites that which was done, nothing to the contrary may be presumed; but where the record is silent the presumption is that that was done which was requisite to sustain the jurisdiction." This rule has been followed without deviation in all cases where its applicability is apparent. Under the facts of the instant case the clerk was not required to give any notice of the

time set for the proof of the will of May 5, 1927, as no petition to probate it had been filed. He was not even required to fix a day for such a hearing. Section 1303, Code Civ. Proc. in effect in 1929. We do not believe that the rule regarding the presumption of notice having been given should be extended to include a notice which the law did not authorize the clerk to give and which would not have been effective for any purpose as no petition to probate the will in question had been filed.

As the decree of distribution in question here is based on the provisions of the will of May 5, 1927, and as that document had never been admitted to probate and was not properly before the court below (In *re Estate of Christensen*, 135 Cal. 674, 68 P. 112), it could furnish no basis upon which distribution of the property of the estate could be made. It follows that the decree of distribution must be reversed.

Respondents suggest that the law does not require that the will be filed concurrently with the petition for its probate, and that as the will was filed on August 16, 1929, the order admitting it to probate was proper. This argument would be sound had the petition to probate the will included the latest will and had the proper notice of the time and place of hearing the petition been given. The petition did not mention or describe this will, but particularly described the testamentary documents dated December 24, 1915, and October 16, 1925, both of which were filed concurrently with the petition which omitted all reference to the latest will.

As we have observed, the question originally involved on this appeal was a construction of the terms of the will of May 5, 1927. As this will was never admitted to probate it was not properly before the court below and is not properly before us. Any opinion we might express on the construction of the language of this document would be dicta of the worst kind. In *re Estate of Cobb*, 49 Cal. 599.

The decree of distribution is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

KIRK WHITE & CO. v. BIEG-HOFFINE
CO. et al.
Civ. 9739.

District Court of Appeal, Second District,
Division 2, California.
April 15, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

Action by Kirk White & Co. against Bieg-Hoffine Company and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Redwine & Redwine, of Hollywood, for appellant.

Chas. L. Nichols and Harmel L. Pratt, both of Los Angeles, for respondents.

1. Trusts ⇨74

Under transaction wherein finance company furnished automobile dealer with money to purchase automobiles, ownership of automobiles *held*, through operation of principle of resulting trust, to be in finance company with legal title, which was in dealer by virtue of invoices, being held by dealer in trust for finance company.

2. Trusts ⇨73

Principles of equity to which resulting trust in real estate are subject are equally applicable to personal property.

3. Trusts ⇨77

Where purchase by automobile dealer of automobiles and securing of money from finance company to make purchase was interlocked and continuous, money *held* to have been furnished at time of purchase, as respects requirement for creation of resulting trust of automobiles in finance company, that money must be shown to have been given at or prior to time purchase was made and for purpose of making purchase.

4. Attachment ⇨299

Finance company, being constituted owner of automobiles purchased by dealer with money furnished by finance company through operation of principle of resulting trust, *held* entitled to possession of automobiles under third party claim upon failure of creditor, who had attached automobiles as incident to suit against dealer, to provide indemnity bond (Code Civ. Proc. §§ 633, 689, Civ. Code, § 3440).

5. Evidence ⇨471(3)

In action against finance company for alleged wrongful release of plaintiff's attachment upon automobiles in possession of dealer, objections to cross-examination of dealer as to who furnished money at time he purchased automobiles, and if finance company paid all purchase price on each one of automobiles, *held* properly overruled, since questions were framed to elicit a matter of fact and not a conclusion of witness.

WILLIS, Justice pro tem.

This is an appeal by plaintiff from an adverse judgment in an action instituted by it to recover damages arising from an alleged wrongful release of an attachment and subsequent conversion by defendants of the personal property so released.

The facts shown in the evidence and as found by the trial court, in so far as they are pertinent herein, are as follows: On June 24, 1931, plaintiff commenced an action against one Clarence M. Wold to recover the sum of \$7,000, with interest and attorneys' fees on a promissory note, and on the same date caused a writ of attachment to be issued and levied by the sheriff of Los Angeles county upon 35 described automobiles of the value of \$15,000 then in the actual possession of Wold on the premises leased and occupied by him as a place of business of selling automobiles. On June 27, 1931, defendant Bieg-Hoffine Company, by its secretary, made and delivered a third party claim under the provisions of the Code of Civil Procedure to the sheriff, wherein said defendant asserted its claim of ownership of said attached property. No indemnity bond being presented by plaintiff nor any proceedings having been taken to determine title to said property, the sheriff, after the expiration of five days, released the whole of said property to defendant Bieg-Hoffine Company, which company took and retained the same to its own use and benefit. On July 16, 1931, judgment was entered in the action against Wold, the amount of which has since been reduced by partial satisfaction obtained through levies by execution process to the sum of \$6,293.49, with interest at 7 per cent. from July 16, 1931. The court found upon probative evidence that Wold did not furnish or pay any of the purchase price of the automobiles attached, but that defendant Bieg-Hoffine Company furnished all the money used in the purchase thereof, and that they were "floored in the premises of said Wold for sale by Wold"; that at the time of purchase an invoice for purchase of each of the automobiles was made out in the name of Wold

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

and such automobiles were each delivered to Wold by the maker and original seller, and "after such delivery to Wold remained in his premises and that the ownership in, possession of and control over said automobiles by Wold was as aforesaid and not otherwise." Upon the admissions in the pleadings and upon its findings, the court concluded that the third party claim was in due form and properly filed; that all the title, ownership, and possession of Wold was at all times, particularly at the time of said attachment, taken and held in trust by Wold for the defendant Bieg-Hoffine Company, which was at all of said times and thereafter the equitable owner of each and every of said automobiles so attached; and that said defendant did not convert any of said automobiles but was justified in its claim of ownership and in receiving and disposing of said automobiles as its own property.

[1-4] Appellant contends that the evidence is insufficient to justify the decision. With this claim we cannot agree. The ultimate facts as found and constituting part of such decision, as defined in section 633 of the Code of Civil Procedure, are fully sustained by the evidence, and the conclusions of law, constituting the other part of such decision, are fully supported by such facts. The evidence and the ultimate facts found thereon show that defendant Bieg-Hoffine Company furnished to Wold all the money with which he purchased the automobiles from the manufacturer in each instance, and that such automobiles were placed in the possession of Wold on the floor of his premises for purpose of sale to the public. This justifies the conclusion that ownership thereof was in Bieg-Hoffine Company and that Wold's legal title, as evidenced by the invoices delivered to him at the time of his cash purchase from the manufacturer, was held by him in trust for Bieg-Hoffine Company.

Under familiar principles of equity jurisprudence a resulting trust arose in favor of Bieg-Hoffine Company upon its furnishing the consideration for the purchase of the automobiles in question, to the extent of that consideration; for the principles of equity to which resulting trusts in real estate are subject are equally applicable to personal property. *Thompson v. Bank of California*, 4 Cal. App. 660, 667, 88 P. 987. And while it is an essential to the creation of a resulting trust that the consideration or money for the purchase must be shown to have been given at or

prior to the time the purchase was made, and for the purpose of making the purchase (*Woodside v. Hewel*, 109 Cal. 481, 42 P. 152), still it appears from the evidence herein that this essential is clearly and substantially established. The transaction comprising the purchase by Wold of the automobiles and the securing of the money from defendant Bieg-Hoffine Company with which to pay the purchase price thereof was all so interlocked and continuous in its nature that it may be properly found that the money was furnished at the time of such purchase, and that such defendant thereby became the equitable owner of the automobiles so purchased, upon which it could legally base a claim of actual ownership under the provisions of section 689 of the Code of Civil Procedure. These conclusions eliminate the claim of appellant that the transaction was condemned by the provisions of section 3440 of the Civil Code as a transfer in fraud of creditors.

[5] We have examined into the errors assigned by appellant in respect to rulings of the trial court on admission of evidence and find that the record does not sustain appellant's statement thereof in either instance. In the first instance the court overruled (not sustained, as stated in the brief of appellant) an objection to a question on cross-examination propounded to Wold as to who furnished the money at the time he purchased the automobiles. His answer was "Bieg-Hoffine Company" (not "yes," as stated in the brief). There was no error in this ruling. The question clearly was framed to elicit a matter of fact, not a conclusion of the witness, as claimed by appellant. The other instance relates to a question of the same witness on cross-examination to which no objection was interposed. The answer to such question rendered it entirely harmless, even had it been objectionable and objected to. An objection was interposed to the succeeding question: "Bieg-Hoffine Company paid all the purchase price on each one of those automobiles?" To this question the witness answered "Yes." Assuming that this is the objection referred to, we conclude there was no error in overruling it, being based on the ground that the question called for a conclusion of the witness, as it is patent, when considered in the context, that it sought to elicit a matter of fact on cross-examination of the adversary's witness.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ORAIL, J.

PEOPLE v. COWLING et al.

Cr. 1419.

District Court of Appeal, Third District,
California.

April 25, 1935.

1. Robbery ☞15

Persons acquiescing in plan to rob store, furnishing automobile and revolver used in committing such crime, and accompanying actual perpetrator thereof to and from scene, *held* guilty of aiding and abetting him and hence punishable as principals, though they remained away during actual robbery (Pen. Code, § 971).

2. Criminal law ☞531(3)

Several officers' positive statements, not contradicted by defendants, neither of whom testified, that no threats or offers of reward were made nor coercion exercised to procure defendants' signatures of incriminatory statements, *held* to show that such statements were voluntarily made and hence admissible in evidence.

3. Criminal law ☞1158(4)

Whether defendant's admission or confession was made voluntarily is primarily for trial court to determine.

4. Criminal law ☞1158(4)

Trial court's ruling on question whether defendant's admission or confession was voluntarily made cannot be disturbed on appeal, except for abuse of discretion.

5. Criminal law ☞680(2)

Mere order in which corpus delicti is proved is immaterial, in absence of showing that defendants were prejudiced.

6. Criminal law ☞517(4)

Admission in evidence of defendants' written statements, admitting their guilt of aiding and assisting in commission of robbery, after conclusive proof of corpus delicti by two witnesses of actual robbery, *held* not error.

7. Criminal law ☞563

Proof of corpus delicti does not necessarily include fact of accused's participation in commission of crime charged.

8. Criminal law ☞563

Proof that crime charged was actually committed by means of some criminal agency is usually sufficient to establish corpus delicti.

9. Criminal law ☞680(2)

Prima facie showing of necessary elements of corpus delicti is sufficient to authorize admission of evidence connecting accused with commission of crime charged.

10. Criminal law ☞517(4)

Corpus delicti must be proved, independently of accused's extrajudicial statements, before admission of evidence connecting them with commission of crime charged.

11. Criminal law ☞327

Burden is on prosecution, after establishing corpus delicti, to prove defendants' guilt of alleged crime in manner provided by law.

12. Criminal law ☞1173(2)

Refusal to charge that jury must find that corpus delicti was adequately established by evidence, independently of defendants' extrajudicial admissions, *held* not prejudicial error requiring reversal of judgments of conviction, where corpus delicti was conclusively proved without substantial conflict before defendants' statements were offered in evidence.

13. Criminal law ☞1186(4)

Refusal to instruct jury that they must find that accused's admission or confession was made freely, without coercion or threats, and that corpus delicti was satisfactorily established, independently of such confession or admission, before considering it in determining their guilt, is not ground for reversal of judgments of conviction, in absence of showing of prejudice to defendants thereby (Const. art. 6, § 4½).

14. Criminal law ☞1186(4)

District attorney's questions in argument to jury as to what evidence was offered by defendants and what other witness was called *held* not prejudicial misconduct requiring reversal of judgments of conviction, though clearly inferring that defendants failed to testify, where commission of crime charged and defendants' participation therein were conclusively established without conflict of evidence (Const. art. 6, § 4½).

15. Constitutional law ☞23

Constitutional amendment, authorizing court or counsel to comment to jury on defendant's failure to explain or deny by his testimony any evidence of facts in case against him, *held* immaterial on question of prejudicial misconduct of district attorney in referring to defendants' failure to testify in trial occurring before such amendment became effective (Const. art. 1, § 13, amended Nov. 6, 1934; art. 4, § 1).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

A. H. Cowling and Rodger McKenny were convicted of second-degree robbery, and they appeal.

Affirmed.

Marc F. Morrison and Blaine McGowan, both of Eureka, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowling, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants were jointly tried and convicted of robbery of the second degree. They have perfected separate appeals based upon the same record. It is contended the evidence fails to support the judgment of conviction, that the court erred in the admission of evidence in the course of the trial, and that the district attorney was guilty of prejudicial misconduct in his argument to the jury.

The record shows without substantial conflict that the appellants met John Rodgers in Eureka and he proposed to them that they rob a country store at Pepperwood. To this suggestion the appellant Cowling said: "Sure, I have the gun and ammunition in the car." The defendants and Rodgers immediately took Cowling's car and drove to Pepperwood, past the store which they planned to rob, to a point on the highway just south of that place. Here they stopped the car, and Rodgers, taking Cowling's pistol, got out and entering the bushes near the roadside he changed his clothes so as to disguise himself. It was then about 5 o'clock in the afternoon. The appellants then drove south a few miles to Redcrest, which is an auto camp. Here they remained for about half an hour, waiting for Rodgers to complete the job of holding up the proprietor of the store at Pepperwood, during which time they ate a light lunch. Having donned his suit of disguise, including a gray cap, Rodgers took Cowling's revolver and walked back to the store. He found the proprietor and one other man at the store. He entered on the pretense of buying some matches, and held them up at the point of his revolver, robbing the cash register of about \$13. Telling his victims not to leave the store for ten minutes on penalty of receiving bodily harm, he stepped out upon the front porch, anxiously looking south for the return of the appellants with their automobile. After a few moments, when the car failed to return, Rodgers hastily went south until he reached the point where he had changed his clothes. He again changed his clothes, leaving the disguise uniform in the bushes. The car soon returned with the appellants. Cowling was driving the vehicle. Rodgers whistled for them and immediately got in, jingling the coin in his pocket, saying that he had robbed the store. He then told the appellants the de-

tails of how he had succeeded in robbing the store. He urged them to "get out of there in a hurry." They drove on past the store in Pepperwood where they were seen by the occupants thereof. Upon Rodgers's departure from the store, the proprietor promptly called over the telephone for an officer. The officer arrived shortly after the robbers passed on their way toward Eureka. He also picked up a traffic officer who chanced to be driving by and together they pursued and overtook the robbers. The officers stopped the defendants' car and arrested the three men, charging them with robbing the Pepperwood store. The car was searched and the revolver and cartridges were found under the front seat where Cowling sat driving the machine. The following day the officers took the appellants and Rodgers in a machine and drove down the highway to a place which was pointed out by one of them as the spot where Rodgers change his clothes. Hidden in the bushes nearby the officers found the bundle of clothes which had been discarded. Later, Rodgers pleaded guilty to the charge of robbery. Cowling wrote a letter to his wife, which fell into the hands of the officers, virtually admitting his guilt of the crime. Each of the appellants subsequently wrote out in his own handwriting a statement substantially conforming to the above recitation of facts, which statements were later typed and signed by them. Each signed statement was prefaced with the declaration that it was made by the accused "of his own free will, there being no threats or promises of any kind made to him."

The defendants were jointly tried and convicted of robbery of the second degree. Motions for new trial were denied. They were accordingly sentenced to state prison. Separate appeals have been perfected.

[1] The evidence abundantly establishes the fact that the appellants were both guilty of aiding and abetting Rodgers in the commission of robbery, and are therefore punishable as principals in that crime pursuant to the provisions of section 971 of the Penal Code. They acquiesced in the plan to rob the store. They furnished the automobile and accompanied Rodgers to and from the scene of the robbery. Cowling furnished the revolver with which the crime was accomplished. The fact that they cautiously remained away during the time that the store was actually robbed in no way minimizes their guilt. Under the circumstances of this case it may not be said they did not participate in the commission of the crime. They did participate in all the details of the crime except the actual stealing

of the money in the store at the point of the revolver. The evidence is adequate to support the verdict and the judgments against both appellants.

[2-4] The court did not err in admitting in evidence the signed statements of the defendants without first requiring a sufficient foundation to be established showing that they were voluntarily made. A careful examination of the record leaves no doubt these statements were freely and voluntarily made by the defendants without any threat of punishment or offer of reward on the part of any one. The record is replete with positive statements of several officers that no threats, coercion or offers of reward were made. These statements of the officers were not contradicted by the defendants. Neither of them took the witness stand in his own behalf. The only statement upon which the appellants rely in support of this alleged error is that Constable Marshall, after a lengthy cross-examination, in reply to the question, "Do you remember saying to him, well, if you come clean, it will be better for you, or words to that effect?" said, "Well, probably words to that effect." This same witness had previously testified that these statements were voluntarily made. To a similar question, as follows, "Now you recall saying to him * * * you are a young man, the best thing you can do is come clean on this," he replied, "No sir." Several officers told the exact circumstances under which the statements were made and signed. It leaves no doubt there was no coercion exercised or inducement offered which procured the documents to be signed. The court therefore did not err in receiving the statements in evidence. *People v. O'Brien*, 53 Cal. App. 754, 200 P. 766; *People v. Haney*, 46 Cal. App. 317, 189 P. 338. The question as to whether an admission or confession is made voluntarily is primarily for the determination of the trial court. Except for an abuse of discretion in that regard, the ruling of the court may not be disturbed on appeal. *People v. Lebew*, 209 Cal. 336, 237 P. 337; *People v. Luzovich*, 127 Cal. App. 465, 470, 16 P.(2d) 144.

[5-11] Nor did the court err in admitting the defendants' statements of their guilt prior to the establishment of the corpus delicti. In the absence of showing that the defendants were prejudiced on that account, the mere order in which the corpus delicti is proved is immaterial. *People v. Wilkins*, 158 Cal. 530, 111 P. 612; *People v. Hudson*, 139 Cal. App. 543, 34 P.(2d) 741; 8 Cal. Jur. 234, § 303. In the present case the corpus delicti was con-

clusively proved by two witnesses to the actual robbery, before the statements of the defendants were offered in evidence. Nothing then remained to show their guilt of the crime of robbery except to prove that they aided and assisted in the commission of the offense, although they were not actually present when the store was robbed. The corpus delicti was fully established independently of the defendants' statements. The mere connection of the accused persons with the commission of the offense with which they are charged is not an essential part of the corpus delicti. Proof of the corpus delicti does not necessarily include the fact that the accused persons participated in the commission of the crime. *People v. Ward*, 134 Cal. 301, 306, 66 P. 372. It is usually sufficient for the purpose of establishing the corpus delicti to prove that the crime charged in the information was actually committed by means of some criminal agency. *People v. Jones*, 123 Cal. 65, 55 P. 698; *People v. Wagner*, 29 Cal. App. 363, 155 P. 649. A prima facie showing of the necessary elements constituting the corpus delicti is sufficient upon which to authorize subsequent evidence connecting the accused persons with the commission of the crime. *People v. Bollinger*, 196 Cal. 191, 237 P. 25; *People v. Hill* (Cal. App.) 37 P.(2d) 849. But proof of the corpus delicti must be first made independently of any extrajudicial statement of the accused persons. *People v. Tapia*, 131 Cal. 647, 651, 63 P. 1001; 8 Cal. Jur. p. 167, § 248. It necessarily follows that, having established the corpus delicti, the burden is then placed on the prosecution to further prove the guilt of the defendants of the alleged crime, in the manner provided by law. In the present case the order of proof heretofore suggested was strictly followed, and both the corpus delicti and the proof of the defendants' guilt were satisfactorily established.

[12, 13] Under the circumstances of this case it was not prejudicial error which requires the reversal of the judgments that the court refused to charge the members of the jury that they must find the corpus delicti was adequately established by evidence independently of the extrajudicial admissions of the defendants, for the reason that the corpus delicti was conclusively proved without substantial conflict before the defendants' statements were offered in evidence. Assuming, without so deciding, that ultimately it is the province of the jury to determine whether an admission or confession of an accused person is made freely, without coercion or threats (*People v. Oliveria*, 127 Cal. 376, 59 P. 772; *People v. Fowler*, 178 Cal. 657, 174 P. 892; 85

A. L. R. 883, note), in the absence of a showing of prejudice thereby, it is not reversible error to refuse to instruct the jury that they must so find and that the corpus delicti has been satisfactorily established independently of such confession or admission, before the statements may be considered in determining the guilt of the accused persons. Article 6, § 4½, of the Constitution. In this case, the defendants did offer instructions covering the points last mentioned, which might have been properly given to the jury. But since there is no reasonable question that the statements of the defendants were voluntarily made and that the corpus delicti was clearly established before they were offered in evidence, it was not prejudicial error to refuse to give the proposed instructions to the jury, since it does not appear there was a miscarriage of justice in finding the defendants guilty of robbery of the second degree.

[14] For the same reason last mentioned, we are of the opinion the challenged declarations of the district attorney in the course of his argument to the jury do not constitute prejudicial misconduct which requires a reversal of the judgments. Neither of the defendants took the witness stand in his own behalf at the trial of the case. In his argument to the jury, after summing up the undisputed facts and circumstances shown by the evidence, which leaves no reasonable doubt that the robbery was committed and that the defendants participated therein, the district attorney said: "What evidence has been offered by the defendants in defense of this case?" And again, after reviewing the testimony of witnesses establishing the commission of the crime beyond all doubt, he said: "What other witness was called?" Of course these statements do clearly infer that the defendants failed to take the stand in their own behalf. There was no objection to these statements at the trial, and the court was not asked to instruct the jury to disregard them. They were not then assigned as prejudicial. But since the commission of the offense of robbery and the defendants' participation therein are so conclusively established without conflict of evidence, we are of the opinion they do not constitute reversible error under the constitutional provision heretofore referred to.

[15] Article 1, § 13, of the Constitution was amended at the general election held November 6, 1934, authorizing the court or counsel to comment to the jury upon a defendant's failure to "explain or deny by his testimony

any evidence of facts in the case against him." This amendment of the Constitution, having been proposed by initiative, did not become effective until "five days after the date of the official declaration of the vote by the Secretary of State" (article 4, § 1, Const.), which, with regard to this amendment, occurred December 20, 1934. The trial of this case having occurred on November 7th and 8th of that same year, the amendment has no bearing on the determination of that question of alleged prejudicial error on the part of the district attorney in referring to the defendants' failure to take the witness stand in their own behalf.

For the reasons assigned, the judgments and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 398

HOFFMAN v. MAGUIRE.

Civ. 9608.

District Court of Appeal, Second District,
Division 2, California.

April 23, 1935.

1. Negligence ⇨136(14)

Whether person is guilty of negligence is ordinarily question of fact to be determined upon all facts and circumstances in evidence bearing upon question.

2. Automobiles ⇨245(74)

In action for injuries received when newsboy selling his papers in pedestrians' crosswalk was struck by motorist, newsboy's failure to look for 30 seconds in direction in which traffic was coming held not negligence as matter of law (St. 1931, p. 2127, § 131½).

3. Municipal corporations ⇨705(10)

Newsboy and pedestrian in street must both exercise reasonable care for their own safety.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Edward Hoffman against C. H. Maguire. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

George D. Blair, of Los Angeles, for appellant.

A. A. Rotberg, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff against the defendant for damages for injuries resulting from an automobile accident. The plaintiff, a newsboy, was standing in a pedestrian crosswalk as defined by section 131½ of the California Vehicle Act (St. 1923, p. 517, § 131½, as added by St. 1931, p. 2127), selling his papers. The defendant, coming in his car at a fast rate of speed, suddenly turning his automobile to the right and, running his right wheels through a safety zone, struck plaintiff and injured him. All this occurred at an intersection where it was the duty of defendant to make a boulevard stop. The defendant makes no claim that he was not guilty of negligence. His defense was that the plaintiff was guilty of contributory negligence. On this issue the trial court found for the plaintiff. In its findings of fact the court included in the detailed findings "that plaintiff was standing at the place where he was struck by defendant for approximately two minutes prior to the time he was struck, and that plaintiff did not look in an easterly direction to observe the traffic approaching him from the east on Pico street for at least thirty seconds prior to the time that plaintiff was struck by defendant's automobile * * *." The defendant contends that for a person to stand in an intersection of a busy highway for 2 minutes is negligence itself, but to fail to look for 30 seconds in the direction in which traffic was coming is gross negligence. Defendant asks us to find the plaintiff guilty of negligence as a matter of law.

[1-3] Whether or not a person is guilty of negligence is ordinarily a question of fact to be determined by the fact finder upon all the facts and circumstances in evidence bearing upon the question. It is not negligence as a matter of law for a person in a pedestrian zone to fail to look for approaching vehicles for a period of 30 seconds. Negligence is a comparative and not a positive term and its use is relative. The defendant contends that the newsboy must exercise the same degree of care in the street as a pedestrian. This is true. The rights of both are determined by the same rule. They both must exercise reasonable care for their own safety. On the

other hand, what an ordinarily prudent person would do under one set of circumstances and what the same ordinarily prudent person would do while acting under another set of circumstances might be very different. There is no merit in defendant's contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



6 Cal.App.2d 488

KENT v. KENT et al.

Civ. 9691.

District Court of Appeal, Second District,
Division 2, California.

April 26, 1935.

Hearing Denied by Supreme Court
June 25, 1935.

1. Bills and notes ⇨443(4)

Plaintiff to whom note held by bank had, prior to commencement of action on note, been assigned by indorsement "for the purpose of collection only" held entitled to maintain action notwithstanding possession of note was not acquired until after commencement of action and that under agreement with bank plaintiff was obligated to turn moneys collected on note over to bank (Civ. Code, § 3103).

2. Corporations ⇨243(6)

That certain stockholders had received more stock than they had paid for in cash, although commissioner's permit authorized issuance of stock for cash only, held not to render stock void so as to relieve persons acquiring such stock of liability as stockholders, where surplus shares were bonus shares coming from private holdings of president of corporation.

3. Corporations ⇨243(1)

Stockholders sued on their statutory liability as such could not escape liability merely because some stock required under commissioner's permit to be exchanged for cash only was exchanged for property, since under statute whole stock issue was not rendered void by violation of permit, but only such shares as were sold in violation thereof (St. 1917, p. 679, § 12).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Lillian D. Kent against J. M. Kent and others. From a judgment for plaintiff, defendants A. F. Gilmore Company, Midway Premier Oil Company, and J. C. Axelsson appeal.

Affirmed.

Salisbury & Robinson, B. R. Ware, and Frank Mergenthaler, all of Los Angeles, for appellants Gilmore Co. and Axelsson.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant Midway Premier Oil Co.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Action to enforce the statutory liability of stockholders of the Ethyl Oil Company arising out of a loan of \$50,000 made to that corporation by Bank of America and evidenced by a promissory note.

Appellants challenge the right of plaintiff to bring this action. It appears that the note sued upon was guaranteed by C. F. Whittier and J. M. Kent, president and vice president of the borrower, and, the note not being paid, the bank sued the corporation and the guarantors and attached certain property which plaintiff here, Lillian D. Kent, claimed as her sole and separate property. Lillian D. Kent and J. M. Kent then entered into an agreement with the bank whereby, in consideration of the release of the attachment, they agreed to join as trustors in the execution of trust deeds upon the attached property as security to the extent of \$25,000 upon the \$50,000 note and to the extent of \$25,000 against a separate obligation of J. M. Kent to the bank. In addition to releasing the attachment, the bank agreed that as soon as the obligation of Ethyl Oil Company had been reduced to \$50,000 or less the bank would deliver the note of the oil company to Lillian D. Kent for such action as she might care to take, with the understanding that any money she might collect on the note should be paid to the bank for credit toward satisfaction of the trust deed obligations.

Before the commencement of this action, the bank indorsed upon the note an assignment thereof to Lillian D. Kent "for the purpose of collection only," pursuant to the above-mentioned agreement. The note remained in the possession of the bank, subject to the right of the assignee to obtain it at any time she desired, and was obtained by her shortly before the trial and introduced in evidence. The bank further executed and deliv-

ered to plaintiff a separate assignment transferring to her the "debt, obligation and/or liability in its favor and against the stockholders of Ethyl Oil Company" for the moneys advanced by the bank and which debt was evidenced by the promissory note, the assignment providing that any moneys collected thereunder be paid to the bank to apply under the above-mentioned agreement with Lillian D. Kent and J. M. Kent.

[1] Appellants' contention that the plaintiff had not acquired the right to bring this action is based upon the fact that the note was not delivered to plaintiff until after the action was brought. The cases holding that a transfer of a negotiable instrument by indorsement is not complete without both delivery and valid indorsement of the instrument are not in point, as the case at bar is not one of transfer by indorsement but of transfer by assignment. A promissory note may be transferred by assignment without indorsement as well as by indorsement (*Barling v. Weeks*, 4 Cal. App. 455, 88 P. 502), and "the indorsement or assignment of the instrument by a corporation * * * passes the property therein" (Civ. Code, § 3103). The assignment of a promissory note is fully effective without the transfer of possession of the note itself. *Burkett v. Doty*, 32 Cal. App. 337, 162 P. 1042. The fact that the plaintiff as assignee was obligated under the agreement and the conditions of the assignment to turn moneys collected thereunder to the bank does not affect the validity or effect of the assignment, and the disposition of moneys so collected is of no concern to appellants but is a matter solely between the assignor and assignee. The assignment fully qualified plaintiff to bring the action.

[2] Appellants' main contention is that they were not stockholders because they secured their stock under a violation of the corporation commissioner's permit and the stock was therefore void. The permit authorized Ethyl Oil Company to sell and issue 250,000 shares of capital stock in the manner following: (1) To issue 20,000 shares to three named persons in exchange for certain lease interests; (2) after the corporation received the consideration and issued the shares as above provided, to sell 184,000 shares for cash; and (3) to sell 46,000 shares in exchange for services rendered the corporation by certain designated persons. By a supplementary permit the corporation was authorized to sell 208,334 shares for cash and to issue 41,666 shares to certain named persons for services. It appears conceded that the first 20,000 shares were prop-

erly issued. A. F. Gilmore and J. C. Axelson each paid cash for 10,000 shares, each receiving 12,000 shares. Midway Premier Oil Company paid cash for 37,500 shares, and received 47,525 shares. From this it is argued that said appellants did not pay the full value in cash for the stock they received, a contention which would be well founded if, in fact, the excess numbers of shares came from the corporation. There is, however, evidence from which the court was warranted in concluding that the additional 2,000 shares to Gilmore were received by him not under his stock subscription, but some five months after he received the 10,000 shares through private arrangements with the president of the corporation, and were shares belonging to such president, having been issued to him as part of the 46,000 shares of promotion stock authorized by the permit. The difference in the number of shares received by Axelson and the Midway Company under their subscriptions and the cash payments and the number of shares eventually owned by them is similarly accounted for in the evidence. The bonus shares, coming not from the corporation but from the private holdings of the president of the company, there was no violation of the permit and the shares of appellants were not void.

[3] The final contention of appellants is based upon the fact that 25,500 shares of stock which under the permit should have been sold for cash were exchanged for property. Such stock was void under the Corporate Securities Act (St. 1917, p. 673, as amended) as it existed before 1931 (Kahle v. Stephens, 214 Cal. 89, 4 P.(2d) 145; Regan v. Albin, 219 Cal. 357, 26 P.(2d) 475), and it is the claim of appellants that the issuance of these void shares rendered void all of the issued shares. The precise point does not appear to have been previously decided in this state. The nearest approach to the question which has come to our attention is the case of Imperial Livestock, etc., Co. v. Tracy, 208 Cal. 205, 281 P. 50, in which the permit of the corporation commissioner authorized sales of stock by the payment of 25 per cent. of the par value in cash and the balance to be paid by promissory notes. The defendant Tracy subscribed in four instances for stock without paying any cash, and this stock was held void. As to a fifth subscription, in which the 25 per cent. was paid in cash and the balance evidenced by a note, the court in effect held the subscriber liable upon the note, a conclusion which could not have been reached if that

subscription had been made void by the four void subscriptions. The Corporate Securities Act (St. 1917, p. 679, § 12), as it existed at the time of the stock issue here involved, provided that every security issued without a permit of the corporation commissioner authorizing the same should be void. We do not believe that this language can be construed to mean that the issue of a part of the shares of a corporation without a permit should render the entire stock issue void, and had such been the intention of the Legislature it would doubtless have employed language declaring such an intent. While it was the evident object of the section to prevent any rights of a shareholder against the corporation, or any rights of the corporation against the subscriber to its shares, from arising where the issue of shares violated the statute, there is no apparent reason why the issue of some shares in violation of the statute should render void other shares, whether issued before or after those unlawfully issued, where such other shares are lawfully issued. The section is clearly limited to the single effect of declaring void those shares not issued in accordance with the required permit.

The judgment is affirmed.

We concur: CRAWL, J.; STEPHENS, P. J.



6 Cal.App.2d 392

HAGGARD v. FRICK et al.

Civ. 9529.

District Court of Appeal, First District,
Division 2, California.

April 23, 1935.

Rehearing Denied May 23, 1935.

Hearing Denied by Supreme Court
June 21, 1935.

1. Automobiles ☞195(1)

Owner who delivered automobile to his son for use while attending University without reservation other than statement that owner "would rather he would not let any other person drive" held liable for injuries caused by son's college mate whom son, without father's knowledge, permitted to drive automobile for mate's own pleasure (Civ. Code, § 1714¼).

2. Automobiles ☞192(1)

Under statute making owner of automobile liable for negligence of person operating it with owner's permission, owner is liable

for negligence of person to whom his permittee has intrusted automobile temporarily, since owner's negligence is imputed from express or implied permission to another to use or operate automobile (Civ. Code, § 1714¼).

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Robert G. Haggard against Donald J. Frick and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Myrick & Deering and Scott, of San Francisco, for appellant.

Bronson, Bronson & Slaven, of San Francisco, and Maurice J. Rankin, of San Jose (John H. Painter, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

The cause was tried before the court without a jury. Findings were made favorable to plaintiff and the defendant Frick has appealed from the judgment.

The appellant, who was a resident of the city of Los Angeles, purchased an automobile for the use of his son while the latter was attending Stanford University. The son drove the car from his home to the University and kept it at his fraternity house on the campus. With the son's permission the defendant Hulen was operating the car on the public highway where a collision occurred resulting in the injuries to plaintiff which are the subject of this litigation. The appellant delivered the car to his son without direction or restriction as to its use other than the expressed wish that he would not let any one else drive it. It was given, however, with the intention and understanding that the son should have the exclusive use and control of the car throughout the college year, at a place more than 400 miles from appellant's home. The only issue raised on the appeal is the liability of the father under section 1714¼ of the Civil Code.

We will reform appellant's "Statement of Question Involved" to more nearly accord

with the evidence, the change appearing within the parenthesis:

"Appellant, the registered owner of an automobile, delivers it to his son for use while attending the university, without direction or reservation, other than the statement that he 'would rather he would not let any other person drive' the car). The son without the knowledge of his father permits a college mate to take the car and drive it for pleasure purposes of his own. Through the negligence of the college mate an accident ensues in which plaintiff is injured. Is the father liable under section 1714¼ of the Civil Code?"

[1, 2] The question must be answered in the affirmative under the settled rule that under this section of the Code the owner is "liable for the negligence of a person to whom his permittee has intrusted the automobile temporarily." *Hughes v. Quackenbush* (Cal. App.) 37 P.(2d) 99, 103. See, also, *Sutton v. Tanger*, 115 Cal. App. 267, 1 P.(2d) 521; *Pohle v. Bolinas Beach Realty Co.*, 130 Cal. App. 704, 20 P.(2d) 730; *Kerns v. Lewis*, 246 Mich. 423, 224 N. W. 647; *Grant v. Knepper*, 245 N. Y. 158, 156 N. E. 650, 54 A. L. R. 845. The reason for the rule is well stated in the *Grant Case* (156 N. E. 650, page 652): "Only a narrow construction would permit us now to say that an owner, placing a car in the care of members of his family to be used for their pleasure or for the family business would escape liability if wife or son or daughter should give over the wheel to the management of a friend."

It would serve no purpose to discuss the cases on the liability of the owner where the car has been operated without the consent of the permittee, or the cases involving liability under the relation of agent or bailee. Here the liability is purely statutory. The owner's negligence is imputed from the express or implied permission to another to use or operate the vehicle. If the owner intrusts his car to another, he invests him with the same authority to select an operator which the owner has in the first instance.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

6 Cal.App.2d 167

**JONAS v. BANK OF AMERICA NAT. TRUST
& SAVINGS ASS'N.**
Civ. 8833.

District Court of Appeal, Second District,
Division 1, California.
April 13, 1935.

Trusts ⇐147(1)

In action against bank to recover trust funds, finding that beneficiary did not orally assign trust funds to bank to be applied upon indebtedness of another to bank *held* authorized by evidence that there was no meeting of minds upon definition and terms of proposed assignment, and that parties contemplated execution of written instrument, terms of which were left open for further consideration.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Leon K. Jonas against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Affirmed.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for appellant.

Harry G. Sadicoff, of Los Angeles, for respondent.

CONREY, Presiding Justice.

In the complaint it is alleged that at some time prior to September 21, 1931, the defendant became indebted to Irving H. Hellman in the sum of \$6,399.49, for and on account of money had and received by the defendant for the use and benefit of said Hellman in connection with the defendant's trust No. 739 N. S. Plaintiff claims as assignee of Hellman's rights to the fund. Judgment having been entered in favor of the plaintiff, the defendant appeals therefrom.

In accordance with the first paragraph of the "second and separate defense" stated in the answer of the defendant, the court found that at all times mentioned in the complaint, the defendant was and now is the trustee of a trust No. 739 N. S., in which Irving H. Hellman, the person mentioned in the complaint, was beneficiary; that as trustee under the said trust defendant received the said sum of \$6,399.49, which is the money mentioned in the complaint. Paragraph two of said second defense contains the following: "Alleges that on or about June 7, 1931, and prior

to either of the assignments mentioned in the complaint herein, the said Irving H. Hellman, for valuable consideration, agreed with defendant that all of said money might be held by the defendant and applied by it upon the indebtedness of the said Harry W. Boles to this defendant, and assigned to this defendant as security for such indebtedness, all of the interest of the said Irving H. Hellman in and to the moneys." The court found the allegations of this paragraph are not true. (Finding VIII.) Appellant contends that this finding VIII is not sustained by the evidence. Paragraph three of the second defense alleged the said Boles was indebted to the defendant in a sum far in excess of the sum in controversy here. In finding IX the court decided that this allegation was not true, but it is now conceded by respondent that those allegations were true and that the finding IX is erroneous. The court also found against the defendant on the allegations of its paragraph four of the second defense wherein it was alleged that a part or all of said sum of money of \$6,399.49 belongs to the said Harry W. Boles, and that defendant holds all of the said fund as security for the repayment of the said indebtedness of the said Harry W. Boles to it.

From the foregoing it appears that the merits of this appeal principally depend upon appellant's challenge to the sufficiency of the evidence to sustain said finding VIII. The property covered by the trust included a tract of land known as tract 9909, containing a certain "lot 4." In October, 1927, Hellman agreed to "sell and convey" to Boles said lot 4, upon certain conditions, one of which was that Boles would erect upon the lot a residence to cost not less than \$15,000; thereafter the property should be sold and out of the proceeds of the sale the first \$20,000 should be paid to Hellman as the purchase price for his lot. The proceeds of the sale next received were to be used to repay to Boles the actual cost of the improvement made by him thereon; "all moneys received thereafter shall be divided equally between the first and second parties." The house was built and the property was thereafter sold. The evidence does not establish the amount which had been received by Hellman out of the sale price. Appellant attempted to show that by reason of a certain mortgage, Hellman had in effect received his \$20,000, but this was not the necessary result of that transaction. The evidence does not prove that the funds now in the trust and which are the subject of the present controversy were the

property of Boles. The trust fund was not assigned to him; although as between Boles and Hellman their contract gave to Boles an interest in the proceeds of the sale of the lot.

It is an admitted fact (although finding IX erroneously runs the other way), that at the time when this controversy arose and at the time when it is claimed that Hellman made the agreement relied upon as a defense to this action, Boles was indebted to the bank in the sum of \$38,500. This was an unsecured indebtedness of Boles to the bank, and the evidence indicates that a part of the money borrowed was used in the building operations on lot 4. But the position of appellant here is shown in appellant's opening brief, page 13, as follows: "However, as is shown by the pleadings, the bank actually placed its claim herein upon the assignment by Mr. Hellman of the funds on deposit, and the case has not been tried as an attempt to collect Mr. Boles' debt direct from Mr. Hellman or Mr. Hellman's property as a direct debt of the joint adventure, though such we believe was the fact."

This limitation of appellant's claim we think was more necessary than generous. Hellman was not obligated on the debt of Boles to the bank, and the bank had acquired no interest in the trust property, nor any lien on the funds resulting therefrom with relation to that debt. Again, we have the statement by appellant "that as Mr. Hellman was on the face of things the sole beneficiary under the trust, his agreement and assignment was necessary even so far as Boles' money was concerned." But this concession does not go quite so far as the record compels us to go. The bank as trustee of the trust was required to recognize Hellman as the sole beneficiary not only on the face of things, but in fact. It was for this reason, of course, that the attempt was made to obtain from Hellman an assignment of the funds.

On a day early in June, 1931, an interview was held between Hellman and three other officers of the bank. These were Louis H. Moore, vice president, E. J. Nolan, chairman of the board of directors, and R. G. Trengrove, a director. As witnesses to prove the agreement of assignment the defendant produced Nolan and Moore. Mr. Nolan testified as follows:

"Q. Then, if you will proceed to relate what was said, in substance, at that conversation. A. Certain moneys had come into the trust of which Mr. Boles was the beneficiary, as I recall, and Mr. Hellman had a certain interest in the trust. What interest he had,

I don't know; I don't recall now what interest it was, but I was asked to talk to Mr. Hellman, which I did at that conversation, and asked him if he would allow this money to be used to pay taxes and interest on other indebtedness of Mr. Boles, and then the balance left, if any, to apply on the unsecured indebtedness of Mr. Boles, and after some discussion, Mr. Hellman readily agreed. Mr. Sadicoff: I move to strike 'readily agreed.' Let's have the conversation.

"The Court: That expression may go out. A. After certain conversation, Mr. Hellman said that that was perfectly all right—that that could be done, and he would—if I would have prepared the necessary papers, he would sign them.

"Q. By Mr. Hanson: Was there anything said, as you now recall it, with reference to Mr. Hellman assigning what interest he had in the trust to the bank? A. Yes, there was conversation along that line, and he said he would assign it as security."

The testimony of Mr. Moore, concerning that interview, while different from that of Mr. Nolan in some of its phrases, is substantially in harmony therewith. On the other hand, Mr. Hellman's testimony, without direct contradiction of the statements of the witnesses Nolan and Moore, presents the interview in a different light. The following are questions addressed to Hellman, and his answers:

"Q. Will you please relate the conversation? A. Mr. Nolan, as I recall, addressed me and asked me whether I would assign the moneys that were coming out of this sale of this one piece of property to Mr. Boles' notes. I understood at the time that he meant that the assignment would be prorated the same as the arrangement that we had on the property, namely, that I was to receive all of my money first—which was stipulated, as I understood, in the trust—that I was to get my money first for my properties and then he was to get his money from his house that he had built on the property, and that after that we were each to receive half of the profits. Mr. Sadicoff: All right; what was the balance of the conversation? A. He asked me, and I said—well, I don't remember exactly what was said, but the conversation was really brought down to the point of how such a document should be drawn, and I believe he instructed Mr. Moore at the time to draw a document or have a document drawn.

"Q. In other words, your understanding was that you would execute a document which

would evidence Boles' interest in the trust?
A. That is what I understood.

"Q. Did you tell any of them that they could use the funds that would be due you, in the payment of the obligations of Boles? A. Not due me—no, sir.

"Q. Now, did you ever intend that they should use your funds towards the payment of Boles' indebtedness? A. Only for what his share might be.

"Q. Do you mean as far as you were concerned they could use any moneys that would be due Boles out of the trust in the discharge of his obligations? A. Of which I would make an assignment.

"Q. In other words, you would execute an instrument showing what Boles' interest was in the trust? A. Yes, sir."

It is admitted that very promptly after said interview, Mr. Moore, at the request of Mr. Nolan, caused to be prepared an instrument of assignment. This document was submitted to Mr. Hellman, who took advice of counsel and then declined to execute the assignment. Appellant, nevertheless, relies upon the alleged oral agreement as constituting a valid assignment to it of Hellman's interest in the fund, and from that premise argues that finding VIII is not supported by the evidence.

It is apparent, from reading Mr. Nolan's testimony, that he had not deemed it necessary to precisely define, even in his own mind, the subject under discussion. It is a reasonable inference from the conversation as related, that they were endeavoring, not to make a present contract, but to arrive at a preliminary understanding, to result in a written instrument which would be signed upon approval of its terms. The testimony of Hellman shows that his understanding of the thing proposed was not identical with that of the other parties. We are of the opinion that the court was justified in making the said finding VIII, for at least two reasons: First, that there was no meeting of the minds of the opposing parties upon the definition and terms of the proposed assignment; and, second, that the parties, at the time of said interview contemplated the execution of a written instrument, the terms of which were left open for further consideration. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 469, 163 P. 1037.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

RIO GRANDE OIL CO. v. CITY OF LOS ANGELES.
Civ. 10143.

District Court of Appeal, Second District,
Division 2, California.
April 16, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

Licenses ⇐28

Gasoline sold to municipality by distributor held not exempt from motor vehicle fuel tax, although gasoline was used in essential governmental functions, since tax is levied against distributor and not against municipality as consumer (St. 1923, p. 571, as amended).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Rio Grande Oil Company against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert A. Todd, Deputy City Atty., all of Los Angeles, for appellant.

H. L. Dunnigan and Gordon A. Goodwin, both of Los Angeles, for respondent.

U. S. Webb, Atty. Gen., and H. H. Linney and Eugene M. Elson, Deputy Attys. Gen., amici curiæ.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to recover the purchase price of a quantity of gasoline, including the amount of the tax imposed by the Motor Vehicle Fuel License Tax Act (Stats. 1923, p. 571, and amendatory acts), which item was separately stated. It is conceded that the gasoline involved was "to be used in essential governmental functions." The judgment was for the full amount of the claim including the tax. The sole question presented is this: Is a municipality entitled to purchase motor vehicle fuel from a distributor without payment either by the distributor or the city of the 3 cents per gallon tax? The contention of the city is that the tax, in effect, is a sales tax, and, as such, is laid upon the fuel and is paid by the purchaser, and that a municipality as purchaser cannot be compelled to pay such a tax on fuel which is used for essential governmental

purposes. A necessary element of the city's contention is that the tax is paid not by the distributor but by the consumer. Other points made by the city in its briefs are corollaries of this first point and must stand or fall according to the decision with reference thereto. The question is one of general interest throughout the state, and the Attorney General of the state of California has filed a brief as *amicus curiæ*.

The question seems to be already definitely settled in California. The Supreme Court in the case of *People v. Ventura Refining Co.*, 204 Cal. 286, 268 P. 347, 350, 283 P. 60, in construing this law, said: "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel and thus in effect collect the tax from the consumer." In the case of *People v. Herbert's of Los Angeles, Inc.* (Cal. App.) 39 P.(2d) 829, a similar question was presented under the provisions of the Retail Sales Tax Act of 1933 (Stats. 1933, p. 2599). The appellant therein contended that while the title of the act indicated an intention to impose a tax on the retailer and relate it entirely to his privilege of selling tangible personal property at retail, yet the bill itself imposed the burden of payment on the consumer. This was the sole question involved in the case, and the court (Mr. Presiding Justice Nathaniel P. Conrey writing the opinion) said: "We think that this claim is not well founded. * * * The tax is upon the privilege of transacting the business. But we find in the statute nothing which imposes the tax upon the consumer, or which conflicts with the clearly expressed imposition of tax upon the retail dealer and upon him only. That in ultimate effect the fund out of which payment is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer."

A similar question was presented in the recent case of *Meyer Construction Co. v. Corbett* (D. C.) 7 F. Supp. 616, 618. The court said: "The act clearly shows that the tax here in question is a tax on the retailer and not on the consumer. * * * The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer."

It is apparent from what has been said that the tax is levied against the distributor and not against the city or its property; that in the enforcement of the tax the state is exercising its sovereign power against the distributor, which power it is authorized to so use, and not against the city, and therefore the city's contention is not tenable.

Judgment affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 203

GRAHAM BROS., Inc., v. CITY OF LOS ANGELES.
Civ. 10144.

District Court of Appeal, Second District,
Division 2, California.

April 16, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

Licenses — 28

Rock and gravel sold to city *held* not exempt from tax imposed by Retail Sales Tax Act on ground that city cannot be compelled to pay such tax, since tax is imposed against retailer, not against city (St. 1933, p. 2599; Const. art. 13, § 1).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Graham Brothers, Incorporated, against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Robert A. Todd, Deputy City Atty., all of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson and Matthew O. Simpson, all of Long Beach, for respondent.

U. S. Webb, Atty. Gen., and H. H. Linney and Eugene M. Elson, Deputy Attys. Gen., *amicus curiæ*.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to recover the purchase price of a quantity of rock and gravel including the amount of the tax imposed by the Retail Sales Tax Act of 1933

(Stats. 1933, p. 2599), which item was separately stated. The judgment was for the full amount of the claim including the tax. The contention of the city is that the tax is a sales tax and as such is laid upon the property purchased and is paid by the consumer; that because of the constitutional exemption (Constitution, art. 13, § 1) the city cannot be compelled to pay taxes on property; that under the law in question, in any event, the city cannot be compelled to pay taxes. A necessary element in all of the city's contentions is that the tax is paid by the city. If the decision is adverse to the city with reference to this element, the city's contentions fall.

The question seems to be already definitely settled in California against the city. *People v. Ventura Refining Co.*, 204 Cal. 286, 268 P. 347, 283 P. 60; *People v. Herbert's of Los Angeles, Inc.* (Cal. App.) 39 P.(2d) 829; *Meyer Construction Co. v. Corbett* (D. C.) 7 F. Supp. 616. Upon the authority of these cases we hold that the tax is a tax imposed against the retailer and not against the city. The underlying principles of this case are somewhat more definitely discussed and supporting authorities cited in *Rio Grande Oil Co. v. City of Los Angeles* (Cal. App.) 44 P.(2d) 451, decided by us this day.

Judgment affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 311

HOWLAND et al. v. DOYLE et al.

Civ. 9422.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Hearing Denied by Supreme Court
June 18, 1935.

1. Automobiles ⇨244(22)

Existence of permission to use motor vehicle, necessary to render owner liable for driver's negligence, must be affirmatively proved as essential element of cause of action, and proof must consist of facts and circumstances from which can follow inference that owner either expressly gave permission or that his acts and conduct were such that permission might be implied (Civ. Code, § 1714¼).

2. Automobiles ⇨192(7)

Owner, giving possession of truck to another with permission to try it out for purpose of sale, either to himself or another, who turned truck over to third person to drive and test, *held* not liable for death caused by driver's negligence where owner gave driver no express permission to use truck and had no knowledge that person to whom it gave possession would turn truck over to third person or that person causing accident would be driver (Civ. Code, § 1714¼).

3. Automobiles ⇨192(1)

Permission to drive motor vehicle, necessary to render owner liable for driver's negligence, can exist only when owner had knowledge or at least reason for believing that vehicle would be driven by person with whose negligence it is sought to charge owner (Civ. Code, § 1714¼).

4. Witnesses ⇨276

Receiver in equity of defendant corporation through whom defendant's answer was made *held* not subject to examination by plaintiffs as "party to the record" (Code Civ. Proc. § 2055).

5. Evidence ⇨314(1)

Exclusion as hearsay of testimony, other than that relating to damages, of defendant whose default had been entered *held* not error.

6. Appeal and error ⇨1058(2)

Exclusion of testimony, other than that relating to damages, of defendant whose default had been entered and who was called as witness by plaintiff *held* not prejudicial where such defendant was subsequently examined by plaintiffs as party of record (Code Civ. Proc. § 2055).

CRAIL, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Lottie E. Howland and another against Elmer G. Doyle, the Reo Dennis Company, Inc., and another. From a judgment of nonsuit as to second-named defendant, plaintiffs appeal.

Affirmed.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants.

Goodwin J. Knight and Knight & Reynolds, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

This is an action to recover damages for a death resulting from the negligent operation

of a motor truck. The trial court granted the motion of defendant Reo Dennis Company for a nonsuit and the jury returned a verdict for damages against the other defendants.

The appeal raises no question as to plaintiff's right to recover damages, but only the question as to whether there was any evidence which would make Reo Dennis Company liable for the payment thereof. If there was any substantial evidence to support a prima facie case against that company, the granting of the nonsuit was error.

Defendant Robert G. Fifield, employed by his brother who did business under the name of Victor Tank Line, hauling oil and gasoline, visited Reo Dennis Company, which was a dealer in motor vehicles and which had in its possession the Sterling truck here involved. The president of the Reo Dennis Company, John D. Scouller, informed Fifield, who had previously demonstrated and sold trucks for the company, that he had this truck and was desirous of selling the same. Fifield expressed an interest, either from the standpoint of purchasing the truck himself or of selling it to some one else, but expressed a doubt as to whether the truck would stand up under the kind of work necessary to make it a paying proposition and offered to take the truck for the purpose of demonstrating either for the purpose of buying the truck himself, if it proved efficient, or of selling it to some one else. Nothing was said in the conversation which would indicate that any one other than Fifield would drive or test the truck, nor did Reo Dennis Company or any of its officers know that Fifield had, upon calling for the truck several days later, turned it over to the defendant Doyle, who drove and operated it thereafter and who had been hired by Fifield to try out the truck. The legal title to the truck was in Commercial Investment Trust, having been financed through that corporation on a former sale by Reo Dennis Company, but repossessed by the latter company upon default by the purchaser in his payments. No contract of sale or transfer of ownership was made to Fifield, but the truck was turned over to him with the understanding that he would try it out. During the use of the automobile, some bearings which had burnt out were replaced and some changes and repairs were made by respondent company. About three days after the last work on the truck and about a month after Fifield first received it, and while Doyle was operating it, the accident here involved occurred.

Appellant urges that evidence of ownership alone is sufficient upon which to predicate the

inference of agency and relies upon *Grantham v. Ordway*, 40 Cal. App. 758, 182 P. 73. In that case, however, the driver was in the employ of the owner of the motor vehicle and the presumption existed that he was acting within the scope of his employment. The case cited is not in point as the driver here was the employee of Fifield and engaged in the latter's business.

Appellant also claims that ownership of the truck of itself renders Reo Dennis Company liable under section 1714¼ of the Civil Code which so far as applicable here reads: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

[1] Appellant cites *Gammon v. Wales*, 115 Cal. App. 133, 300 P. 988, which holds an owner liable under this section even though at the time of the accident the vehicle was not being operated in the business of the owner. This does not, however, cover the question here as the liability of an owner under section 1714¼ is contingent upon the vehicle having been used or operated with the express or implied permission of the owner. Section 1714¼ places upon the owners of automobiles a statutory liability which otherwise would not exist. Before this section can be applied, it must appear by the proof that the vehicle was used or operated "with the permission, express or implied, of such owner." The existence of such permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved as an essential element of the cause of action. Such proof must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied. Where the evidence does not warrant either of such inferences, section 1714¼ does not apply as a matter of law.

[2, 3] There was no express permission for Doyle to drive the truck and the theory of implied permission is not tenable from the evidence. The Reo Dennis Company turned the possession of the truck over to Fifield with a sale of the same in prospect and with the incident permission to try it out. Nowhere does it appear that the company had any knowledge or information that Fifield was going to turn the truck over to a third

person to drive and test and particularly is there no basis for a claim that the company knew that Doyle would be the driver. Permission to drive a motor vehicle, implied as well as express, such as is necessary to bring the case within section 1714½, can only exist when the owner had knowledge or at least reason for believing that the vehicle would be driven by the person with whose negligence it is sought to charge him. A person cannot be said to have permitted that of which he had no knowledge or information. *Bradford v. Sargent*, 135 Cal. App. 324, 332, 27 P.(2d) 93. There is no evidence upon which a liability of Reo Dennis Company could be based.

[4] Appellants claim error because the trial court would not permit the examination of one R. F. Marshall as "a party to the record" under the provisions of section 2055 of the Code of Civil Procedure. Appellants admit that Marshall, who was not named as a defendant, was not a party in interest, but rest their claim solely on the fact that Marshall was the receiver in equity of the Reo Dennis Company and that this relationship made him "a party to the record" of the action. Section 2055 from its very nature is limited in its application to adverse parties to the action. The mere fact that the answer in behalf of Reo Dennis Company was by and through Marshall, the receiver, does not make him a party to the action.

[5, 6] Appellant also claims that the defendant Fifield was called by plaintiff under section 2055, Code of Civil Procedure, and that the court ruled that the witness could not be examined as to any matter except the subject of damages. An examination of the record discloses a somewhat different situation. It there appears that appellant's counsel declared that he did not intend to call Fifield as a witness and offered the latter's deposition and that the court held that since Fifield had not answered and his default having been entered, no question as to Fifield remained except the amount of his liability and that any statements in his deposition relating to anything other than the amount of damage would be hearsay as to the remaining defendants. Thereafter Fifield was called to the witness stand under section 2055. To this respondents objected and the objection was sustained, but the court stated that it would permit any questions pertaining to the subject of damages. Appellants then called "as a party of record" and questioned Fifield and without any limitation as to subject-matter, the examination and cross-examination covering

some forty-two pages of the reporter's transcribed transcript.

We can see no error, nor have appellants shown any prejudice from the rulings of the court.

Judgment affirmed.

I concur: STEPHENS, P. J.

CRAIL, Justice.

I dissent. The evidence upon which plaintiff relies is referred to in appellants' brief, pages 14 to 30, inclusive, and is supported by citations to the reporter's transcript. In my opinion there is evidence a plenty to sustain the inference that the use of the truck by the defendant Doyle was with the implied consent of the defendant Reo Dennis Company, Inc. The judgment should be reversed to the end that the cause may be determined upon its merits. I think this is in accord with our holding in the case of *Boland v. Gosser* (Cal. App.) 43 P.(2d) 559.



6 Cal.App.2d 361

**CRANE et al. v. EAST SIDE CANAL &
IRRIGATION CO.**

Civ. 4920.

District Court of Appeal, Third District,
California.

April 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Contracts ⇨313(2)

"Anticipatory breach of contract" occurs when one of parties repudiates contract by acts or statements indicating that he will not or cannot substantially perform essential terms, or by voluntarily transferring to third person property rights which are essential to substantial performance, or by voluntary act which renders substantial performance impossible or apparently impossible.

[Ed. Note.—For other definitions of "Anticipatory Breach," see Words & Phrases.]

2. Contracts ⇨313(2)

Conveyance of property without protecting interest secured by previous executory contract with relation to property conveyed constitutes breach of previous contract which authorizes suit for damages on doctrine of anticipatory breach.

3. Waters and water courses ⚡263

Conveyance by irrigation company of water rights without protecting interest of plaintiff under contract to furnish plaintiff with water for irrigation purposes constituted anticipatory breach, so as to authorize suit for damages, where conveyance rendered furnishing of water practically impossible.

4. Waters and water courses ⚡263

Measure of damages for breach of contract to furnish water for purpose of irrigation during specified limited period of time is difference in rental value of land with and without the water.

5. Waters and water courses ⚡263

Measure of damages for breach of contract to permanently furnish water for purpose of irrigation during all future time is difference between market value of land with and without water to be supplied according to terms of contract.

6. Waters and water courses ⚡263

In suit for damages for breach of contract to permanently furnish water for irrigation purposes during all future time, award of damages based on difference between market value of land with and without water right *held* proper as against objection that award of damages was too remote and uncertain because landowner had used land for 20 years for grazing purposes without irrigation, and that it was too speculative to assume landowner or his successor in interest would desire to cultivate land, where land was adaptable for cultivation of alfalfa, barley, and rice.

7. Waters and water courses ⚡263

Where award of damages in suit for breach of contract to permanently furnish water for irrigation purposes during all future time was based on difference between market value of land with and without water right, various practical purposes to which land was naturally adaptable was proper element in ascertaining market value.

8. Waters and water courses ⚡263

In suit for damages for breach of contract to permanently furnish water for irrigation purposes during all future time, award of damages of \$15 per acre, which was difference between market value of land with and without water right, *held* not excessive.

9. Waters and water courses ⚡263

In suit for damages for breach of contract to permanently furnish water for irrigation purposes during all future time, elimination of definition of due diligence and circumstances deemed to constitute due diligence, from instruction that defendant was entitled to verdict if it used due diligence

in protecting flow of water in its canal, *held* proper, and in any event not prejudicial, where instruction was not applicable to issues.

10. Waters and water courses ⚡263

Refusal to give requested instruction that if landowner failed to use water for beneficial purpose to which he was entitled under contract for period of time, and that if some stranger to contract subsequently succeeded in acquiring either riparian or appropriative rights to portion of such water, landowner would forfeit his right to future delivery of water under contract *held* proper as inapplicable to issues.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by C. A. Crane and another against the East Side Canal & Irrigation Company. From a judgment for the plaintiffs, the defendant appeals.

Affirmed.

For prior opinion, see 38 P.(2d) 467.

Fred B. Wood, of San Francisco, Norris J. Burke, of Sacramento, and Hugh K. Landram, of Merced, for appellant.

Treadwell, Laughlin & Treadwell, of San Francisco, and C. Ray Robinson, of Merced, for respondents.

PER CURIAM.

On rehearing we are persuaded there is evidence to support the judgment for damages on the doctrine of anticipatory breach of the contract.

The complaint originally included two counts. The second count referred exclusively to a demand for alleged damages to the land of George S. Bloss, Jr., which was subsequently dismissed. This appeal will therefore be considered as though C. A. Crane were the only plaintiff in the action.

The defendant has appealed from a judgment of \$19,200, which was rendered against it pursuant to a verdict returned in a suit for damages based on anticipated depreciation of the value of farm land on account of the inability of the defendant to fulfill the terms of a contract to furnish plaintiff C. A. Crane with water for the purpose of irrigation. After accepting the obligation of a contract to supply the plaintiff with water, the defendant conveyed its water rights to other parties so that it is unable to supply the water in fulfillment of the agreement. During more than twenty years that the plaintiff

owned the land which is involved in this suit, he never used any water provided for by the contract. The cause, however, is based on the doctrine of anticipatory breach of contract and the expected damages as a result thereof.

For more than twenty years the plaintiff C. A. Crane has been engaged in the cattle business. During all of that time he owned 1,280 acres of grazing land which is included in adjacent sections 19 and 30, township 8 south, range 12 east, M. D. B. & M., in Merced county. This land is situated about ten miles southwest of the city of Merced. It is located twelve miles south of the Merced river, three miles north of the San Joaquin river, and fifteen miles easterly from the confluence of these two streams. In the vicinity of that property are Owens creek, Duck creek, Mariposa creek, and Dead Man creek. The Mariposa slough also lies to the south of plaintiff's land. This land is comparatively flat and level. It has never been cultivated for crops. It has always been used exclusively for grazing cattle thereon. There is evidence that, with proper cultivation, the land is adaptable for and would produce barley, rice, and alfalfa.

For more than forty years J. J. Stevenson, who was also engaged in the cattle business, owned a vast tract of land consisting of thousands of acres occupying the intervening space between the Merced river and the San Joaquin river westerly from plaintiff's property. Stevenson also possessed riparian, prescriptive, and appropriative water rights in that vicinity incident to both the Merced river and the San Joaquin river. March 21, 1898, Stevenson conveyed these water rights to the defendant East Side Canal & Irrigation Company, a corporation, of which he was then president and principal stockholder. The Occidental Land & Improvement Company, a corporation, which then owned sections 19 and 30 hereinbefore mentioned, also owned valuable and extensive water rights in the same vicinity. On the last-mentioned date, in consideration of conveying to the defendant corporation a right of way across sections 19 and 30 to be used for the construction and maintenance of an irrigation canal, it executed and delivered to the owner of those sections of land a contract, by the terms of which it was agreed the grantee and its successors in title would furnish the grantor of the right of way, and its successors, "all the water that may be required" for irrigating sections 19 and 30, not to exceed 14 cubic feet of water per second, to be paid for at the rate of not to exceed \$2 per acre. This contract also pro-

vides that in consideration of the sum of \$25 for each season, the owner of the land may close the canal gates in August and September of any year to flood the land east of the canal to a depth of not to exceed 18 inches for the purpose of irrigating the soil to produce grass or pasture. The contract provides that the water rights "form a part of the appurtenances to said described land (of the plaintiffs) and the right thereto shall be transferable only with and run with said land, and that the party of the second part is bound by this instrument to all subsequent owners of said land." Sections 19 and 30 were subsequently conveyed to the plaintiff, who ever since has owned and still does own that land.

The agreement referred to reads, in part:

"That the said party of the first part does hereby sell and convey to the said party of the second part, its successors and assigns forever, a right of way for an irrigating canal upon and through sections nineteen (19) and thirty (30) * * *

"Said second party agrees for itself, its successors and assigns, that it will deliver and furnish to the first party from the main canal above mentioned, all the water that may be required, not exceeding at any time, fourteen (14) cubic feet of water per second, for the purpose of irrigating said sections * * * from the first day of March, 1898, and during the existence of said corporation and its successor or successors in interest, and that it will charge and collect from said first party, its successors and assigns, for said water, such rate per acre, irrigated as may be charged and collected for other lands irrigated by water from said canal, providing, however, that in no one year shall said charge for water for irrigating said lands exceed the sum of Two (2) Dollars, per acre, for each acre irrigated.

"Said second party also agrees that upon payment to it or its successors in interest, of twenty-five (25) dollars, said first party may, in August or September of any year, for the purpose of irrigating the natural grass or pasture upon those parts of sections nineteen (19) and thirty (30) * * * close the canal gates and back the water over so much of said lands as it will cover when standing to a height of eighteen (18) inches above the general level of land on east line of right of way on the east bank of the canal.

"It is understood and agreed that the water to be furnished under this agreement is intended to form a part of the appurtenances to said described land and the right thereto

shall be transferable only with and run with said land, and that the party of the second part is bound by this instrument to all subsequent owners of said land but to no other person or persons.

"It is covenanted and agreed by the parties hereto that the party of the second part shall not be responsible for the deficiency of water caused by drouth or insufficiency of water in the river, temporary damage by flood or other accident, but that the party of the second part shall employ due diligence at all times in restoring and protecting the flow of water in its canal."

At no time prior to the commencement of this suit did the plaintiff ever request the defendant to furnish him with water, nor did he use water pursuant to the terms of the preceding contract.

March 19, 1928, in consideration of the sum of \$200,000, and of the dismissal of all pending actions involving water rights, the defendant corporation and J. J. Stevinson conveyed to the Southern California Edison Company, a corporation, the absolute right to "take, divert, use and store water," without limitation of time, from the San Joaquin river for irrigation and for hydro-electric power purpose, together with "an easement in the canals and works" of the defendant. The sole condition of this grant of water rights is that the Edison Company shall return the water used for power purpose to the San Joaquin river at a point "above Herndon in Fresno County," which is above the property of the plaintiff. So, also, on January 21, 1929, in consideration of the sum of \$100,000, and the dismissal of all pending suits involving water rights, J. J. Stevinson, a corporation, conveyed to seven other water companies all of its water rights on the San Joaquin river within Merced county.

As a part of the consideration for the grants last mentioned, the defendant and J. J. Stevinson dismissed the actions in all pending litigation involving their water rights. The respondent contends the conveyances of these water rights and the dismissal of these pending suits render it impossible for the defendant to fulfill its previous contract of March 16, 1898, to supply plaintiff with water to irrigate his land in sections 19 and 30, if he should desire the use of that water at any time in the future. It is asserted by the respondent that this conduct on the part of the defendant constitutes an anticipatory breach of the contract to furnish the plaintiff with water, which authorizes the maintenance of a suit for damages for all loss which is reasonably attributable thereto.

Upon that theory this suit was commenced. It was tried with a jury which returned a verdict of \$25,000 in favor of the plaintiff. On a motion for new trial the amount of the judgment was reduced by the trial court to \$19,200, which sum was accepted by the plaintiff as satisfactory. From that judgment the defendant has appealed.

On appeal it is contended the conveyance of the water rights and the dismissal of the suits by the defendant do not constitute an anticipatory breach of the contract to furnish plaintiff water; that the verdict and judgment are not supported by the evidence for the reason that there is no competent evidence of past or future damages, and because there is no evidence that plaintiff ever did use water under the terms of the contract, or that it is probable he ever will require the use of the water for that purpose in the future. It is also asserted the court erred in receiving evidence and in giving to the jury and refusing to give certain instructions.

[1-3] We are of the opinion the evidence in this case shows an anticipatory breach of the contract on the part of the defendant to furnish the plaintiff with water for irrigation of sections 19 and 30, township 8 south, range 12 east, in Merced county, by the defendant conveying to other parties all of its title to nonriparian water rights in that vicinity, and thus rendering it practically impossible for the grantor to fulfill the agreement. An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible. 1 Restatement of the Law of Contracts, p. 475, § 318; 6 Cal. Jur. p. 457, § 273; 3 Elliott on Contracts, p. 206, §§ 2028-2039; 3 Page on Contracts, p. 2220, §§ 1436-1443.

The appellant asserts that the doctrine of anticipatory breach of contract does not apply to the facts of this case, under our California decisions, for the reason that it has been held the mere conveyance of real property, or an interest therein, by a party to a previous contract for its sale before the time of performance does not necessarily prevent the grantor from fulfilling the agreement since he may subsequently acquire the title thereto by a reconveyance of the property before the agreed time of performance, enabling

the vendor to thus fully perform the terms of the contract. The earlier California cases to that effect, however, are distinguished by the case of *Brimmer v. Salisbury*, 167 Cal. 522, 140 P. 30, 34, wherein it is said that if the vendor conveys the property without protecting the rights of the other contracting party under an unfulfilled executory agreement, the subsequent conveyance will be deemed to be a breach of the contract so as to entitle the injured party to sue for all damages accruing as a result thereof on the doctrine of anticipatory breach of contract. That case holds that the contract is not breached if the vendor of the land does convey it subject to the prior rights assured by the contract, or otherwise protects those rights against the subsequent conveyance. The court says in that regard: "Our adjudications hold that, in an action for breach of contract based upon a conveyance by the vendor to a third person during the existence of such an executory contract of sale, the averment merely that the vendor has sold does not state a complete cause of action; the reason being given in *Easton v. Montgomery* [90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123], supra, and repeated and reaffirmed in the *Shively Case* [99 Cal. 259, 33 P. 848], supra, and again in the *Garberino Case* [109 Cal. 125, 41 P. 857], supra. * * * A vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee. * * * Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. * * * It is, of course, no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing."

The *Brimmer Case*, supra, contains a complete review of the previous leading cases in California regarding that subject, and it holds that the mere conveyance of real property in violation of the express terms of a previous executory contract to sell land to another person may not be deemed to be a breach of the agreement unless the vendor fails to transfer the property subject to the prior rights secured by the executory contract or fails in some manner to protect the prior rights. It is there said: "A vendor will not have breached his contract if he shall have

conveyed the property subject to or under circumstances such as do protect the rights of his vendee." It follows that if the property is conveyed without protecting the interest secured by a previous executory contract with relation thereto, the subsequent transfer of title does constitute a breach of the previous agreement which authorizes a suit for damages on the doctrine of anticipatory breach of contract. *Heden v. Point Reyes Land Co.*, 185 Cal. 121, 125, 196 P. 44. In the present case the water rights were conveyed by the defendant without attempting to protect the interest of the plaintiff. There is no reasonable probability that the defendant ever will or can repossess these water rights so that it could fulfill the contract with plaintiff. The doctrine of anticipatory breach of contract therefore applies to the circumstances of this case.

The respondent contends there is no satisfactory evidence of detriment to the plaintiff on account of the conveyance of the defendant's water rights for the reason that for more than twenty years after the execution of the contract of March 21, 1898, the plaintiff continued to use the land only for grazing stock and never exercised the right to purchase water under the provisions of the contract during that entire period of time, or at all. He continued to use the land, as he had previously used it, without irrigation. There is evidence that the land, under proper cultivation, would produce barley, rice, or alfalfa, but there is no evidence that the plaintiff ever intends to use it for that purpose. There is no direct evidence that the natural growth of grass on the property, which was relied on by the plaintiff to feed his stock, would ever be affected by the lack of water which might have been supplied under the terms of the contract. The only evidence of alleged damages for anticipatory breach of the contract was furnished by four witnesses who testified that the market value of the property with the water rights attached thereto, as provided by the terms of the contract prior to January 21, 1929, when the water rights were conveyed, was from \$50 to \$75 an acre, and that the market value of the land without the water rights was only \$25 per acre. With the exception of the testimony of one witness, this evidence was adduced over the objection of the appellant that "It is incompetent, irrelevant and immaterial, * * * and is not a proper measure of valuation and not based upon the evidence in this case."

[4, 5] After reargument of the cause and careful research, we are of the opinion the

proper measure of damages was applied under the circumstances of this case. It is true that the California cases have uniformly held that the measure of damages for a breach of contract to supply real estate with water for the purpose of irrigation during a specified limited period of time is the difference in the rental value of the land with and without the water. *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 P. 805; *Pallett v. Murphy*, 131 Cal. 192, 63 P. 366; *Crow v. San Joaquin, etc. Irr. Co.*, 130 Cal. 309, 62 P. 562, 1058; 67 C. J., p. 1444, § 1117; 3 *Kinney on Irr. and Water Rights*, p. 3135, § 1698. From an examination of the California authorities it appears that all of these cases were founded on damages accruing on account of a loss of water for only a single season, or for a specified limited period of time. Under such circumstances it appears to be a just and reasonable method of ascertaining the damage to prove the difference between the rental value of the land with and without the use of the water. In the present case, however, the alleged damage arising from an anticipatory breach of the contract to furnish water for irrigation purpose is a permanent detriment to the freehold. The contract specifically provides that the water rights "form a part of the appurtenances of said described land and the right thereto, and * * * (shall) run with the land." This suit is based on an alleged breach of the contract resulting in a permanent failure to supply the water, as distinguished from a temporary omission to do so, and affects the plaintiff's easement in the water as a perpetual and inseparable part of his real property. Under such circumstances, the mere difference between the rental value of the land for a single season or for a limited period of time, does not furnish an adequate measure of damages. When there is a breach of contract to permanently furnish water for the purpose of irrigation during all future time, we assume that the only just and adequate rule of estimating the damage to the freehold is to ascertain the difference between the market value of the land with and without the water to be supplied according to the terms of the contract, similar to the measure of damages which applies in eminent domain proceedings.

[6-8] The most serious question to be determined in this case is whether the damages which were awarded are not too remote and uncertain, since it appears without conflict of evidence that the plaintiff failed for some twenty years to exercise his privilege to use the water according to the terms of the contract. The appellant asserts that it is too

speculative to assume that the plaintiff might desire to use his land to raise alfalfa, barley, or rice, in the future, when for twenty years in the past he has used it only for grazing purpose without irrigation. But the evidence is uncontradicted that the land is adaptable for that purpose, and it does not appear to be too remote, uncertain, or speculative to assume that the owner of the land or his successor in interest may reasonably desire to cultivate and use it for that purpose. In this case full opportunity was afforded the appellant to cross-examine witnesses or supply evidence to refute the plaintiff's positive showing that the land is reasonably adaptable to the cultivation and raising of crops of alfalfa, rice, or barley. It has been definitely held that it is competent to prove the various "practical purposes to which land is naturally adaptable" as a proper element in ascertaining the market value thereof. *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 P. 224; *Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, 53, 186 P. 772. We are unable to say that the award of damages is excessive. It amounts to only \$15 per acre of the land which is affected by the breach of contract.

[9] The appellant assigns the modification and refusal to give certain of its instructions as erroneous. We are satisfied there was no error in that regard. The first instruction complained of contained the statement that the contract in question required the defendant to use "due diligence at all times in restoring and protecting the flow of water in its canal." It then recited certain principles which it assumes would constitute due diligence on the part of the defendant, including the ordinary definition of that term as the conduct which a reasonably prudent person would use under like circumstances, and concluded by saying that "If you find that the defendant at all times used due diligence in restoring and protecting the flow of water in its canal, you will bring in a verdict for defendant." The instruction was given to the jury after eliminating therefrom the recital of the definition and circumstances deemed to constitute due diligence. The modification of this instruction was not erroneous. The instruction does not appear to be applicable to the issues of the case. The portion of the challenged instruction which is quoted was given to the jury. The damages were awarded on the theory that the contract was repudiated by the defendant by transferring its water rights so as to render it practically impossible for it to fulfill the agreement. Moreover, the instruction, as it was presented, is obscure. In reciting the circumstances

which are deemed to constitute due diligence on the part of the defendant, it was said that it "would depend on all the circumstances, to-wit, financial burden, number of invasions, claims and rights, if any, of the invaders, and any and all other circumstances." We are of the opinion this language is uncertain and erroneous. The "financial burden" of the defendant would not excuse it from "protecting the flow of water in its canal." Nor do we believe that a mere limitation of the "number of invasions" of its water rights would determine the question of the necessity of exercising diligence in protecting the flow of water in its canal. In our opinion the instruction was properly modified. At least the modification was not prejudicial.

[10] The court properly refused to give defendant's proposed instruction which charges that if the plaintiff failed to use the water for a beneficial purpose, to which he was entitled under the contract, for a period of time, and that some stranger to the contract subsequently succeeded in acquiring either riparian or appropriative rights to a portion of such water, then the plaintiff would thereby forfeit his right to future delivery of water under the terms of the agreement. This instruction appears to be inapplicable to the issues of this case. The plaintiff claimed no appropriative or riparian rights as against the defendant. He relied solely upon his contractual rights under the terms of the agreement. The fact that he failed to use the water for a period of time, and that strangers to the contract were permitted to acquire prescriptive or riparian rights against the defendant, in nowise affected their contract. *Copeland v. Fairview Land & Water Co. et al.*, 165 Cal. 148, 131 P. 119. The defendant was bound by the terms of its contract to exercise due diligence to prevent strangers from interfering with its water rights, and to preserve those rights, so that it could fulfill its contract with the plaintiff.

We are unable to perceive that this case presents equitable issues which require the adoption of findings by the court independently of the implied findings of the jury. It does not appear that the appellant so contended at the trial, or that he offered to the court any proposed findings upon any issue in the case. We are of the opinion findings were unnecessary.

We find no error in the rulings of the court, upon the defendant's demurrer to the complaint, his motion to strike out portions of

the complaint, or regarding the introduction of evidence during the course of the trial.

The judgment is affirmed.



6 Cal.App.2d 289

ROBERTSON et al. v. CITY OF LOS ANGELES et al.

Civ. 9303.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Hearing Denied by Supreme Court
June 18, 1935.

Automobiles ⇨ 230

Where city charter provision required claims to be presented to board, officer, or employee authorized to incur expenditure or liability represented thereby, claim for tort committed by police officer while driving automobile was properly filed with city council rather than with board of police commissioners which had charge of personnel and grant- ed licenses only.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Adam Robertson and wife and others against the City of Los Angeles and another. From a judgment for defendant, plaintiffs appeal.

Reversed.

Blue & Conroy, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheateroff, Deputy City Atty., all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs sued to recover damages alleged to have been sustained in an accident involving an automobile owned by defendant city and driven by defendant Sanderson in the course of his employment as police officer. Prior to suit claim for such damages had been filed with the council of defendant city and rejected. At the trial the city objected to the introduction of evidence as against it on the ground that the claim, although timely, was not filed with the board of police commissioners, and that such filing with said board was required by city charter. Objec-

tion was sustained, and on judgment being entered for the city this appeal is taken.

Section 363 of the charter of the city of Los Angeles provides: "Every claim and demand against the city (except on certain bonds) * * * shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby." Section 376 provides that suit may not be brought on a claim unless it has been so presented and rejected. In this case the claim was properly presented to the city council as a preliminary step before bringing suit.

The interpretation which should be placed upon the sections cited has been considered in a number of cases, including *Musto-Keenan Co. v. City of Los Angeles*, 139 Cal. App. 506, 34 P.(2d) 506, 510, and *Haigh v. City of Los Angeles*, 139 Cal. App. 595, 34 P.(2d) 779, 780, in each of which hearing by the Supreme Court was denied. In the latter case we discussed *Spencer v. City of Los Angeles*, 180 Cal. 103, 179 P. 163; *Continental Insurance Co. v. City of Los Angeles*, 92 Cal. App. 585, 268 P. 920, 923; and *Beeson v. City of Los Angeles*, 115 Cal. App. 122, 300 P. 993, which relate directly to the question here involved, as to the proper body with which to file such a claim.

The *Spencer Case*, *supra*, did not involve a claim arising out of a tort, and is not persuasive in the instant case. The *Continental Insurance Company Case* was based on a claim for damages against the board of public service commissioners (which has been superseded by the board of water and power commissioners), a body exercising proprietary, as distinguished from governmental, functions. Article XXII of the city charter sets out its broad powers, which include the right to sue and be sued and to carry on autonomously, under the charter, the far-flung business enterprise which is a matter of common knowledge.

The *Beeson Case*, *supra*, deals with a claim arising out of the death of a child in a storm drain maintained by the board of public works, whose functions in connection with the construction and maintenance of streets, sewers, bridges, tunnels, street lights, public buildings, etc., are enumerated in article XXIII of the city charter. As we observed in *Haigh v. City of Los Angeles*, *supra*, "any liability in that case was incurred by reason of the negligent act or omission of the board in the performance of its duty of maintaining its own sewers and drains, and it could

not have been incurred by any act of the city council"; and the conclusion seems reasonable that the appellate court in the *Beeson Case* believed that the language used in the *Continental Insurance Company Case* with reference to a board which was exercising proprietary powers should by analogy be extended to apply to a board which, while performing governmental functions, was doing work such as that done by the board of public works. The language in the *Continental Insurance Company Case* which might without controversy be approved as to boards exercising proprietary functions, it must be observed, was in the *Beeson Case* directly applied to the board of public works, with no declaration of logic or precedent to bridge the difference in legal characteristics which separated them. The *Beeson Case*, moreover, considers defects in the complaint which would perhaps render it defective even if a proper claim had been filed. Nevertheless, since the Supreme Court has reviewed it in denying a petition for hearing in that court, without modifying the language used in the opinion, and since claimants have reasonably relied on the case as establishing the course for them to follow, we are constrained to abide by its implications as to claims for torts against the board of public works.

We cannot concede, however, that the construction placed by the *Beeson Case* on the charter sections cited would warrant an extension so as to justify or require the filing of a claim with the board of police commissioners when compensation is sought from the city by reason of a tort of a police officer. No analogy can be found between article XIX of the charter prescribing the functions of the board of police commissioners and articles XXII and XXIII above referred to. That board grants certain licenses and has charge of the personnel of the police department, and there its powers end. Aside from rules and regulations which relate to the orderly conduct of its business, the board enacts no laws or ordinances the enforcement of which constitute the substance of its department's work. We do not believe that the language used in the *Continental Insurance Company Case* should be extended to cover a case where the department is not exercising proprietary functions or doing work so similar in character as to compel the analogy drawn by the *Beeson Case*. As the learned presiding justice of the Third appellate district observed in his opinion in the *Musto-Keenan Case*, *supra*: "This court may take judicial knowledge of the area of the city of Los Angeles and the great diversity of pro-

proprietary and governmental interests with which it is concerned, and it would be a great hardship and inconvenience to demand that a citizen at his peril select from the great number of boards and commissions authorized by the charter the proper subordinate with whom to file his claim."

The charter of course does not authorize the city or any department thereof to commit a tort, nor to incur liability by means of committing a tort. The liability arises by operation of law consequent to the tortious acts. It is not contractual, liquidated, nor subject to audit or appraisal as relates to general damages. The court said in *Continental Insurance Company v. City of Los Angeles*, supra: "It is apparent that the general plan or scheme and intention of the framers of the charter and of the Legislature was first to provide for the presentation of a demand as a necessary prerequisite to the maintenance of a suit to the end that the city should always be given an opportunity to pay before being subjected to litigation, and second, as its business and administrative responsibility increased to create new boards and commissions with the object and to the end of relieving the council of many of its responsibilities and enabling it to function, more especially as a distinctive legislative body."

It is not suggested that the board of police commissioners could bind the city by approving a claim such as that presented in the instant case, nor could it defend against a claim which might be pressed against the city, being without authority or resources so to do. Nor could it pay any judgment recovered after the claim was rejected. The only function of that board in receiving such a claim would be to act as a messenger to transmit it to the city council and perhaps report back the action of that body with reference to it. This intermediate presentation to such a board might prove an obstacle to the attainment of the very object which brought the rule into being, if the board delayed or failed to transmit the claim to the city council and the latter body was thereby kept from paying or settling it or making adequate inquiry to prepare a defense. Furthermore, it would be absurd to construe the court's language just quoted as meaning that the charter intended that the load of determining whether it should pay or reject a claim for damages should be lifted from the shoulders of the city council and placed upon some subordinate board, officer, or employee. Yet that very absurdity is the inevitable concomitant of any further or un-

warranted extension of the theory that in the case of a claim arising out of a tort the demand should be presented to the board having jurisdiction over the agency which committed the tortious act giving rise to any liability. On the contrary, the city council is the duly constituted representative of the taxpayers whose money is to be paid to satisfy the claim, or whose right to be held harmless against fraud or extortion is to be defended. To that body the claim must come for action, and to it the demand should be presented in a case such as this. See *Dougllass v. City of Los Angeles* (Cal App.) 44 P.(2d) 463, this day decided.

We must conclude that the claim of this plaintiff was properly filed with the city council, and that the objection to the introduction of evidence should have been overruled by the trial court so plaintiff could have presented her proof.

Judgment reversed.

I concur: CRAIL, J.

STEPHENS, Presiding Justice.

I concur because the rule of decision should not be changed at this late date. It may be seen by referring to several other cases this day filed that the city itself is not strictly consistent in its construction of the ambiguous charter provision referring to notice before suit may be filed against the city.



DOUGLASS v. CITY OF LOS ANGELES.*

Civ. 9169.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Hearing Granted by Supreme Court
June 17, 1935.

1. Municipal corporations 661(1)

Construction and maintenance of bridge and public street held "municipal affairs" within constitutional provision empowering city under charter to make and enforce regulations respecting municipal affairs subject to restrictions of charter (Const. art. 11, §§ 6, 8).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

2. Municipal corporations ⇨741(1)

Statute regarding filing of claims against city for injuries does not impose its provisions upon those properly proceeding under city charter (St. 1931, p. 2475).

3. Municipal corporations ⇨812(9)

Where claim for injuries caused by defective bridge and public street was properly filed with board of public works under city charter, filing of duplicate notice with clerk of council under statute *held* unnecessary (St. 1931, p. 2475).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Alice Douglass against the City of Los Angeles. From a judgment for defendant, plaintiff appeals.

Reversed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Ray L. Chesebro, Frederick Von Schrader, and D. M. Kitzmiller, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued to recover damages for personal injuries alleged to have been sustained as the result of a defective and dangerous bridge and public street maintained by defendant. As a condition precedent to such suit, plaintiff filed with the board of public works of defendant city a proper and timely claim for compensation for such detriment alleged to have been suffered by her. Upon trial defendant interposed an objection to any testimony on the ground that the pleadings did not state a cause of action by reason of the fact that plaintiff had not filed a further and similar claim with the clerk of the city council. The objection was sustained, and judgment for defendant was thereafter entered. Plaintiff appeals, contending that the demand filed with the board of public works was sufficient. Respondent concedes that under the provisions of the charter of defendant city the claim was properly filed, but urges that under Act 5149, enacted in 1931 (Stats. 1931, p. 2475, Deering's Gen. Laws, vol. 3, p. 2562), a further claim must be filed with the clerk of the city council.

[1-3] Article 11, §§ 6 and 8, of the Constitution of California, empowers defendant city under its charter to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and

limitations of the charter; and, in respect to other matters, it is subject to general laws. It cannot be questioned that the construction and maintenance of a bridge and public street such as are involved here are municipal affairs. Ex parte Prentice, 24 Cal. App. 345, 141 P. 220; Fragley v. Phelan, 126 Cal. 383, 58 P. 923. The charter made them a special charge of the board of public works, and it was by reason of their acts or omissions that the liability if any was incurred. Since no question was raised at the trial nor on this appeal as to the sufficiency of the claim filed with the board of public works as far as the charter provisions relating thereto are concerned, we deem it unnecessary to discuss the case of Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993, upon which reliance is placed, but direct attention to the views expressed in Robertson v. City of Los Angeles (Cal. App.) 44 P.(2d) 461, this day decided. It appears that Act 5149 would not have the effect of imposing its provisions upon those who were properly proceeding under the city charter. O. T. Johnson Corp. v. City of Los Angeles, 193 Cal. 308, 245 P. 164.

We distinguish the situation presented in the instant case from that considered by the court in Bernreither v. City of New York, 123 App. Div. 291, 107 N. Y. S. 1006, 1008, and relied on by respondent, where a legislative requirement for filing of a notice of intention to sue with counsel for the city, in addition to a demand filed with the comptroller as required by the charter, was held on appeal to be a proper condition precedent to suit against the city. The court there remarked that these two requirements "were independent provisions, designed to conserve different objects." Our attention has not been directed to any constitutional provision in that state comparable to the provisions of article 11, §§ 6 and 8, of the Constitution of this state, above referred to. In the case before us we find no different objects to be subserved by the two notices which respondent contends are required.

We conceive the true rule to be that enunciated by the Court of Appeals of New York in Sheehy v. City of New York, 160 N. Y. 139, 54 N. E. 749, 750, in passing upon an appeal from the Supreme Court, Appellate Division, of that state, as reported in 29 App. Div. 263, 51 N. Y. S. 519. In construing the legislative requirement for service upon counsel for the city of a notice of intention to commence an action in a case where a claim was fully presented but no such specific intention to sue

was declared, the court said: "The plain object of this statute [requiring notice] was to provide means by which a city could better guard against the imposition of unfounded claims by being at once informed of their existence, so that its officers might more readily pursue an investigation of their merits than if longer postponed. On the other hand, it could not have been its purpose to deny to a party injured by the negligence of a city any remedy against it, nor to unnecessarily embarrass parties in the enforcement of their rights. While, in an action like this, the statute must be substantially complied with or the plaintiff cannot recover, still, where an effort to comply with it has been made, and the notice served, when reasonably construed, is such as to accomplish the object of the statute, it should, we think, be regarded as sufficient."

It would be a superfluous impediment to a citizen seeking legal redress for an injury to require such duplicate notice, and would be contrary to the clear intent of our Constitution and the decisions construing it. The objection should have been overruled, and the case tried on its merits.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 294

ROGERS et al. v. CITY OF LOS ANGELES
et al.
Civ. 9535.

District Court of Appeal, Second District,
Division 2, California.
April 19, 1935.

Rehearing Denied May 17, 1935.

Hearing Denied by Supreme Court
June 18, 1935.

1. Evidence ⇐586(3, 4)

Weight to be given negative testimony, where it is claimed that signals were not given, is a question for the jury, and such evidence is sufficient to sustain a verdict though it conflicts with other evidence that a warning was actually given.

2. Appeal and error ⇐928(2)

Reviewing court must assume that jury measured evidence by rule given in instruction.

3. Automobiles ⇐245(80)

Whether driver of automobile struck by city ambulance crossing intersection against signal was contributorily negligent *held* for jury (Gen. Laws 1931, Act 5128, § 132 (b); Civ. Code, § 1714½).

4. Automobiles ⇐210

Under statute giving right of way to authorized emergency vehicle, unless motorist knew or in exercise of ordinary care should have known ambulance was approaching, motorist was not obliged to anticipate its presence and give right of way (Gen. Laws 1931, Act 5128, § 132 (b)).

5. Automobiles ⇐230

Under city charter provision requiring claims to be presented to board, officer, or employee authorized by charter to incur expenditure or liability represented thereby, claim for injuries caused by city ambulance *held* properly filed with city council and with board of police commissioners rather than with police surgeon whose office was created by ordinance.

6. Automobiles ⇐230

Police surgeon whose office was created by ordinance authorized by charter was not an "employee authorized by charter to incur expenditure or liability" represented by claim for damages caused by ambulance within charter provision requiring claim to be filed with such an employee.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Action by Billie Eileen Rogers and others against City of Los Angeles and another. From a judgment for plaintiffs defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheateroft, Deputy City Atty., all of Los Angeles, for appellants.

Sherman & Sherman and Erwin H. Haas, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff Billie Eileen Rogers and the other plaintiffs, her parents, recovered judgment against defendants for injuries received by the first-named plaintiff, then 20 years of age, when the coupé driven by her was struck by an ambulance owned by defendant city and driven by defendant Garrett in the course of his employment. Defendants appeal.

The accident occurred about noon on a clear day. The driver of the coupé was going east on Jefferson boulevard in the city of Los Angeles, and as she approached the intersection of Crenshaw boulevard the signal was open for east and west bound traffic. She was traveling in the center lane of the south half of the street. The ambulance was going south on Crenshaw, responding to an emergency call. As it approached Jefferson it swerved toward the east side of the street it was traversing to avoid the south-bound cars thereon, proceeded into Jefferson, and the two cars collided in the intersection. Because of injuries received, the driver of the coupé testified she was unable to recall the incidents surrounding the accident.

Appellants urge three points on appeal: (1) Insufficiency of the evidence to establish their liability; (2) proof of contributory negligence as a matter of law; and (3) noncompliance with charter provisions with reference to presenting claim before suit.

[1] In support of their contention relating to the insufficiency of the case against them, appellants place their reliance upon section 132 (b) of the California Vehicle Act (Deering's Gen. Laws, 1931, vol. 2, Act 5128, p. 2515, Stats. 1929, p. 542), which reads: "The driver of a vehicle upon a public highway shall yield the right of way to any authorized emergency vehicle when the latter are operated upon official business and the drivers thereof sound audible signal by siren. This provision shall not relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of such right of way." The jury, at the request of defendants, was instructed upon the law contained in this section, including definition of the word "arbitrary." It is admitted that the ambulance was an authorized emergency vehicle and that it was being operated on official business. California Vehicle Act, §§ 8½ and 120, Deering's Gen. Laws, 1931, vol. 2, Act 5128, pp. 2455, 2511. The extent to which the siren was being audibly sounded was the subject of testimony which was somewhat in conflict. Nearly all witnesses heard the siren, many of them declaring that it sounded at Twenty-Ninth street, three or four blocks north of Jefferson, and then did not sound again until it entered the intersection not far from the point of impact. One west-bound motorist on Jefferson declared he did not hear it at all until just as the ambulance was

entering the intersection. "The weight to be given negative testimony, where it is claimed that signals were not given, is a question for the jury; and such evidence is sufficient to sustain a verdict even though it conflict with other evidence that a warning was actually given. *Thompson v. Los Angeles Railway Co.*, 165 Cal. 748, 134 P. 709; *Keena v. United Railroads*, 197 Cal. 148, 239 P. 1061." *Ferran v. Southern Pacific Co.* (Cal. App.) 35 P. (2d) 1076, 1077. As above indicated, the traffic signal was closed to north and south bound traffic when defendants' vehicle undertook to cross the intersection, which was a busy one, against the signal, and the speed at which it was being driven was variously stated to be from 30 to 55 miles per hour.

[2] The jury having been instructed concerning the law, we must assume that they measured the evidence by the rule which it afforded. They concluded that the acts of the defendant ambulance driver warranted a verdict in favor of plaintiffs, and under the evidence as above outlined, we are unable to say as a matter of law that they were wrong. Liability of defendant city is of course predicated upon the provisions of section 1714½ of the Civil Code.

[3, 4] Whether the plaintiff, driver of the coupé, was guilty of contributory negligence was a matter similarly within their province. There is nothing to suggest negligence on her part unless she heard the siren and disregarded it. Her duty to give the right of way to the ambulance was based upon her knowledge of its approach. As the court had occasion to observe in connection with the sounding of a siren by a fire truck in *Balthasar v. Pac. Elec. Ry. Co.*, 187 Cal. 302, at page 311, 202 P. 37, 41, 19 A. L. R. 452, "Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus." Unless she knew or in the exercise of ordinary care should have known that the ambulance was approaching, the plaintiff driving the coupé was under no obligation to anticipate its presence. We find nothing in the cases of *Armas v. City of Oakland*, 135 Cal. App. 411, 27 P.(2d) 666, 28 P.(2d) 422, or *Tuten v. Town of Emeryville*, 139 Cal. App. 745, 35 P.(2d) 195, cited by appellants which are in conflict with our views in this case.

[5, 6] Before bringing suit a claim for damages was filed with the council of the city of Los Angeles and with the board of police commissioners within the time provided by

the charter of defendant city, and said claim was rejected. Appellant city urges, however, that the claim against it should have been filed with the police surgeon of the city, and since it was not so filed, respondents are precluded from successfully maintaining their suit as against such appellant.

Reliance is placed upon section 363 of the charter of defendant city, which provides, "Every claim and demand against the city, except as provided in the preceding section, shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby. In all cases the date of such approval shall be given," and section 376 which declares that no suit shall be brought against the city unless such a claim has been filed in the time therein provided.

Appellants contend that the ambulance was in charge and under control of the "receiving hospital," and that the driver was an employee of the "receiving hospital" which it is asserted "is a distinct and regularly constituted department of government of the City of Los Angeles," created by the council of said city, under article II, section 16 of its charter, which says: "The council may by ordinance provide for the election or appointment of officers other than those designated in this charter, whenever the public necessity or convenience may require and prescribe their duties and fix their compensation; provided that such duties shall not include any of the duties of any officer designated in this charter or of his deputies or assistants."

Pursuant to this charter section, appellants state that the council passed an ordinance creating the position of "police surgeon" who appoints assistants and runs the receiving hospital, and who appointed the ambulance driver in this case.

In *Robertson v. City of Los Angeles* (Cal. App.) 44 P.(2d) 461, this day decided, we discussed the principles which should guide us in our interpretation and application of the charter provisions above cited. With reference to filing claims, we are of the opinion that for the reasons therein stated the appellants' contention that the demand in this case should have been filed with the police surgeon as an indispensable prerequisite to bringing suit against defendant city cannot be sustained.

Since the position of police surgeon was not created by the charter but was the creature of an ordinance enacted pursuant to the

general charter provision above quoted, we find an added basis for holding that the police surgeon was not an "employee authorized by this charter to incur the expenditure or liability represented" by the claim in question.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



SKINNER v. CITY OF LOS ANGELES.*
Civ. 10014.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1935.

Hearing Granted by Supreme Court
June 17, 1935.

Eminent domain ⇐277

Claim for damages resulting from change of grade of street held properly filed with city council of Los Angeles, rather than with board of public works.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by T. G. Skinner against the City of Los Angeles. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray L. Chesebro, Frederick Von Schrader, Charles F. Reiche, and Arthur W. Nordstrom, all of Los Angeles, for appellant.

E. H. Delorey, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued to recover damages resulting from a change of grade of a street adjacent to certain property owned by him. Prior to suit, a claim had been filed by plaintiff with the city council of defendant city. At the trial the court found that no such claim had been filed with the board of public works of defendant city, but held that presentation of such claim to the council was sufficient. From judgment for plaintiff, this appeal is taken on the sole ground that such claim should have been filed with the board of public works and that by failing to file it with

that body instead of with the city council plaintiff is precluded from recovery.

We are satisfied with the correctness of the view heretofore expressed in the case of *Haigh v. City of Los Angeles*, 139 Cal. App. 305, 34 P.(2d) 779, and also in the case of *Musto-Keenan v. City of Los Angeles*, 139 Cal. App. 506, 34 P.(2d) 506, and on their authority affirm the judgment in the instant case. See, also, *Robertson v. City of Los Angeles* (Cal. App.) 44 P.(2d) 461, this day decided.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 359

NEWBY v. GIBSON et al.

Civ. 9723.

District Court of Appeal, Second District,
Division 2, California.

April 22, 1935.

Evidence ⇐210

In action against executrices for money allegedly due from deceased to plaintiff's assignors, deceased's deposition given in another action wherein deceased testified that he was indebted to plaintiff's assignor in certain sum held admissible as admission against interest, notwithstanding deceased further testified that his attorney held trust deed on property belonging to assignor and that deceased made settlement with assignor on basis of such sum and instructed his attorney to release trust deed (Code Civ. Proc. § 1838).

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Garnet E. Newby against Grace Ina Gibson and another, as executrices of the estate of John Wishart Gibson, deceased. From an adverse judgment, plaintiff appeals. Reversed.

Ray Howard, of Los Angeles, for appellant.

W. H. Anderson and Anderson & Anderson, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

This is an action against executrices on money allegedly due from deceased to plaintiff's assignors. The only question involved is as to the exclusion of evidence in the absence of which the proof failed to establish the plaintiff's claim.

The trial court excluded from evidence a deposition of the deceased given in another action, which appellant contends should have been received as "the act, declaration . . . of a party, as evidence against such party" (Code Civ. Proc. § 1870, subd. 2), or as an admission against interest. The deposition consists of a rather detailed account of various transactions between the deceased and plaintiff's assignor, Fred A. Newby, in which the deponent testified that he was indebted to Newby in the sum of \$10,000. Respondents contend that the effect of this statement as an admission was removed by the further testimony of the witness that his attorney, Kincaid, held a \$10,000 trust deed on certain property belonging to Newby and that deceased made a settlement with Newby on the basis of \$10,000 "and instructed Mr. Kincaid to release this trust deed. I don't know whether he has or hasn't." Deceased gave other testimony as to there having been a settlement, but taking the deposition as a whole, as we must, it is apparent that in speaking of having made a "settlement" the deponent meant only that he had agreed on the terms of the settlement, and that while he had instructed his attorney to release the trust deed, deponent did not know whether this had been done. The deposition was therefore an admission against interest of an indebtedness due Newby and of the further fact that deceased had directed his attorney to carry out the terms of the settlement agreement. Such admission against the pecuniary interest of deceased was admissible against respondents, his personal representatives. *Steinberger v. Young*, 175 Cal. 81, 90, 165 P. 432; *Horton v. Wimbler*, 175 Cal. 149, 157, 165 P. 423; Code Civ. Proc. § 1833.

The exclusion of the vital and material proof furnished by the deposition was prejudicial error.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

6 Cal.App.2d 224

FALASCO et al. v. HULEN.

HULEN v. FALASCO et al.

Civ. 5122.

District Court of Appeal, Third District,
California.

April 17, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Automobiles ⇨175(4)

In action for injuries sustained when automobile in which plaintiffs were riding on highway was struck by approaching automobile traveling 60 to 65 miles per hour, that approaching motorist was a township constable did not make his automobile an "emergency vehicle" within Vehicle Act providing that speed regulations shall not apply to authorized emergency vehicles (St. 1931, pp. 2101, 2102, 2116, §§ 8½, 29(b), 95(b); St. 1929, pp. 539, 542, §§ 120, 133).

2. Automobiles ⇨226(2)

Motorist's alleged failure to get entirely off highway before state patrolman who was sounding siren of motorcycle passed held not to preclude motorist's recovery for injuries when automobile, which was following patrolman for purpose of conveying injured child to hospital and was traveling 60 to 65 miles per hour, collided with motorist, where alleged failure to get off highway did not contribute to collision and did not interfere with safe passage of approaching motorcycle and automobile (St. 1931, pp. 2101, 2102, 2116, §§ 8½, 29(b), 95(b); St. 1929, pp. 539, 542, §§ 120, 133).

3. Automobiles ⇨245(19)

Whether township constable who was conveying in automobile injured child to hospital under convoy of state traffic patrolman, and who was traveling 60 to 65 miles per hour, was giving audible signal by siren so as to allegedly preclude recovery against him for injuries sustained by plaintiffs, who were traveling in automobile with which constable's automobile collided, held for jury (St. 1931, pp. 2101, 2102, 2116, §§ 8½, 29(b), 95(b); St. 1929, pp. 539, 542, §§ 120, 133).

4. Automobiles ⇨175(2)

That township constable is a peace officer does not bring him within terms of act relieving fire department employees and employees of police department from liability for damage to person or property arising out of operation of motor vehicle in line of duty (St. 1929, p. 568; Const. art. 4, § 24).

5. Automobiles ⇨175(1)

That township constable was conveying in automobile an injured child to hospital

under convoy of state patrolman traveling 60 to 65 miles per hour did not relieve constable from exercising reasonable care in avoiding injury to others on highway (St. 1931, pp. 2101, 2102, 2116, §§ 8½, 29(b), 95(b); St. 1929, pp. 539, 542, §§ 120, 133).

6. Automobiles ⇨245(60, 79)

In action for injuries sustained when automobile in which plaintiffs were riding was struck by approaching automobile traveling 60 to 65 miles per hour, whether driver of plaintiffs' automobile or motorist on opposite side of highway were negligent held for jury.

7. Automobiles ⇨243(4)

In action against constable for injuries sustained when automobile in which plaintiffs were riding was struck by constable's automobile traveling 60 to 65 miles per hour while conveying injured child to hospital under convoy of state traffic patrolman, question as to whether it was customary or usual for constables to convey injured persons to hospitals held properly excluded, since performance of such duties does not relieve constables from restrictive provisions of Vehicle Act (St. 1931, pp. 2101, 2102, 2116, §§ 8½, 29(b), 95(b); St. 1929, pp. 539, 542, §§ 120, 133).

8. Automobiles ⇨245(19)

Whether constable, who was conveying in his automobile injured child to hospital under convoy of state patrolman traveling 60 to 65 miles per hour over road where view was obstructed, and whose automobile upon application of brakes skidded diagonally across highway for 200 feet and collided with automobile which was almost entirely off paved portion of highway, was negligent, held for jury (St. 1931, p. 2120, § 113(a); St. 1929, p. 542, § 132).

9. Automobiles ⇨168(9)

Motorist who, because of rising ground, cannot see oncoming automobile, must exercise same care as is required of driver whose eyes are blinded by glaring lights or dazzling rays of setting sun, and failure to bring automobile under control under such conditions is "negligence" (St. 1931, p. 2120, § 113(a); St. 1929, p. 542, § 132).

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

10. Automobiles ⇨175(4)

Statute providing that speed regulations shall not apply to authorized emergency vehicles held not to relieve drivers of emergency vehicles from duty of driving with due regard for safety of all persons using highway, and not to protect drivers in exercise of arbitrary privileges (St. 1929, pp. 539, 542, §§ 120, 132).

11. Officers ⇨116

Sheriffs and constables ⇨99

Public officers, including sheriffs and constables, are not relieved from liability for acts of negligence.

12. Automobiles ⇨246(22, 25)

In action against township constable for injuries sustained when automobile in which plaintiffs were riding was struck by automobile of constable who was conveying injured child to hospital under convoy of state traffic patrolman at rate of 60 to 65 miles per hour, instruction with respect to alleged failure of driver of plaintiffs' automobile and another motorist to have their automobiles standing still when patrolman passed while sounding siren *held* properly refused, where alleged failure did not contribute to collision, and hence any negligence in failure to stop was immaterial (St. 1931, pp. 2101, 2102, 2116, 2120, §§ 84½, 29(b), 95(b), 113(a); St. 1929, pp. 539, 542, §§ 120, 132, 133).

13. Trial ⇨240

In automobile collision case, instruction including semi-argument setting forth all circumstances upon which defendant relied *held* properly refused, where such circumstances afforded no exemption as against reckless speeding with which defendant was charged (St. 1931, p. 2120, § 113).

14. Automobiles ⇨168(1)

Driving of automobile in excess of 45 miles per hour, in and of itself, is not "negligence," notwithstanding such driving may be unlawful (St. 1931, p. 2120, § 113).

15. Appeal and error ⇨1068(3)

In action for injuries sustained in automobile collision, where defendant filed cross-complaint seeking damages, error in instructing, with respect to cross-complaint, that it was unlawful for person to drive automobile in excess of 45 miles per hour, *held* harmless, where testimony showed beyond controversy that defendant was negligent and was not entitled to recover damages (St. 1931, p. 2120, § 113; Const. art. 6, § 4½).

Appeal from Superior Court, Merced County: E. N. Reeder, Judge.

Action by Dominic Palasco and others against Lewis Hulén, wherein defendant filed a cross-complaint against named plaintiff and Frank Dambrosio. From a judgment in favor of named plaintiff and his wife, and from a judgment against defendant upon his cross-complaint, defendant appeals.

Judgments affirmed.

F. M. Ostrander, of Merced, for appellant.

H. K. Landram, of Merced, D. Oliver Garmino, of Los Banos, and Len H. Hasey, of Stockton, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs, Dominic Palasco and Mrs. Dominic Palasco, had judgment against the defendant for and on account of injuries alleged to have been suffered at the hands of the defendant by reason of his negligent management of an automobile on the 15th day of March, 1932. No judgment was entered in favor of the other plaintiffs named in the action. From the judgment in favor of Dominic Palasco and Mrs. Dominic Palasco, the defendant appeals.

The defendant, Hulén, filed a cross-complaint against Dominic Palasco and Frank Dambrosio et al. Judgment went against defendant Hulén, upon his cross-complaint, and from this judgment, Hulén also appeals.

Upon this appeal the appellant urges six grounds for reversal, to wit:

1. That one person conveying an injured person to an hospital under convoy of a state traffic patrolman is not bound to obey the speed laws and traffic regulations of the California Vehicle Act;
2. That the court erred in instructing the jury;
3. That a constable using his own automobile is exempt, under the act of the Legislature No. 2002 Deering's General Laws (St. 1929, p. 563), from negligence while conveying an injured person to an hospital;
4. That plaintiffs were guilty of contributory negligence as a matter of law;
5. That the evidence was insufficient to warrant holding the appellant negligent;
6. That the court erred in failing to admit evidence of the alleged customary and usual duties of constables.

On the 15th day of March, 1932, the Merced County Farm Bureau held a picnic at a ranch about twelve miles west of the city of Los Banos on the Pacheco Pass highway. On the afternoon of that day, at the picnic grounds, a small girl by the name of Elsie Rocha was injured. It appears that a contest of throwing a rolling pin was in progress, when a woman throwing one of the pins misdirected the same, and in the course of its flight the rolling pin struck the Rocha girl on the head, causing considerable effusion of blood. The defendant took the girl in his automobile and

started to convey her to an hospital in Los Banos. Preceding him was a traffic officer named Nicholson on a motorcycle. The course followed by Nicholson on his motorcycle, and Hulen in his automobile, was easterly over the Pacheco Pass highway. At about the same time the plaintiff, Dominic Falasco, having with him his wife and children, was driving an automobile westward on the same highway. The Pacheco Pass highway from Los Banos westward to the picnic grounds is over a number of low rolling hills. The scene of the accident considered herein took place about midway between Los Banos and the picnic grounds, and was between two of the hills crossed by the Pacheco Pass highway.

After leaving Los Banos, Officer Nicholson preceded the Hulen automobile, acting as a convoy, and set the speed of his motorcycle at 65 miles per hour. The defendant followed in his automobile, having with him a young man who was carrying in his arms the Rocha girl. As Nicholson proceeded eastward, he kept the siren on his motorcycle sounding, and the plaintiff and others near the scene of the accident, hearing the siren of the motorcycle moved, apparently as expeditiously as possible, to the right-hand side of the paved portion of the highway, which at the place in question is testified as having a width of 18 feet with 2-foot shoulders on each side. In proceeding eastward the record shows that Officer Nicholson gained somewhat on the automobile driven by Hulen, until he was some 800 feet ahead of the defendant. The testimony as to the distance between the motorcycle and the automobile varies somewhat, some of the witnesses placing the distance at 600 feet, others at 1,200 feet. There is sufficient showing in the testimony to justify the jury in concluding that the distance between the motorcycle and the automobile near the scene of the accident was at least 800 feet. The hill on the side on which the accident occurred has an elevation above the main level of the highway of about 35 feet. One driving eastward on that hill is confronted with what was called in the testimony a "blind spot," but which we will call an area of several feet in length, where it was impossible to observe the approach of motor vehicles on the opposite side.

At the bottom of the hill on which the accident occurred is a culvert. On approaching this culvert Dominic Falasco heard the siren being sounded on the motorcycle, being too close to the culvert to stop, drove his automobile as closely to the right-hand side as possible, and after the officer had passed by,

continued on up the hill at a medium speed, driving over to the right side of the highway until, at the time of the collision, the testimony shows without contradiction that the front portion of his automobile was not only off the highway, but also that it was off the shoulder on the right-hand side. A number of the witnesses testified that his automobile was entirely to the right of the shoulder, one witness testifying that the left rear wheel of the automobile driven by Dominic Falasco, he thought, was on the shoulder. After officer Nicholson had passed, there appeared nothing in sight which necessitated the plaintiff Dominic Falasco stopping his automobile, but it appears that he nevertheless drove up the hill, keeping to the right, as we have stated. About the same time an automobile driven by the defendant Frank Dambrosio was being operated on the Pacheco Pass highway, moving in an easterly direction, and was sufficiently over the crest of the hill, which we are about to mention, as to be out of sight of an automobile coming up the hill from the opposite side.

There are three automobiles specifically involved in the testimony: A Packard, driven by the plaintiff Dominic Falasco; a Ford, driven by Ambrosio; and a Pontiac coupé, driven by the defendant Hulen.

Just after the Ford car had passed over the crest of the hill, and while the Packard was moving at a moderate speed uphill (both cars being kept to the right of the paved portion of the highway, or practically so), the defendant Hulen, driving his car at a speed of between 60 and 65 miles per hour, came over the crest of the hill in sight of the Ford and the Packard cars. The defendant himself testified that he was driving between 60 and 65 miles an hour. Officer Nicholson testified that he set the pace at 65 miles per hour. Just as the Pontiac coupé had negotiated the crest of the hill, the defendant observed the Ford car, and thinking that it was pulling back toward the paved portion of the highway, steered his car to the left, applied the brakes, and by some means caused his car to skid and go diagonally across the highway directly toward the Packard car, coming into collision with the Packard at the front portion thereof, which was not only off the paved portion of the highway, but also off the 2-foot shoulder along the right-hand side thereof, causing the injuries to the plaintiffs for which damages were awarded.

The defendant Hulen testified that he was sounding the siren on his car; on the other hand, witnesses who were near the scene of the accident, to wit, Dr. Covell, Mrs. Covell,

Frank Dambrosio, Dominic Falasco, and a witness by the name of Arbura, testified to hearing the siren sounded by the officer Nicholson, while Dr. Covell, Mrs. Covell, Dominic Falasco, and the witness Dambrosio all testified there was no siren being sounded on the Hulien car. Dr. Covell, a witness to the accident, described it as follows: "We heard a siren faintly. We immediately decelerated. I looked back; noticed the Packard; could see no one, so I dismissed the possibility of the siren being behind us. At that moment, I should say just before I reached the bottom of the draw, between the two hills, an officer appeared at the brow of the oncoming hill; he was on a motorcycle; he had his lights on, and his siren was going. I maintained my speed at about the same it had been placed when I heard the siren. We were maintaining our position well over to the righthand side, wondering why the siren was on, and what the officer was doing, because he appeared to be attached to nothing. As we approached the bottom of the draw shortly after, almost immediately after the officer appeared in sight, a small car came over the brow of the hill, running quickly onto the dirt and throwing up an immense cloud of dust. Just as we reached the brow of the hill we came quickly in sight of a red coupe. Simultaneously with our seeing him he put on his brakes, and immediately his car skidded toward me, the left rear end coming toward my car. I cut for the ditch, and exclaimed to Mrs. Covell, 'My God, he is going to hit that Packard.' I turned to my right and looked through the rear window and saw the red car hit the Packard. At the time of the impact the Packard was pointed diagonally off the highway; I should say it was north, as if attempting to avoid the collision. At the moment of impact I should say that the left rear wheel, if any, of the Packard was on the highway. I am not positive as to that."

A portion of the defendant's testimony may here be quoted, to wit: "Well, as I came up over the hill I observed a car pulling out on the highway ahead of me. In fact, he was just pulling out on the highway. He hadn't got straightened out yet, and I put on my brakes. * * * Just about the time I pulled off I observed Mr. Falasco coming up the highway on the opposite side, and went down the hill and collided. After I turned to the left I did not turn again to the right. I turned my car to the left and continued then in a diagonal direction at all times up to the time of the accident. I traveled probably 200 feet, perhaps more. * * * As I came up from the west side of the hill on which

the accident occurred, toward the top, I was traveling between 60 and 65 miles per hour. * * * I was driving a red Pontiac sport coupé."

Dominic Falasco testified at the time of the collision the front end of his car was 5 or 6 feet off the pavement; that the Pontiac struck on the left fender, hood, and left wheel; that at the time, the Packard was moving at a speed of from 5 to 10 miles an hour, almost at a stop.

The testimony further shows that at no time was the Falasco car being driven at an excessive speed, and as we have stated, all of the witnesses save one testified that Falasco's car was entirely off the highway; and the testimony is all substantially to the effect that the Ford car was off the highway, the defendant being the only one testifying that the Ford was coming back on the paved portion of the highway.

Irrespective of whether the Ford car was entirely off the paved portion of the highway, or was coming back onto the highway, the testimony shows that the Packard and the Ford cars, as testified to by the defendant, were 200 feet or more apart, and as the testimony all shows that the Packard was practically off the paved portion of the highway, the paved portion of the highway being 18 feet in width, there was ample room for the defendant, if he had had control of his car, to pass between the Ford car and the Packard car without colliding with either one of them.

A number of witnesses testified to what we have set forth herein, but there is substantially no conflict concerning the facts, and what we have stated shows the situation and the circumstances which the jury had before it to consider. The defendant was driving at between 60 and 65 miles per hour over rolling hills and over a hill that made it impossible for him to see sufficiently far ahead to observe an obstruction in time to bring his car under control. He was at least 800 feet in the rear of the motorcycle being driven by Officer Nicholson; he failed to pass between two cars, where the testimony shows that they were in such a position as to afford ample room for safely doing so; that the defendant was driving at such an excessive speed that when he applied his brakes the car skidded and he went diagonally at least 200 feet toward the Packard car without attempting to turn his car to the right, and came in collision therewith. There is some testimony to the effect that the Packard and the Ford cars were between 250 and

800 feet apart, but accepting the testimony of the defendant, we think the jury was warranted in concluding that there was ample room to drive between two cars; in fact, the testimony showing that the Ford car was practically on the south side of the paved portion of the highway, and the Packard was off the paved portion of the highway on the north side, save possibly as to the rear wheel, and the paved portion of the highway being 18 feet in width, had the Ford and the Packard car been exactly opposite each other, the figures show ample space to pass between the two without colliding with either, if the defendant had had control of his Pontiac car.

Placing the Ford car in the position testified to by the defendant, the lefthand side of the highway affording ample width for passage is nevertheless shown to have been unobstructed. Police Officer Nicholson testified as follows: "As I came over the brow of the hill going toward Los Banos, I had my siren open and was traveling approximately 65 miles an hour. I saw Dambrosio's car pulling off on the righthand side just below the brow. He pulled clear off to the right-hand side. I remember seeing Falasco's car and Mr. Arbura's car. I don't recall seeing Dr. Covell's car. When I passed Dambrosio's car it was clear off the highway. When I passed the Falasco car he was just this side of the culvert, that is, west of the culvert. Mr. Falasco was over on his righthand side but not clear off the highway. The right portion of his car was off the highway, but the left side of his car was on the paved portion. Arbura's car was parked on the right-hand side of the road. I didn't look around until I started up the other hill. I just happened to glance around back and I saw there had been an accident. The last time I saw Hulen's car it was about 450 feet behind me. Mr. Hulen must have been making the same speed as I was if he was keeping right up pretty close to me. I held my speed around 65 miles all the time. When I got to the scene of the accident the Falasco car was pointed out toward the fence. The whole front portion of the Falasco car was away off the pavement. I observed tire marks on the pavement, like a tire skidding, a black mark on the highway. The mark went right to the edge of the highway, and went back about 175 feet, angling to the righthand side of the highway toward Pacheco Pass. My purpose of coming in and leading Mr. Hulen with my siren open was in order to permit him to convey this girl (Elsie Rocha) to the hospital as quickly as

possible. I imagine I was 800 feet from the accident."

In addition to what we have stated, the defendant Hulen testified that he was the constable of township No. 3, Merced county; that he was traveling toward Los Banos, and as he came over the top of the hill was traveling between 60 and 65 miles an hour. As he came over the hill he saw the Ford car ahead of him and pulled off to the left. "I observed Mr. Falasco coming up the highway on the opposite side and went down the hill and collided. I would say I was about 30 feet back from the top of the hill when I observed the car pulling off (onto) the pavement in front of me. This car that pulled in front of me was a small car. When I observed the car in that position I put on my brakes and pulled out to go by him. I observed the Falasco car at about the same time; that is, about the time that I put on my brakes, and when I observed the Falasco car it was coming up the hill; I guess it was about half-way up the hill; he was well over on the righthand side. My best recollection is that the Falasco car was not off the pavement. The Falasco car continued right up the highway; I did not observe him turn further to the right. My car went across the highway. After I turned to the left I did not turn again to the right, but held my car in that diagonal direction up until the time of the accident. I would say I traveled approximately 200 feet after I applied my brakes. When I struck the Falasco car the rear end was on the pavement, that is, the left rear wheel was on the pavement, and the front wheels were off the pavement. My brakes were in good condition. I don't know how far it would take me to stop under the conditions there. I did not use my emergency brake at that time; I just used my foot brake. I had my brakes adjusted about two weeks before the time of the accident. I would say that the car on the right side of the pavement that I tried to turn out for when I first saw it, was 150 feet away. I would say that the Ford car and the Falasco car were probably 250 feet apart." The appellant's brief as to this particular reads: "The Ford car and the Falasco car were probably 250 feet away." The testimony in the transcript is as follows: "Q. How far apart was the Ford car and the Falasco car? A. Well, they were probably 250 feet." Hulen testified further, that he would judge the Falasco car was traveling between 30 and 35 miles per hour. As to the injury to Elsie Rocha, and his starting with her to the hospital, Hulen testified as follows: "Charlie

Machado brought the little girl, carrying her. Someone said, 'Will you take her to the hospital?' I went back after my car. When I got back Nicholson was there and he said, 'You follow me and I will clear the highway for you.' From the appearance of the Rocha girl at that time I thought she was dying. I followed Nicholson onto the highway. My car is equipped with a siren, and I blew the siren right after I started, and continued to blow it until just before the accident. Nicholson's siren was much louder than mine. The siren was worked with my left foot. Just before the accident I swerved to the left because it looked like I could not miss Falasco on the left side, so I thought I could get into the bank and hit the ditch. I was injured in the accident; my left leg was broken; two ribs broken on the side; had two cuts on the hand, a cut on the leg, and was in the hospital 97 days."

Dambrosio testified that when he heard the siren on the motorcycle, he pulled entirely off the highway, and kept off. This witness testified he did not see the accident; that he was looking at Nicholson all the time; that he was about halfway down the hill when he first heard the siren; that he started to pass Falasco's car about the center of the hill; Nicholson and Falasco passed just about the same time, just after he heard the siren. This witness further testified: "I heard the siren and I pulled off and slowed down before I stopped; I slowed down to 10 or 15 miles an hour, and at that time was about three-quarters of the way up the hill. The Falasco car was up away from the culvert, I would say about 100 feet. After Nicholson passed me I continued to drive to my right until I got completely off the pavement and the oiled road, and stopped." There is testimony in the record of other witnesses to the effect that they heard the siren on Hulen's car.

While there is some conflict in the record as to the respective distances of the cars from the brow of the hill, and also from the culvert at the base of the hill, likewise, as to the distance apart of the various cars, these distances are shown, however, to have been mere estimates and not actual measured distances, it does appear without any conflict that at the time Hulen's car came over the brow of the hill, the motorcycle on which Officer Nicholson was riding was at the bottom of the hill some 800 feet away, and Dambrosio's car and the car driven by Falasco were either entirely off the paved portion of the highway on what would be the respective

right side for each car, or so nearly so as to leave, as we have stated, an unobstructed passage. After the passage of Nicholson's motorcycle, for a few seconds of time there appeared no reason why other automobile drivers might not resume their respective places on the highway had they so elected. The distance between the motorcycle and the Pontiac car driven by Hulen had become so great owing to the contour of the highway that the convoy purposes of Nicholson could not readily be seen or perceived.

In support of his contention that the appellant being a duly elected constable of township No. 3, Merced county, was not bound by the speed laws or traffic regulations of the California Vehicle Act, the appellant calls our attention, first, to section 29 of the California Vehicle Act, which specifies in subdivision (b) thereof (St. 1923, p. 520, as amended by St. 1931, p. 2102) that the duties of highway patrol officers is to direct traffic in conformance with the provisions of the act, provided that in the event of a fire or other emergency, or to expedite traffic, or to insure safety, officers of the highway patrol may direct traffic as conditions may require. There is nothing in this section, however, which authorizes a mere private individual to drive at the rate of 60 or 65 miles an hour under conditions when he cannot see the highway in front of him for a sufficient distance to bring his car under control to avoid collisions with other cars, or other persons rightfully on the highway. Nor does it appear that Officer Nicholson was in fact directing traffic. If it be admitted that he was acting as a convoy or escort to the car being driven by the defendant, then subdivision (b) of section 95 of the act (St. 1923, p. 545, as amended by St. 1931, p. 2116) would appear to be applicable, where it is declared to be "unlawful for any police or traffic law enforcement officer to use a siren, or to travel at a speed in excess of that permitted under section 113, when serving as an escort of any procession or of other vehicles traveling upon the public highway."

[1] It is true that section 120 of the California Vehicle Act (St. 1923, p. 556, as amended by St. 1929, p. 539) provides as follows: "The provisions of this act regulating the speed of vehicles shall not apply to authorized emergency vehicles as defined in this act when such vehicles are being operated in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation nor when traveling in response to a fire alarm nor to the

vehicles of licensed physicians when traveling in response to emergency calls." The section, however, does not relieve from liability from any arbitrary exercise of the privileges therein granted. Section 8½ of the act (St. 1923, p. 517, as added by St. 1929, p. 509, as amended by St. 1931, p. 2101) reads: "Every vehicle publicly owned and operated by a police or fire department or traffic law enforcement officer in responding to emergency calls or in traffic patrol duty," etc., is an emergency vehicle. The section further provides that vehicles responding to emergency calls by a state or county forest ranger, in case of fire, also, any fighting equipment; likewise, any publicly owned ambulance or privately owned ambulance used in responding to emergency calls; and likewise, emergency repair vehicles, are not limited by the speed regulations of the act. A mere reading of the section shows that the automobile driven by Hulen does not come within the qualifications of an authorized emergency act. The mere fact that he was a constable in township No. 3 of Merced county, does not make his automobile an emergency vehicle.

Some contention is made that Dominic Falasco did not comply with section 133 of the California Vehicle Act (St. 1923, p. 560, as amended by St. 1929, p. 542), which reads: "Upon the approach of any authorized emergency vehicle, giving audible signal by siren, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb of the highway, clear of any intersection, and shall stop and remain in such position unless otherwise directed by a police or traffic officer, until the authorized emergency vehicle shall have passed."

[2] The facts show that the failure, if it be a failure, of Dominic Falasco to get entirely off the highway before Officer Nicholson passed, his failure to do so did not contribute to the collision, or did not interfere with the safe passage of Officer Nicholson.

[3] Again, a question was presented to the jury as to whether Hulen's car coming up from the opposite side of the hill, was giving an audible signal by a siren, even if it be conceded that the car driven by him, for the time-being should be classed as an emergency vehicle.

[4] The appellant likewise relies upon the act of the Legislature approved May 11, 1929 (Stats. 1929, p. 568, Act No. 2602 of Deering's Gen. Laws 1931), which reads: "No member

of a fire department or police department maintained by a county, city and county, incorporated or unincorporated city, town or district, shall be held liable in any civil action for damage to person or property occasioned by any act of such member arising out of the operation, in line of duty, of a motor vehicle of such department while responding to an alarm of fire or an emergency police call." The defendant was not, and is not an employee of any fire or police department; nor an employee of any county. This act, by its very terms, is confined to police and fire departments. The title makes no mention of county or township officers or elective officers of any kind. It applies only to employees. The fact that a constable is a peace officer does not bring him within the terms of the act relieving fire department employees and employees of the police departments from liability.

[5] Section 24 of article 4 of the Constitution limits the scope of an act to the subjects mentioned in its title, and no mention of township or county officers being made, the construction contended for by the appellant would of course be in violation of the Constitution. Hulen was not responding to a police call, nor was he responding to any other of the acts which would relieve a member of the police department or fire department from liability. The fact that he was, as we may say, on a mission of mercy in endeavoring to take the injured girl to an hospital as quickly as possible, did not relieve him from exercising reasonable care in avoiding injury to others who might be on the highway.

[6, 7] The excerpts which we have taken from the testimony and set forth herein we think, beyond controversy, authorized the jury in concluding that neither Dominic Falasco nor Frank Dambrosio were guilty of any negligence, whether as a matter of law or as a matter of fact. The facts as set forth almost establish beyond a reasonable doubt that no act of either Dominic Falasco or of Frank Dambrosio contributed in any particular to the collision. The ruling of the court in excluding a question as to whether it was customary or usual for constables to convey injured persons to hospitals, was clearly correct. That they perform such duties does not thereby relieve such officers from the restrictive provisions of the California Vehicle Act. Nor was it material as to what the defendant Hulen may have thought as to the serious condition in which he found the injured child. While, as we have stated, the injury caused a great effusion of blood, and while

somewhat severe, it was not what would ordinarily be termed a serious injury. Of this, it is probable the defendant Hulen was unaware.

We think the following excerpt taken from the case of *Vandell v. Sanders*, 85 N. H. 143, 155 A. 193, 194, 80 A. L. R. 550, cited by the appellant, is a conclusive answer to his contentions, even though his car for the time-being be classed as an emergency vehicle, to wit: "The speed limitations set forth herein shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall not however protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others."

[8, 9] If driving over the brow of a hill where one's view is obstructed, where one cannot see what is on the opposite side of the hill for a sufficient distance to control the speed of his car, and going over a hill at the rate of between 60 and 65 miles per hour is not an act showing a reckless disregard of the safety of others, it is difficult to conceive what would amount to such an act. Here, the car was going over the hill at such a rate of speed that when he applied the brakes it skidded diagonally across the highway for a distance of approximately 200 feet and collided with a car which was either entirely off the paved portion of the highway or only had the rear left wheel thereon. The witness' own testimony is to the effect that he made no effort to turn his car to the right. We think the facts set forth herein show the jury was entitled to come to one of three of the following conclusions: (1) That the defendant was driving at such a reckless rate of speed that he could not control his car; (2) that he was driving at such a high rate of speed that he did not perceive that the highway ahead of him afforded an unobstructed passage; (3) that the defendant, under the circumstances shown by the foregoing testimony, was driving at a rate of speed violative of, and absolutely in disregard of subdivision (a) of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120), which provides that no person shall drive any vehicle upon a public highway at such a rate of speed as to endanger the life, limb, or property of any person.

Driving of an automobile where the rising ground bars the view so that the driver can neither see, nor his oncoming automobile be seen, we think imposes upon one the same care required of a driver whose eyes are blinded by glaring lights or the dazzling rays of a setting sun. Under such conditions failure to slow down and bring one's automobile under control is held negligence. *Hatzakor-zian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; *Havens v. Loebel*, 103 Cal. App. 209, 284 P. 676; *Meads v. Deener*, 128 Cal. App. 328, 17 P.(2d) 198. In such instances the hazard is the same, necessitating the same reasonable care and caution.

[10] Section 120 of the California Vehicle Act does not relieve the drivers of emergency vehicles from the duty of driving with due regard for the safety of all persons using the highway, nor does it protect the driver in the exercise of any arbitrary privileges. The same restrictive provisions appear in section 132 (St. 1923, p. 560, as amended by St. 1929, p. 542). The record before us amply justified the jury in coming to the conclusion that both Dominic Falasco and Frank Dambrosio complied with all of the legal requirements of section 133, *supra*. No intersection is involved in this action.

The appellant calls our attention to, and quotes at length from, a number of cases having to do with fire equipment and police departments when attempting to apprehend fleeing criminals, to wit: *Balthasar v. Pacific Electric Ry. Co.*, 187 Cal. 302, 202 P. 37, 19 A. L. R. 452; *Armas v. City of Oakland*, 135 Cal. App. 411, 27 P.(2d) 666, 28 P.(2d) 422; *Tuten v. Town of Emeryville*, 139 Cal. App. 745, 35 P.(2d) 195; and similar cases from other jurisdictions. The circumstances of these cases are all readily distinguishable from those presented in the case at bar. In all of the cases either a fire equipment was speeding to extinguish a blaze, or a police officer was hastening to apprehend some fleeing criminal. The safety of society under such circumstances demands exemption from liability. That exemption, however, does not extend to any arbitrary action. It is readily perceived that when an officer is seeking to overtake a speeding offender, a requirement to stop at arterials or lessen his own speed would be, in effect, giving the offender a handicap as against the officer seeking to make his arrest.

In the case we are considering nothing of the kind is presented which the courts had to consider in the cases relied upon by the ap-

pellant. In some of the cases relied upon by the appellant section 1714½ of the Civil Code was involved, which is not the case before us. Relying upon that section and its failure to include chartered cities, exemption from liability was sustained.

In contradistinction to the cases relied upon by the appellant we think that the case of *Spencer v. Schiffman* (also entitled *Delgado v. Schiffman*), 119 Cal. App. 746, 7 P. (2d) 361, 362, sets forth a rule applicable here. In that case two police officers riding on motorcycles in response to an alleged emergency call, which was in fact a call to investigate an accident, were traveling at the rate of 37 miles per hour. On reaching an intersection the rate was reduced to 25 miles an hour, at which speed a collision occurred with an automobile. The plaintiffs were injured. The court held that the police officers were negligent and that they were not protected by any provision of the California Vehicle Act, and damages were denied. In concluding its opinion in that case the court said: "Moreover, by express provision of section 132 of the statute (Cal. Vehicle Act, St. 1923, p. 517, 560), the driver of any emergency vehicle is not relieved from the duty to drive with due regard for the safety of all persons using the highway, nor from the consequence of the arbitrary exercise of the privileges theretofore declared in the statute."

[11] Public officers, which includes, of course, sheriffs and constables, are not relieved from liability for acts of negligence. *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50, dealing with officers of reclamation districts; *Proper v. Sutter Drainage District*, 53 Cal. App. 576, 200 P. 664, dealing with the same class of officers; *Filarski v. Covey*, 75 Cal. App. 353, 242 P. 874, dealing with sheriffs and deputy sheriffs; *Wolfson v. Wheeler*, 130 Cal. App. 475, 19 P. (2d) 1004, dealing with officers whose duties were to exterminate rodents and other pests; notes in 1 A. L. R. beginning on page 236, treating of duties of sheriffs and deputy sheriffs; *Manwaring v. Geisler*, 191 Ky. 532, 230 S. W. 918, 18 A. L. R. 192. We quote from the syllabus: "A police officer is not exonerated from liability for an injury to another while in the discharge of official duties on the ground of public necessity, if he failed to exercise reasonable care to protect those whom he knew, or by exercise of reasonable judgment should have expected, to be at the place of the injury." See, also, notes to the same case, 18 A. L. R. beginning on page 197, under the caption, "A peace officer is generally held to be personal-

ly liable for negligent or wrongful acts causing personal injury or death." To the same effect is the case of *Florio v. Mayor and Aldermen of Jersey City*, 101 N. J. Law, 535, 129 A. 470, 40 A. L. R. 1353, and notes beginning on page 1358.

[12, 13] Without quoting the instructions requested by the appellant and refused by the trial court, it is sufficient to say that the court did not commit any error in those particulars. The failure of Falasco or of Dambrosio to have their cars standing still when Officer Nicholson passed by did not in any wise contribute to the collision which subsequently occurred. Not being a part thereof, or contributing thereto, any negligence in failure so to stop is wholly immaterial. Nor did the defendant Hulen have the right to assume that no other person would be upon the highway, nor was the court under obligations to include in an instruction a semi-argument by setting forth all the circumstances upon which the appellant relied, which circumstances we have shown afforded no exemption as against reckless speeding.

Among the instructions given by the trial court we find instruction No. 10, which included all of the provisions of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120), save and except subdivision (c). Following this instruction the court read to the jury instruction No. D-7 as follows:

"The law of this state provides that any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive a vehicle upon a public highway at such a speed as to endanger the life, limb, or property of any person.

"Subject to the provisions of the law just read to you, it is unlawful for a person to drive an automobile in excess of 45 miles per hour.

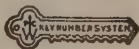
"Should you find from the evidence in this case that the defendant Hulen violated either of said provisions of law, then you may find that he was guilty of negligence, and if such negligence, if any, on the part of said Hulen, proximately contributed in the slightest degree to the incident in question, and his resulting injuries, if any, he is not entitled to recover on his cross-complaint and your verdict should be for the cross-defendants Frank Dambrosio and Dominic Falasco."

[14, 15] The following words, to wit, "Subject to the provisions of the law just read to

you, it is unlawful for a person to drive an automobile in excess of 45 miles per hour," contained in instruction No. D-7, do not correctly state the law when applied to civil cases. This instruction was directed to the alleged negligence of Dominic Falasco and Frank Dambrosio set forth in Hulen's cross-complaint. While it may be unlawful, which we do not decide, to drive an automobile in excess of 45 miles per hour, such driving in and of itself is no longer held to be negligence. *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P.(2d) 58; *Nieves v. Vigolino*, 135 Cal. App. 763, 27 P.(2d) 916; *Schroeder v. McCargar*, 137 Cal. App. 320, 30 P.(2d) 543. The error in this instruction, however, does not necessitate a reversal. It was directed primarily to the cross-complaint filed by the defendant Hulen, in which he was seeking damages. The testimony in relation thereto showing beyond controversy that he was not entitled to recover any damages as against either Falasco or Dambrosio renders the instruction harmless. Likewise, the testimony which we have set forth showing, as we think beyond question, negligence on the part of the defendant Hulen, under the provisions of section 4½ of article 6 of the Constitution, we are required to hold the erroneous instruction did not and could not result in a miscarriage of justice. We have considered all of the instructions given and refused, and deem further comment thereon unnecessary.

The judgments are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



6 Cal.App.2d 245

ROCHA v. HULEN et al.

Civ. 5128.

District Court of Appeal, Third District,
California.

April 17, 1935.

Hearing Denied by Supreme Court
June 13, 1935.

1. Appeal and error ⇨1064(1)

In child's action for injuries sustained when automobile in which child was taken by constable to hospital collided with automobile on highway, erroneous instruction given on behalf of third motorist, who was allegedly negligent to effect that constable was

negligent if he violated law regulating operation of motor vehicles, *held* not prejudicial to constable, where instruction did not touch upon controversy urged by child as to negligence of constable and testimony showed that constable was guilty of negligence constituting proximate cause of injury (St. 1931, p. 2120, § 113).

2. Trial ⇨199

In action for injuries sustained in automobile collision, instruction that, if plaintiff was a guest within Vehicle Act, then plaintiff could not recover, *held* properly refused as calling for jury to pass upon question of law where no instruction directing jury to find facts from which conclusion of law could be drawn was requested (St. 1931, p. 1693, § 141¾).

3. Automobiles ⇨181(2)

To be a "guest," within statute precluding guest from recovering for injuries sustained in automobile collision, one must have accepted ride in vehicle involved, and word "accepted" imports both knowing and voluntary acceptance and does not include either involuntary or forced ride (St. 1931, p. 1693, § 141¾).

Word "accept" means to admit and agree to; to accede to or consent to; to receive with approval; to adopt; to agree to; and in past tense word is commonly used to signify assent and agreement. Word "agreement" in its broad and comprehensive sense demonstrated by general usage means a coming or knitting together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation.

[Ed. Note.—For other definitions of "Accept," "Accepted," "Agreement," and "Guest," see Words & Phrases.]

4. Automobiles ⇨181(2)

Words "without giving compensation therefor," within statute providing that any person who as a guest accepts ride in vehicle without giving compensation therefor shall not recover for injury sustained in automobile accident, are dependent upon previous words relating to person who accepts a ride (St. 1931, p. 1693, § 141¾).

A "passenger" is one who accepts a ride and returns compensation in some form,

or compensation from whom in some form is contemplated.

[Ed. Note.—For other definitions of "Passenger" and "Without Giving Compensation Therefor," see Words & Phrases.]

5. Automobiles ⇨181(1)

Statute precluding guest from recovering for injuries sustained in automobile collision must be strictly construed and cases will not be held within statute unless it clearly so appears (St. 1931, p. 1693, § 141½).

6. Automobiles ⇨181(2)

Injured 5 year old child who without her consent or consent of either of her parents was taken by motorist for purpose of conveying child to hospital held not "guest" so as to preclude recovery for injuries subsequently sustained by child when automobile in which she was taken collided with another automobile on highway (St. 1931, pp. 1693, 2120, §§ 141½, 113).

7. Automobiles ⇨181(2)

Five year old child cannot "accept," within meaning of statute providing that any person who as guest accepts ride in vehicle shall not recover for injury sustained in collision (St. 1931, p. 1693, § 141½).

8. Automobiles ⇨175(2)

Township constable held not exempted from liability for injuries sustained by child whom constable was conveying to hospital in his automobile traveling 60 to 65 miles per hour, under statute providing that no member of fire or police department shall be held liable for damage to person or property arising out of operation of motor vehicle in line of duty, where constable was not member of police or fire department (St. 1929, p. 568; St. 1931, p. 2120, § 113).

9. Appeal and error ⇨1170(9)

Alleged technical errors in instructions given in automobile collision case held not prejudicial, where evidence was sufficient to support verdict, and jury could not reasonably have come to any other conclusion (Const. art. 6, § 4½).

Appeal from Superior Court, Merced County; El. N. Rector, Judge.

Action by Elsie Rocha, minor, by her guardian ad litem, Antonio Rocha, against Lewis Hulen and others. From a judgment, named defendant appeals.

Affirmed.

F. M. Ostrander, of Merced, for appellant.

O. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff had judgment only against the defendant Lewis Hulen. The other defendants mentioned in the action do not appear upon this appeal, and for convenience, when we use the words "defendant and appellant," same will refer only to Lewis Hulen.

The complaint alleges that on or about the 13th day of March, 1932, while the defendant Lewis Hulen was operating an automobile upon the Pacheco Pass highway, at a point about 5½ miles southwest from the city of Los Banos, in the county of Merced, and was at the same time carrying and conveying in said automobile, without her consent or the consent of her parents, or either of them, the plaintiff Elsie Rocha, he did so carelessly and negligently drive his automobile as to cause the same to violently strike and collide with an automobile then and there being driven by one Dominic Falasco, as a result of which there was inflicted upon the person of Elsie Rocha severe and permanent bodily injuries, etc. It was on account of these injuries that judgment was awarded the plaintiff as against the defendant Lewis Hulen, and from which judgment he appeals.

The circumstances involved in this action are the same as those involved in the action entitled Dominic Falasco et al. v. Lewis Hulen (Civil No. 5122) (Cal. App.) 44 P.(2d) 469, the opinion in which action was this day filed. As the facts and circumstances involved in this action are practically the same, with the exceptions hereinafter mentioned, we refer to that case and to all the facts therein stated, as correctly indicating the facts to be considered herein, saving space by reference, and avoiding repetition. The additional testimony necessary to be set forth following the injury to the plaintiff who attended the picnic mentioned in action Civil No. 5122 supra, is as follows:

Testimony of Mrs. Silva:

"A rolling-pin come right here, and the baby put hand in the face this way; I stand up and take the hands out; the blood come, I put fingers right here and stop the blood, and the baby start crying; the mother see the blood and fainted and all; the baby take

the left hand and walk with me, that is all, and Charley Machado came and Mrs. Silva—"you tell me Mrs. Silva, you give me baby"; no, I hold the baby, I bring the baby; no, I will take the baby; see, I close the little cut right here and the baby walk along with me, and I gave the baby, I stopped the flow, no, no, I take a white handkerchief I got in the cut and bringing them, I put in arm and take along, and I stay here, just a little spot in blood, and walk to the creek for to wash, that is all.

"Q. In other words, the little baby was standing in front of you, and your little boy was ahead of Elsie, is that right? A. Yes, the baby here, and put both hands in face this way (indicating).

"Q. And Mrs. Rocha fainted when she saw the blood? A. 'My baby killed, my baby.'

"Q. Mr. Rocha then took care of his wife, did he? A. Yes.

"Q. And you took Elsie? A. Yes.

"Q. Now, with reference to the cut on the forehead, how high up on the forehead was it? A. Well, about here, I tell Charley Machado, you put finger here, stop the blood; I take white handkerchief and never run no more.

"Q. Did you notice if that cut was through from the eyebrow to the eye? A. Just a little cut right here, see, the rolling pin just slit, come right here (indicating).

"Q. Was any out— A. Just about the ground this high (indicating).

"Q. The little girl was crying? A. Yes, crying, and I tell her it is not nothing and stop the crying.

"Q. And she walked over, how far did she walk before Charley Machado took her? A. Walk with me. * * *

The testimony of the father corroborated that of the mother and of Mrs. Silva. The pertinent portion thereof was:

"Q. What happened immediately after the rolling-pin hit Elsie? Did Elsie get hit with a rolling-pin? A. Yes.

"Q. Then what happened? A. Then I see get up, see a little blood, never see no more.

"Q. What were you doing? A. My wife, she faint, and I take care of my wife.

"Q. After you got your wife taken care of, was Elsie gone? A. Yes."

There is no evidence in the record showing either knowledge or consent on the part of either of the parents to the taking of the plaintiff by the defendant to any hospital.

While we do not find anything in the testimony as to the age of the plaintiff at the time of the injury, the records included in the transcript show that the plaintiff was of the age of about five years.

The assignments of error and the grounds set forth for reversal are the same as those set forth in action, Civil No. 5122, save and except the question involving the application of section 141½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693). All the sections of the California Vehicle Act specifically set forth and considered in action, Civil No. 5122, are set forth and relied upon in this action, and the same argument is presented by the appellant here as was presented in the case to which we are making reference. Avoiding repetition, we refer to the opinion filed in action, Civil No. 5122, as a sufficient answer to every question presented concerning the interpretation of the respective sections of the California Vehicle Act involved in this action, and also to all the cases cited in the opinion to which we are referring, as a complete answer to every legal objection urged by the appellant herein, save and except as to one instruction given by the court, which we will hereinafter set forth, and also the question as to whether the plaintiff was a guest within the intent and meaning of section 141½, supra. We also refer to the opinion filed in action, Civil No. 5122, showing that the jury in this case was amply justified in finding the defendant Hulen guilty of negligence.

After quoting all the provisions of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120) save and except subdivision (c), the court gave to the jury the following instruction: "D-4. The fact that defendant Hulen was a peace officer did not give him the right to fail to observe the law regulating the operation of motor vehicles, and if you find from the evidence in this case that defendant Hulen did operate his vehicle in violation of the law as the same is given to you in these instructions, then you may find that said Hulen was guilty of negligence; and if you find from the evidence that the negligence of defendant Hulen, if any, was the sole proximate cause of the accident in question, then you cannot render a verdict against defendant Frank Dambrosio, and your verdict should be in his favor."

[1] This instruction being one offered by the defendant Dambrosio, relates specifically to the contention between the appellant and

Dambrosio, as to who was guilty of the negligent act, as constituting the proximate cause of the injury to the plaintiff. For the reasons which we have stated in the opinion in action Civil No. 5122 and the cases cited, it is apparent that this instruction is erroneous, but as it does not touch upon the controversy urged by the plaintiff as to the negligence of the appellant, and as the testimony to which we have referred shows without conflict or any substantial question that the appellant Hulen was guilty of the negligence constituting the proximate cause of the injury to the plaintiff, it clearly appears that no prejudice was or could be suffered by the appellant on account of the erroneous instruction.

The appellant asked, and the court refused to give to the jury this instruction, to wit: "A 'guest' is defined by the Motor Vehicle Act as being a person who accepts a ride in any vehicle without giving compensation therefor. If you find under the evidence in this case that the plaintiff Elsie Rocha was a guest within the meaning of the definition just given you, then she cannot recover from the defendant Hulen, and it is your duty to bring in a verdict in favor of the defendant Hulen."

[2] This instruction as worded of course called for the jury to pass upon a question of law. No instruction directing the jury to find the facts from which the conclusion of law could be drawn was requested by the appellant. However, if the testimony in the case establishes the facts from which the conclusion would necessarily follow that Elsie Rocha was a guest of the appellant at the time of receiving the injuries complained of, then the judgment should be reversed. If, on the other hand, the plaintiff was not within the intent and meaning of section 141¾, supra, a guest of the appellant, then no reason is presented why the judgment should be disturbed.

As stated in the case of *Bookhart v. Greenlease-Lied Motor Co.*, 215 Iowa, 8, 244 N. W. 721, 722, 82 A. L. R. 1359: "In order to arrive at the proper construction to be placed upon a statute, it is proper to look at the law as it previously stood, the matter sought to be remedied, and the nature and spirit of the statute. See *Latta v. Utterback*, 202 Iowa, 1116, 211 N. W. 503; *Sinnott v. District Court in and for Clarke County*, 201 Iowa, 292, 207 N. W. 129; *State v. Claiborne*, 185 Iowa, 170, 170 N. W. 417, 3 A. L. R. 392; *Crawford v. Foster*, 110 Cal. App. 81, 293 P. 841, 843. As is well stated in the

case last cited: 'It has been held that the terms of a statute should be construed with their intent and purpose in view. *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801, 31 A. L. R. 1121. The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section (one similar to Section 5026-b1, Code 1931) was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation.'"

The reasons mentioned in the foregoing excerpt have been mentioned in the cases of *Crawford v. Foster*, 110 Cal. App. 81, 293 P. 841, and *Sullivan v. Richardson*, 119 Cal. App. 367, 6 P.(2d) 567; also, *Smith v. Fall River Joint Union High School District*, 118 Cal. App. 673, 5 P.(2d) 930, to which we will hereinafter refer.

None of the reasons set forth in the excerpt from the *Bookhart Case* for the adoption of the guest law appear to be presented by the circumstances surrounding, and which led up to the injury of the plaintiff. While a number of the cases cited by the respective counsel show that the circumstances led the court to declare the injured party a guest, and in other cases to declare the injured party a passenger, we have here presented circumstances which lead us to the conclusion that the plaintiff does not strictly come within the meaning of either classification. In this particular we may consider first the language used in the statute involved in the *Bookhart Case*, and then the wording found in section 141¾, supra. The Iowa statute involved in the *Bookhart Case* appears to be a copy of the Connecticut statute, and reads: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." Pub. Acts Conn. 1927, c. 308.

This action specifically refers to persons being transported without payment, etc., and apparently widens the scope and the meaning of the word "guest," as it does not take into consideration whether the injured person has taken any action on his part toward becoming a guest of the owner or operator of the vehicle involved in the accident.

[3] Section 141½, supra, reads: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California," etc., shall not recover for any injury. This section calls for some specific and voluntary action on the part of a person who becomes an occupant of the vehicle moving upon the public highways of the state involved in the accident, resulting in an injury to such occupant. To be a guest one must have accepted the ride in the vehicle involved. We think this imports both a knowing and a voluntary acceptance, and does not include either involuntary or a forced ride.

The word "accept" has a definite meaning. In 1 C. J. p. 377, it is thus defined: "To admit and agree to; to accede to, or consent to; to receive with approval; to adopt; to agree to. In the past tense the word is commonly used to signify assent and agreement." The meaning of the word "agreement" is thus set forth in 2 C. J. p. 979: "In its broad and comprehensive sense, demonstrated by general usage, a coming or knitting together of minds; a coming together in opinion or determination; the coming together in accord, of two minds, on a given proposition. * * * In law, a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation," etc.

The testimony of the appellant in this case is to the effect that when the child was brought to where the appellant and some others were standing, some one asked the appellant if he would take the child to the hospital, and he took the child to the hospital without the consent of her parents, or either of them, without interviewing either of the parents, and we may add, there is not a word of testimony indicating that the child, if she was competent to give consent, was ever asked a single question, but was simply placed in the automobile and driven away. We find nothing in the record by which the inference

of consent may be drawn. It is all to the effect that the parents did not know what had become of the child; that she was taken away while the father was looking after the mother who had temporarily fainted at the sight of blood. No examination was made as to the injury suffered by the plaintiff for which she was being hastened to an hospital.

The liability of parents to care for their children is not involved in this action, and therefore appellant's reference to section 270 of the Penal Code requires no answer. The facts show that the child was taken away without the knowledge or consent of either of the parties as we have stated; nor is there anything in the record indicating that the father or mother, or either of them, by any act or word, had indicated any intention not to properly look after the welfare of the plaintiff.

[4] Section 141½, supra, does include within its terms the meaning of the word "guest," within the intent of the Legislature, as one who accepts a ride in a vehicle without giving compensation therefore, but the words "without giving compensation therefor" are dependent upon the previous words found in the same clause or paragraph of the section, which again specifically mentions the words, "a person who accepts a ride." A passenger, of course, is one who accepts a ride and returns compensation in some form, or that compensation in some form is contemplated. There is nothing in the record, as we have stated, which indicates that the plaintiff ever accepted the ride, or indicated any intention whatever to make compensation therefor. Hence, she does not come within the classification of either passenger or guest. The Legislature, at the time of enacting the section referred to, evidently had in mind the redress of an obvious wrong, to wit, the readiness with which both driver and guest would pool issues to exact tribute from an insurance company. The Legislature, we think, never had in mind and never intended to include within the terms of section 141½, supra, the exempting of one from liability who would take a minor child five years of age, without the knowledge or consent of her father or mother, or either of them, and without the consent of the child (if it be held that a child of that age could give consent), and proceed in the reckless driving which the testimony shows to have occurred in this case, and exempt such a person from the consequences of his lack of judgment and negligent action. Considering the whole section and the intent and object to be accomplished by the Legislature

by its enactment, we conclude that Elsie Rocha was neither a passenger nor a guest in the automobile driven by the appellant Hulen at the time of the accident, and at the time of receiving her injuries by reason of his negligence, but was in truth and in fact simply an involuntary occupant of the vehicle driven by the appellant.

In all the cases having to do with guest statutes, it appears that the various courts have had distinctly in thought the question of whether the circumstances presented bring the case within the intent and purpose to be accomplished, and the evils to be remedied by the enactment of such statutes, as well as whether the plaintiff is within the language appearing in the statutes being considered.

[5] The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined. The following cases illustrate this statement:

In *Bookhart v. Greenlease-Lied Motor Co.*, supra, the facts show that the plaintiff was invited to ride in an automobile of a salesman, and accepted a ride therein for the purpose of ascertaining whether the plaintiff would become a purchaser of the automobile being demonstrated. Under such circumstances, although invited to ride, and having accepted the invitation to ride in the automobile, the plaintiff was held not to be a guest within the meaning of the guest statute.

In *Crawford v. Foster*, supra, the court had before it a similar question, and held that one invited to ride, and accepting a ride in a demonstration automobile driven by an automobile salesman, was not a guest within the contemplation of the Legislature in enacting the statute.

In *Sullivan v. Richardson*, supra, the plaintiff was invited by a representative of a real estate firm, and accepted the invitation to go and view lands held for sale by the real estate company, as a prospective purchaser. It was there held that the plaintiff was not a guest.

In *Smith v. Fall River Joint Union High School District*, supra, this court held that the little girl injured while being transported in a school bus was not a guest within the meaning of the statute.

In *Kastel v. Stieber* (Cal. App.) 297 P. 932, it was held that a minor compelled to take a ride against her will in an automobile was not a guest.

[6] Other cases might be cited where the circumstances required the court to hold that the injured person was not a guest, and also cases might be cited where the circumstances required the court to hold the plaintiff in the action to be a guest; but the foregoing cases which we have mentioned we deem sufficient to support the conclusion at which we have arrived, that the plaintiff in this action was not a guest within the intent and meaning of section 141½, supra, and does not come within the purposes to be accomplished, or the evils to be remedied by the statutes.

[7] In the consideration of section 141½, supra, and in determining the intent of the Legislature as to whom its provisions should apply, we may add that a five year old child has no capacity to "accept", in any legal sense.

[8] The appellant in this action, as in case Civil No. 5122, relies upon Act 2602, Deering's General Laws 1931, St. 1929, p. 568, as exempting him from liability. We fail to find any merit in this contention, as the appellant was not a member of either a police or a fire department. Even under such circumstances, full exemption is not granted.

In addition to the cases which we have cited, we may refer to the case of *City of Sacramento v. Hunger*, 79 Cal. App. 234, 249 P. 223, in which the liabilities of such employees are carefully set forth.

[9] Without further reviewing the evidence which we have set forth in action Civil No. 5122, and supplemented herein, we think it clearly appears amply sufficient to support the verdict, and that the jury could not have reasonably, in light of the facts, come to any other conclusion. From which it follows that any technical errors in the instructions given by the trial court under section 4½ of article 6 of the Constitution cannot be held in any respect prejudicial.

Upon the authorities reviewed, and the views expressed in the opinion filed in action Civil No. 5122, and the additional views herein set forth, we think the judgment in this action should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

6 Cal.App.2d 455

OVERTON et al. v. HARBAND et al.
Civ. 5329.District Court of Appeal, Third District,
California.

April 25, 1935.

1. Deeds ⇨32

Deed in which name of grantee is left blank and in which name of the grantee is afterwards inserted without authority of grantor is void.

2. Evidence ⇨383(4)

In action involving validity of deed, certified copy of deed received in evidence *held* prima facie evidence of its execution and of facts stated therein, and sufficient proof of its validity in absence of evidence to contrary (Code Civ. Proc. §§ 1920, 1948, 1951).

3. Deeds ⇨192

Parties, claiming that deed executed by them was void because at time they signed and acknowledged it name of grantee was not therein, had burden of proving such claim (Code Civ. Proc. §§ 1920, 1948, 1951).

4. Witnesses ⇨397

Where deposition, taken before certain defendants were made parties to action, was excluded as to such parties, any statements therein could be used only for purposes of impeachment and not as evidence of truth of such statements.

5. Witnesses ⇨397

In action to cancel deed and deed of trust given by grantee, where deposition taken before certain defendants were made parties, was excluded as to such defendants, conflicting statements in such deposition as to whether deed was executed in blank and used for impeachment purposes *held* insufficient to overcome prima facie effect of certified copy of record of deed as against such defendants (Code Civ. Proc. §§ 1920, 1948, 1951).

6. Equity ⇨66

One who prays equitable relief must be willing to do equity.

7. Equity ⇨66

Parties who received and retained full consideration paid them for property by stranger who gave trust deed before payment for property in full *held* not entitled to return of property while they retained price paid them (Civ. Code, § 3543).

8. Estoppel ⇨96

Where for cash payment and note possession was surrendered and deed was delivered to stranger, who had it recorded, and gave a trust deed, grantors' negligence estop-

ped them from having trust deed set aside, as against innocent third parties (Civ. Code, § 3543).

9. Names ⇨18

In action to set aside trust deed given by person who acquired deed to property under assumed name, testimony that mortgagor stated that property stood in name of his brother-in-law, which was identical with name assumed by mortgagor, *held* inadmissible (Code Civ. Proc. § 1963, subd. 25).

10. Evidence ⇨230(3)

Rights of grantee or mortgagee cannot be prejudicially affected by ex parte statements or admissions of the grantor or mortgagor made after execution of a grant or mortgage.

11. Evidence ⇨55

Presumption of identity of person from identity of name does not apply where uncontroverted facts show that there was no identity of person, though there was identity of name (Code Civ. Proc. § 1963, subd. 25).

12. Acknowledgment ⇨20(1)

Generally, a party to an instrument is disqualified to take acknowledgments, but when only effect of acknowledgment is to impart notice, the disqualification must appear on the face of the instrument.

Appeal from Superior Court, Los Angeles County; Leo Aggeler, Judge.

Action by Joseph Overton and another against Harry I. Harband and others. From a judgment for plaintiffs, the defendants Title Insurance & Trust Company and Mortgage Guarantee Company appeal.

Reversed.

Earl E. Johnson, Lawrence L. Otis, Gilbert E. Harris, and Arch H. Vernon, all of Los Angeles, for appellants.

William J. O'Brien, of Los Angeles, for respondents.

RANKIN, Justice pro tem, delivered the opinion of the court.

This is an appeal by defendants Title Insurance & Trust Company and Mortgage Guarantee Company from a judgment decreeing a trust deed executed in the name of one Henry Schwartz, and conveying certain real property described therein, to Title Insurance & Trust Company, as trustee, and naming Mortgage Guarantee Company as beneficiary, to be null and void, and restraining appellants from asserting any rights thereunder.

The material facts bearing upon the questions raised by the appeal are as follows:

Respondents Joseph Overton and Eliza A. Overton are husband and wife, and on August 10, 1931, were the owners of the property described as lot 59, block 7, of McCarthy Company's Florence Avenue Heights tract, in the city of Los Angeles, and improvements thereon consisting of bungalow court.

Following negotiations instituted some time in July, 1931, they sold the property, presumably to one Harry I. Harband, for a consideration of \$10,000, evidenced by a promissory note in said amount, executed by Harco Construction Company and Harry I. Harband, in which deal it was agreed that respondents were to receive the sum of \$700, one year's interest under the terms of said note, in advance.

On August 10, 1931, respondents went to the office of said Harry I. Harband, in the city of Los Angeles, delivered to him the deed they held to the property, their certificate of title, and all insurance policies. Harband then requested them to sign a deed to the property, and respondents signed the instrument on the lines indicated by Harband, and left the deed on Harband's desk. Neither of them read the deed, nor did they know whose name was written therein as grantee, or if any person was named as grantee. They then received from Harband the \$10,000 note and \$700, one year's interest thereon. Respondents then delivered to Harband the possession of the property, and Harband collected the rents thereon for the month of August.

The deed signed by respondents was recorded August 12, 1931, at the request of the grantee. The grantee named in the deed is Henry Schwartz (a single man). The instrument purported to have been acknowledged before Harry I. Harband, a notary public, his certificate of acknowledgement being in due form and bearing the imprint of his notarial seal.

On August 12, 1931, Harband appeared in the office of the Mortgage Guarantee Company and met O. Henry, Jr., escrow officer of said company, and presented to him a written application for a loan of \$3,000 on the property involved in this action, purporting to have been signed by Henry Schwartz. Harband was not personally known to Mr. Henry, but stated that he was Henry Schwartz. A note and a trust deed conveying the property to the Title Insurance & Trust Company as trustee, was prepared and delivered to Harband, who took the same to his office and signed the name "Henry Schwartz" thereto, and a notary public executed the certificate of acknowledgement in due form, certifying to

the execution of the trust deed by "Henry Schwartz." Harband then delivered said note and mortgage to the Mortgage Guarantee Company, and on August 13th, Title Insurance & Trust Company issued its loan policy in the usual form in favor of Mortgage Guarantee Company, insuring the trust deed to be a valid incumbrance and a first lien upon the property, and delivered it to Mortgage Guarantee Company. Before the loan policy was issued the examiner of Title Insurance & Trust Company called Mr. Overton on the telephone and asked him whether he had sold the property, to which question Mr. Overton replied that he had. Upon receipt of said instruments, Mortgage Guarantee Company paid over to Harband the amount of the loan, less expenses thereof, and immediately placed the trust deed on record. Payment of the proceeds of said loan were made to Harband by check payable to Henry Schwartz. Harband received this check and indorsed the same in the name of Henry Schwartz, and underneath the name of Henry Schwartz he wrote his own name also, as indorser. These negotiations were carried on with the Mortgage Guarantee Company officials by Harband, under the name of Henry Schwartz, and it was some three weeks after the transaction was closed that appellants, or either of them, learned that the real name of the man to whom they had made the loan as "Henry Schwartz," was Harry I. Harband.

Defendant Harband had a brother-in-law living in Los Angeles by the name of Henry Schwartz. This brother-in-law was a tailor by trade, and had no knowledge of said transactions carried on by Harband until the 14th day of October, 1931; made no claim to the property; received none of the money from the loan placed thereon; and did not authorize in any manner the use of his name in said transaction.

Appellants filed an answer herein denying material allegations of the complaint and as a matter of defense alleging that defendant Harry I. Harband adopted and used the name "Henry Schwartz" in acquiring title to the real estate involved, and in making a loan thereon. Appellants also, as a further and separate defense, pleaded that plaintiffs are estopped from denying the execution of said deed as against appellants.

The court made lengthy findings to the effect that all the material allegations of the complaint are true, and the allegations of the answer are untrue, and entered judgment in accordance therewith.

The first contention advanced by appellants is, that the trial court's finding that the name

of the grantee was not contained in the grant deed executed by respondents, and that subsequently Harband inserted the name "Henry Schwartz" therein, is not sustained by the evidence.

[1] The law is well established, and it is conceded by counsel, that a deed in which the name of the grantee is left blank and in which the name of the grantee is afterwards inserted without authority of the grantor is void; a nullity.

The question here involved is whether or not the evidence sustains the finding to that effect. A certified copy of the deed was offered and received in evidence. Section 1951 of the Code of Civil Procedure provides: "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may together with the certificate of acknowledgment or proof, be read in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof."

[2] And sections 1948 and 1920 of the same Code make such proof prima facie evidence of the execution of the writing and of the facts stated therein. The deed is sufficient in the absence of evidence to the contrary. *Thomas v. Fursman*, 177 Cal. 550, 553, 171 P. 301.

[3] The burden of proving that at the time respondents signed and acknowledged the deed the name of the grantee was not written therein, was upon respondents. Counsel for respondents rely mainly upon so-called conflicts in the evidence of defendant Harband in support of the said finding. Harband's evidence was taken by deposition on September 15, 1932, before a notary public, and read in evidence at the trial. On the point now under consideration he testified in substance as follows:

The deed was prepared in my office in the Western Pacific Building, Los Angeles. I took the certificate of acknowledgement as a notary public. I asked them to acknowledge their signatures, and they acknowledged them at the time of signing the deed. The deed had been prepared previously with the exception of the acknowledgement. The name "Henry Schwartz" was placed in the deed at the time they affixed their signatures. I inserted that name before the signing. I am

positive that the name of the grantee was inserted at that time.

"Mr. Harband: I merely wanted to state that Mr. Overton, after he had read the deed, he handed it over to Mrs. Overton. Then, after she had read it and handed it back to Mr. Overton, he pulled his chair forward up to the desk and signed it and then called to Mrs. Overton to also come forward and sign it. Then, after they signed it, he handed me the deed.

"Mr. O'Brien: Q. After that you inserted the name of Henry Schwartz? A. I did not. It was inserted before either party had signed it. As I have said, it was before the signing of the notary document.

"Q. Do you recall, Mr. Harband, of having given a deposition in this matter in Los Angeles? A. I do.

"Q. * * * I will read a few questions and answers which are part of that deposition found on page 8. It is a deposition given by Henry I. Harband on October 7, 1931, at the office of William J. O'Brien, 903 California Building in the city of Los Angeles, before Florence Kelly, a notary public. * * * Following are excerpts from the previous deposition: 'Q. Mr. Overton, you say, deeded this property to you? A. Yes, sir.' Q. That was your answer, I believe, to one of my former questions. 'Q. It is a fact that it was deeded to Henry Schwartz? A. The paper was signed in blank with instructions that I could deed it to whoever I wished to deed it to. Q. The name of the grantee was not in the deed when signed? A. Yes, sir, it was deeded to Henry Schwartz, yes, sir, in his presence, Mr. Overton's presence. Q. The name of Henry Schwartz was not in the deed when Mr. and Mrs. Overton signed it? A. Yes, sir, it was. Q. Then what do you mean when you said it was signed in blank? A. Mr. and Mrs. Overton signed the deed and I put the name of Henry Schwartz in, in their presence.'

"Mr. O'Brien: Q. Did you so testify? A. I did.

"Mr. Vernon: And in pen there is marked, 'additional testimony on page 12-A,' initialled 'C. T. D.' And page 12-A reads as follows: 'In reference to deposition given by myself on Oct. 7, 1931, at the office of William J. O'Brien, 903 California Bldg., in the City of Los Angeles, before Florence Kelly, a notary, I testified that I had inserted the name of Henry Schwartz, after the deed was signed. This is erroneous on my part, as I intended to say that I had signed the name of Harry I. Harband after the deed was

signed, as a notary public, Harry I. Harband'; initialed 'C. T. D.'"

[4] The record discloses that the Harband deposition of October 7, 1931, was taken before appellants were made parties by amendment of the complaint, and without notice to appellants; that it was offered in evidence, and objected to by appellants. The objection was properly sustained, and the deposition received in evidence as to defendants other than appellants. It was rejected as proof of the facts therein stated, and it therefore could be used or referred to on the cross-examination of Harband only for purposes of impeachment, and that counsel so intended is indicated by his laying the proper foundation for impeachment. The court could consider the same only for that purpose, and when so considered the only effect of the prior conflicting statement would be to neutralize his testimony given at the trial. On this point we quote from *Albert v. McKay & Co.*, 174 Cal. 451, at page 456, 163 P. 666, 668: "When a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him. 2 Wigmore on Evidence, § 1018; *Keyes v. Geary Street, etc., R. Co.*, 152 Cal. 437, 441, 93 P. 88; *Worley v. Spreckels Bros. Commercial Co.*, 163 Cal. 60, 71, 124 P. 697."

[5] We find in the evidence no such substantial conflict in the testimony of Harband as would justify any inference in support of the finding. Nor is there any merit in respondents' argument that statements of Harband were received as admissions of the defendant. The record contains no evidence sufficient to overcome the prima facie effect of the certified copy of the record of the deed.

Appellants' next contention is that even if respondents' deed to the property was executed in blank and therefore void, still respondents are estopped from denying the validity of their deed. As the judgment must be reversed as to appellants, and the cause may again be tried, we deem it necessary to discuss the question of estoppel.

[6, 7] Respondents come into a court of equity and by their amended complaint, filed January 29, 1932, ask equitable relief from a lien on their real property given appellants. That appellants are in the position of innocent incumbancers relying upon the record, is not controverted. Respondents executed and delivered the deed conveying their property pre-

sumably to Harband, but without any investigation upon their part, or apparent interest in the wording of the deed, and without exercising any due diligence to ascertain the value of the consideration they received, and of which they now complain. This act was the basis of the record title which was relied upon by appellant in subsequent transactions. Respondents received the consideration they had agreed to take for the property, and there is no proof that it was not an adequate and valuable consideration. They delivered possession of the property to the person with whom they made the deal. A day or two later, Mr. Overton stated to the title examiner for appellant, Title Insurance & Trust Company, that he had sold his property on Seventy-Ninth street. It is evident that the policy of title insurance would not have been issued, and the loan would not have been made, had not appellants done these things. One who prays equitable relief must be willing to do equity. Bearing in mind the fact that appellants received and retained the full consideration paid them for their property, we cannot say that equity will be done by returning to appellants their property, while they retain the selling price.

After reviewing the authorities the Supreme Court said, in the case of *Trout v. Taylor*, 220 Cal. 652, 32 P.(2d) 968, 970: "An innocent purchaser taking a void instrument can, however, find protection in the doctrine of estoppel, where circumstances are presented which establish negligence or some other misconduct by the other party, which contributed to the loss. Section 3543 of the Civil Code provides broadly that 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.'"

[8] We think it clear under the facts of the instant case that respondents were negligent in their transactions relative to their property rights, and particularly, in that they permitted their deed to be recorded, delivered possession of the property, and stated to the title examiner that they had sold the same. By their carelessness and undue confidence they enabled Harband to obtain the money of an innocent third party, and to this situation section 3543 of the Civil Code is peculiarly applicable. The finding against the plea of estoppel is not sustained by the evidence.

We come now to the question involving the validity of the trust deed executed by Harband in the name "Henry Schwartz," to se-

cure the loan of \$3,000 made to him by Mortgage Guarantee Company.

[9, 10] Appellants maintain that the trust deed is valid, Harband having taken title for himself in the assumed name "Henry Schwartz." Respondents claim the trust deed was forged by Harband and therefore is void, and in support of such contention rely upon the presumption under section 1963, subd. 25, Code Civ. Proc., "identity of person from identity of name." They cite a line of authorities holding that the identity of names is prima facie evidence of identity of persons, and point to the fact that Harband had a brother-in-law by the name of Henry Schwartz. The uncontradicted proof, however, shows that Henry Schwartz, the brother-in-law of Harband, had no knowledge of the transaction until after its consummation. He paid no consideration for the property, nor did he receive anything from the proceeds of the loan, or otherwise, or at any time sign any paper or authorize any person to deal for him with reference to the transaction, nor did he claim any interest therein. He was married and resided at 1402 Fourth avenue, Los Angeles, and at no time resided at 1150 So. Hayworth street, the residence number given in the Henry Schwartz papers on application for the loan. All of Harband's dealings with appellants were carried on by him under the name "Henry Schwartz." The only evidence in the record indicating that Harband intended to vest title in his brother-in-law, Henry Schwartz, is the testimony of the witness, Adams, admitted over appellants' objection, that at some time subsequent to the completion of the deal and the recordation of the papers, Harband, in connection with an attempt to sell the property, told the witness that the property stood in the name of his brother-in-law, Henry Schwartz. This testimony is inadmissible, as it is well settled that the rights of the grantee or mortgagee cannot be prejudicially affected by the ex parte statements or admissions of a grantor or mortgagor made after the execution of a grant or mortgage. 10 Cal. Juris. 1092; *Silva v. Serpa*, 86 Cal. 241, 24 P. 1013; *Bollinger v. Bollinger*, 154 Cal. 695, 99 P. 196; *Bury v. Young*, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; *Ord v. Ord*, 99 Cal. 523, 34 P. 83; *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703.

[11] Under the facts of this case the presumption of identity, and respondents' authorities in support of their theory with reference thereto, have no application, as the uncontroverted facts dispel the presumption. The finding that the trust deed was forged was clearly erroneous.

Harband, for the purpose of taking title and dealing with appellants in securing a loan, assumed the name "Henry Schwartz." The rule is laid down in 19 Cal. Juris. 526, as follows: "If an owner of property convey by any name, the conveyance as between himself and his grantee is valid and transfers the title. And if one chooses to take the title to real estate in a name other than his true name, so far as that property is concerned he has assumed the name in which he takes title as his true name, and in suits affecting the property he may be sued by such designation." *Emery v. Kipp*, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; *Wilson v. White*, 84 Cal. 239, 24 P. 114; *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Knaugh v. Baender*, 84 Cal. App. 142, 257 P. 606.

[12] One other question requires attention. Respondents claim that neither the record of the deed from themselves to Harband in the name "Henry Schwartz," nor the trust deed to appellant, Mortgage Guarantee Company, impart notice, for the reason that Harband, the grantee in the former deed, and the grantor in the trust deed, took the acknowledgements as notary public. There is no question as to the general rule that a party to the instrument is disqualified to take the acknowledgements. This rule is established by the authorities, such as the case of *Lee v. Murphy*, 119 Cal. 364, 368, 51 P. 549, 955, cited by respondents, but when the only effect of the acknowledgement is to impart notice, as in the instant case, the disqualification must appear on the face of the instrument. This exception to the general rule is recognized in *Lee v. Murphy*, supra, and in *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 P. 849, 33 P. 732; 1 Cor. Juris. 803.

For the reasons herein stated, the judgment should be reversed. And it is so ordered.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

2. Injunction ⇨118(1)

Complaint of stockholder of building and loan association seeking to enjoin further proceedings by commissioner taking possession of association's property *held* not to state a cause of action by statement that association deemed itself aggrieved by commissioner's action, where facts were not stated (St. 1931, pp. 539, 540, §§ 13.11, 13.12).

3. Injunction ⇨118(1)

Complaint by building and loan association stockholder to enjoin further proceedings by commissioner taking possession of association's property, merely alleging that directors were under domination of commissioner, and that association had for previous six months been on a pro rata basis, and that directors had refused to act, *held* not to state a cause of action without stating facts, since allegations were consistent with conclusion that commissioner acted justifiably (St. 1931, pp. 539, 540, §§ 13.11, 13.12).

In Bank.

Appeal from Superior Court, Santa Clara County; Maurice Dooling, Judge.

Action by Harry G. Holabird, as receiver for the North American Associated Companies, against Friend W. Richardson, as Building and Loan Commissioner of the State of California, J. C. Hughes, and others. From a judgment entered on an order sustaining a demurrer without leave to amend, plaintiff appeals.

Affirmed.

David R. Faries and Don F. Tyler, both of Los Angeles, for appellant.

J. C. Hughes, of Oakland, Fry & Jenkins, of San Jose, and Thomas M. Gannon, of San Francisco, for respondents.

SHENK, Justice.

On January 23, 1933, the defendant Friend W. Richardson, as building and loan commissioner, pursuant to the power vested in him by the provisions of section 13.11 of the Building & Loan Association Act (Stats. 1931, p. 483), took possession of the business and assets of the defendant California Mutual Building & Loan Association. On February 21, 1933, the plaintiff, as receiver of North American Associated Companies, a stockholder of said association, brought the present action against the commissioner and the association to enjoin the possession and further proceedings in relation thereto. The trial court sustained, without leave to amend, a demurrer to the plaintiff's third amended

3 Cal.2d 299

HOLABIRD v. RICHARDSON, Building and Loan Com'r, et al.

S. F. 15074.

Supreme Court of California,

April 19, 1935.

1. Building and loan associations ⇨2
Constitutional law ⇨306

Statutes authorizing building and loan commissioner to take over assets of building and loan association which appear to be in unsafe condition, and providing for action by association should it deem itself aggrieved thereby, *held* not to deny due process (St. 1931, pp. 539, 540, §§ 13.11, 13.12).

complaint. From the judgment entered on the order, the plaintiff appeals.

We may assume that the plaintiff, as receiver of the corporation North American Associated Companies, has authority to bring any action which the corporation for which he is receiver could bring. The action purports to have been brought pursuant to section 13.12 of the Building & Loan Association Act. The questions for determination are whether the plaintiff's corporation, as a stockholder of the defendant California Mutual Building & Loan Association, under the circumstances alleged, may bring the action provided by said section 13.12 on behalf of the association. The plaintiff also questions the validity of the provisions in question in relation to the due process clauses of the federal and state Constitutions.

Section 13.11 of the act, among other things, provides that if it shall appear to the building and loan commissioner that any building and loan association is in an unsafe condition, or is conducting its business in an unsafe or injurious manner, such as to render its further proceeding hazardous to the public, or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to investors, they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, the commissioner may forthwith demand and take possession of the property, business, and assets of the association and retain possession until the association shall resume possession with the consent of the commissioner, or until its affairs be liquidated.

Section 13.12 of the act provides that whenever an association of whose property, business, and assets the commissioner has so taken possession deems itself aggrieved thereby, it may at any time within thirty days after such possession apply to the superior court of the county in which the principal office of the association is located, to enjoin further proceedings. The same section provides for a citation to be issued to the commissioner to show cause why further proceedings should not be enjoined, and for a hearing upon the return thereto. The court is empowered to enjoin further proceedings and order the return of the property and assets, or dismiss the proceeding.

It is alleged in the complaint that the plaintiff, deeming said California Mutual Building & Loan Association aggrieved by the act of the commissioner, made demand upon the di-

rectors of the association to commence an action to enjoin further proceedings pursuant to section 13.12 of the act; that the association did deem itself aggrieved, but that a majority of the directors thereof were wrongfully dominated by, in fear of, and under the control of, the defendant Richardson, and feared personal retaliation from him for reasons personal to themselves; that, contrary to the best interests of the association, the board of directors, despite the demand of the plaintiff, failed and refused to commence an action on behalf of the association; that in order to prevent the lapsing of the thirty-day period, the plaintiff filed the action on behalf of the association, and joined the association as a defendant. It is also alleged that the association has deemed itself further aggrieved in that the possession is in violation of the constitutional rights of the association because the commissioner did not apply to any court for permission to take the property and thus accord to the association an opportunity to be heard, and furthermore, for the reason that the association for more than six months prior to the taking had been on a pro rata basis as provided by the act, and had neither accepted deposits, or made payments or loans, and that during that period the commissioner had had agents stationed in the offices of the association who had access to the books thereof. It is further alleged that the act of the commissioner was arbitrary, unreasonable, and unjustified in that it was done in an effort to prevent a reorganization of the affairs of the association for the benefit of its investors.

[1] We may at the outset dispose of the contentions that the provision for taking possession by the commissioner forthwith under the circumstances and conditions provided by the act, and the provision for an action to be brought by the association if it deem itself aggrieved thereby, are a deprivation of due process. The questions thus raised must be deemed to be settled adversely to the plaintiff's contentions by the case of *State Savings and Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L. R. A. 1915E, 675. In that case it was held that provisions of the Bank Act were constitutional which vested in the superintendent of banks similar powers with relation to banking institutions. Section 136, Banking Act, Stats. 1909, p. 115. Common knowledge discloses the similarity between banking institutions and building and loan associations under the laws of this state; and the applicability of the cited case to the facts here, in so far as the necessity exists for the exercise of the police power of

the state, must be recognized. All of the considerations then held to make the legislation involved a proper and reasonable exercise of the police power are appropriate here, and an extended discussion of the subject is now unnecessary. Indeed, if there be any remaining doubt of the propriety of the present legislation, we may finally resolve that doubt in its favor by quoting from the opinion in that case, decided in 1913: "Under the rapid changes which have occurred in recent years in the industrial and economic world, enterprises and industries which were theretofore considered mainly of a private character, have become essentially of a public nature and the changed conditions have called for regulations of a kind different from those that have theretofore sufficed." See, also, *Richardson v. Superior Court*, 138 Cal. App. 389, 32 P.(2d) 405, 8 A. L. R. pages 898-901, note and cases cited; 78 A. L. R. page 774, note and cases cited.

[2] We may assume that in a proper case the plaintiff as a stockholder may sue on behalf of the association. *Dodge v. Woolsey*, 18 How. 331, 341, 15 L. Ed. 401. The plaintiff has attempted by this action to preserve what he deems to be the association's right to bring the action within the time limited by the act, but he has not shown that the association would have had a cause for the equitable relief sought had the association chosen to commence the action. The plaintiff contends that allegations in the words of the statute, viz., that the association "deems itself aggrieved," constitute a sufficient statement of a cause of action. It may be assumed that every litigant who brings an action deems himself aggrieved, but it is an obviously elementary proposition that, nevertheless, he must state facts constituting his *prima facie* case for relief.

[3] The plaintiff argues that section 13.12 of the act, in providing for a return to the order to show cause to be directed to the commissioner, places the burden upon the commissioner of proving the unsafe condition of the association, and that his taking possession was within his power as defined by the act. Even so, the immediate question here is whether the complaint states facts sufficient to entitle the plaintiff to an order to show cause. What showing the association must

make on application to the superior court for an order is not here involved. If the plaintiff, as a stockholder, undertakes to sue on behalf of the association, he must allege facts to support a conclusion that the association has wrongfully refused to commence the proceeding on its own behalf. He has not alleged such facts unless by the complaint he has made a *prima facie* showing that the taking possession by the commissioner was beyond the scope of his powers under the act. This is so for the reason that the complaint falls far short of averring fraud or collusion on the part of the directors, or that their refusal to bring the action was wrongful. What allegations in this regard do appear, viz., substantially that the directors were dominated by the commissioner, are merely the conclusions of the pleader, and are not inconsistent with a decision of the board of directors, based on fact, that the taking possession by the commissioner was within his powers. They do not, therefore, afford the required support to sustain the plaintiff's application for relief in a court of equity. *Hawes v. Contra Costa Water Co. (Hawes v. Oakland)*, 104 U. S. 450, 26 L. Ed. 827. So, unless the complaint states facts showing that there was not existing any condition which would justify the act of the commissioner, the plaintiff's application is deficient. The allegations of fact in the complaint that the association had for the previous six months been on a pro rata basis and had not made any loans or received any deposits, that agents of the commissioner had been stationed at the association's place of business with access to the books, and that the directors had refused to make application to the superior court, are plainly insufficient. Such allegations are consistent with a conclusion that the association was in a condition which justified the act of the commissioner under the provisions of the statute.

The plaintiff's allegations do not measure up to the requirements of a sufficient pleading. The demurrer was therefore properly sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

3 Cal.2d 350

FERRAN v. SOUTHERN PAC. CO. et al.

S. F. 15296.

Supreme Court of California.

April 24, 1935.

Rehearing Denied May 22, 1935.

1. Judgment ⇨199(3)

Court's power to enter judgment notwithstanding verdict is same as power to grant nonsuit, and on motion for such judgment court has no power to weigh the evidence (Code Civ. Proc. § 629).

2. Judgment ⇨199(3)

On motion for judgment for defendant notwithstanding verdict for plaintiff, court must disregard conflicting evidence and accord to evidence favorable to plaintiff all value to which it is legally entitled, including every legitimate inference therefrom, and court cannot grant the motion if there is any evidence sufficiently substantial to support the verdict (Code Civ. Proc. § 629).

3. New trial ⇨68

Where court believes that evidence is unreliable, court should grant new trial, and court may do so even where there is substantial evidence to sustain the verdict if court believes that evidence preponderates against verdict.

4. Negligence ⇨83

"Last clear chance" rule means that if one has opportunity of avoiding injuring another he must at his peril exercise the opportunity.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

5. Carriers ⇨321(23)

Where commuter, while standing between tracks after signaling approaching north-bound train to stop, was struck by overhang of south-bound locomotive, court properly omitted to instruct on last clear chance doctrine, since it did not necessarily appear that from plaintiff's position between tracks defendant's employees had such knowledge of plaintiff's peril as to make doctrine applicable.

6. Carriers ⇨327

General rule as to quantum of care required of person about to cross tracks or walking on or near tracks does not apply to intending passengers obliged, in boarding trains, to cross intervening tracks, the passenger in such case being entitled to assume that company will regulate train movements so as to enable him to cross safely, and in such cases questions whether passenger has exercised ordinary care and whether com-

pany has fulfilled its duty are ordinarily for jury.

7. Carriers ⇨320(10), 347(3)

Where commuter, while standing between north and south-bound tracks in front of station after signaling north-bound train to stop, was struck by overhang of locomotive of a late south-bound train, questions of railroad's negligence and commuter's contributory negligence held for jury under evidence.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Phillip Ferran against the Southern Pacific Company and another. From a judgment for defendants notwithstanding a verdict in plaintiff's favor, plaintiff appeals.

Reversed.

Prior opinion, 35 P.(2d) 1076.

Daniel A. Ryan, Thomas C. Ryan, and James W. Harvey, all of San Francisco, for appellant.

Dunne, Dunne & Cook and Dunne & Dunne, all of San Francisco, for respondents.

PER CURIAM.

We adopt from the opinion prepared by the District Court of Appeal, First Appellate District, Division 1, the following portion thereof:

"An appeal by plaintiff from a judgment entered for defendants, notwithstanding a verdict in plaintiff's favor.

"Plaintiff was injured while waiting to board a north-bound train at Lomita Park, a station on the railroad of the Southern Pacific Company, which company will be hereinafter referred to as the defendant. The railroad at this point consists of double tracks. Fronting the station the tracks are approximately eight feet apart. Upon the track nearest the station were operated the south-bound trains, and upon the other track the north-bound trains. Certain passenger trains made regular stops at this station; others stopped only when flagged by passengers. The injury to plaintiff occurred on the morning of June 14, 1931. He was at that time a resident at Lomita Park, and 'commuted' to and from San Francisco, where he was employed. A train bound for San Francisco and which would stop only upon signal, was due at Lomita Park station at 8:22 a. m.

Plaintiff held a regular commutation ticket and was awaiting this train. The station platform was macadamized, as was the space between the tracks. According to the plaintiff, when he arrived at the station platform, he looked in both directions for approaching trains: he saw no train approaching from the north, in which direction he had a clear view for about a mile. Looking south, he saw the train he intended to board rounding a curve about half a mile away. He then walked to the macadamized space in front of the station, and signaled the approaching train. He again looked to the north and, seeing no train in that direction, remained between the tracks, facing south. While in this position" his elbow "was struck by the overhang of the locomotive of a south-bound passenger train which, according to schedule, did not stop at this station. He knew that during the morning hours through trains from the north passed through the station without stopping." It should be noted here, however, that the south-bound train, which usually met and passed the north-bound train at Millbrae, a station about a mile and a half south of Lomita Park, was about two minutes late. "The north-bound train on this occasion stopped about 600 feet south of where plaintiff was struck, and the south-bound train was brought to a stop about the same distance south of the station. The engineer of the latter train died before the trial, but defendant John E. Monroe, who was the fireman, saw plaintiff standing between the tracks when about 1,700 feet away and called the engineer's attention to the fact. * * * The train was traveling at the rate of 45 to 50 miles an hour, and its speed was not slackened before the collision."

[1-3] The power of the court to enter a judgment in favor of the moving party notwithstanding a verdict is the same as the power of the court to grant a nonsuit. It has no power on such a motion to weigh the evidence. In the present case, therefore, disregarding conflicting evidence and according to the evidence favorable to the plaintiff, all the value to which it is legally entitled, including every legitimate inference that may be drawn therefrom, if there is any evidence of sufficient substantiality to support the jury's verdict for the plaintiff, the court was without power to enter the judgment for the defendant. *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 118, 291 P. 184, 188; *Estate of Flood*, 217 Cal. 763, 21 P.(2d) 579; *Code Civ. Proc.* § 629. As stated in *Hunt v. United Bank & Trust Co.*, *supra*, "if, in the opinion of the court, the evidence is unreliable,

it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict."

Counsel have argued at length the applicability to the facts of the doctrine of last clear chance. The plaintiff contends that the judgment was erroneous because the verdict should stand under the application of that doctrine. The court did not instruct the jury upon that theory, but did fairly and fully instruct the jury upon the issues of negligence and contributory negligence. It may be assumed that the court omitted to instruct the jury on the doctrine of last clear chance because of the decisions which hold that the doctrine is inapplicable where an essential element is lacking, viz., the element that the plaintiff must have been imperiled so as to have been unable to escape by the exercise of ordinary care. See *Holmes v. Southern Pac. Coast Ry. Co.*, 97 Cal. 161, 31 P. 834; *Everett v. Los Angeles Consolidated Elec. Ry. Co.*, 115 Cal. 105, 43 P. 207, 46 P. 889, 34 L. R. A. 350; *Green v. Los Angeles Terminal Ry. Co.*, 143 Cal. 31, 42, 76 P. 719, 101 Am. St. Rep. 68; *Hamlin v. Pacific Elec. Ry. Co.*, 150 Cal. 776, 782, 89 P. 1109; *Basham v. Southern Pacific Co.*, 176 Cal. 320, 325, 168 P. 359; *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 P. 36; *Id.*, 189 Cal. 746, 210 P. 259; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *Giannini v. Southern Pac. Co.*, 98 Cal. App. 126, 276 P. 618. The defendant contends that this essential element is lacking in the present case because if the plaintiff had kept a watch to the north or had looked to the north again he would have seen the approaching south-bound train and could have stepped into a place of safety.

[4, 5] We find it unnecessary to discuss the merits of the plaintiff's contention that his unawareness of the danger which threatened him was sufficient to supply the claimed missing element. See *Darling v. Pacific Electric Ry. Co.*, 197 Cal. 702, 707, 708, 242 P. 703; *Palmer v. Tschudy*, *supra*. However, it may be noted that this court has lately said that "a defendant is never relieved of liability if he has it in his power to prevent injuring another, and this is so whether one is unaware of his peril by reason of his negligence or not. The rule of the last clear chance means just what the words imply, namely, if one has the opportunity of avoiding the injury, he must at his peril exercise it." *Center v. Yellow Cab Co.*, 216 Cal. 205, 208, 13 P.(2d) 918, 920; see, also, *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.(2d) 915. It was shown in this

case that it was customary for passengers taking the north-bound train to stand between the tracks to flag the train, and it may be said that the place taken by the plaintiff was not necessarily a warning to the defendant's employees that the plaintiff was in a position of such danger as to require emergency action on the part of the former. It does not necessarily appear, therefore, that the defendant's employees had such knowledge of the plaintiff's peril as to make applicable the last clear chance doctrine. It is quite apparent therefore that the court properly omitted to instruct the jury on that theory.

[6] The question then is whether there was evidence of sufficient substantiality to support the verdict in the plaintiff's favor. The solution depends upon the state of the record and the decisions with reference to the issues of negligence and contributory negligence. The defendant contends that the plaintiff was guilty of contributory negligence as a matter of law and that the trial court appropriately exercised its power in entering a judgment for the defendant notwithstanding the verdict pursuant to the case of *Holmes v. Southern Pacific Coast Ry. Co.*, 97 Cal. 161, 31 P. 834, 835. That case and the cases following it apply the general rule that "a railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence per se."

It has been so many times decided as now to appear incontrovertible, that this general rule does not apply in all its strictness as to the quantum of care required of the plaintiff when he is upon the tracks of the defendant with the intention of becoming a passenger on its train and at a station or similar stopping place maintained by the company for the purpose of receiving passengers. The rule applicable in such cases is that stated in *Wilkinson v. United Railroads*, 195 Cal. 185, 199, 232 P. 131, with supporting authorities. That and other cases hold that the general rule as to the quantum of care required of persons about to cross the tracks

does not apply where passengers are obliged, in boarding a train, to cross intervening tracks, but the passenger is entitled to assume that the company will so regulate the movement of its trains as to enable him to cross in safety. In such cases the intending passenger is not absolved from the exercise of any care, but the question whether he has exercised ordinary care under the circumstances involved and the question whether the defendant has fulfilled the duty enjoined upon it by virtue of the relationship between it and the person upon its premises by its invitation are ordinarily for the jury to determine. See *Anderson v. San Francisco-Oakland Terminal Rys.*, 61 Cal. App. 21, 24, 214 P. 289; *Aydloft v. Key System Transit Co.*, 104 Cal. App. 621, 627, 286 P. 456; *Choquette v. Key System Transit Co.*, 118 Cal. App. 643, 650, 5 P.(2d) 921; *Warner v. Baltimore & Ohio Railroad Co.*, 168 U. S. 339, 18 S. Ct. 68, 42 L. Ed. 491; *Chunn v. City & Suburban Ry.*, 207 U. S. 302, 28 S. Ct. 63, 52 L. Ed. 219; *Klein v. Jewett*, 26 N. J. Eq. 474; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. Railroad Co.*, 84 N. Y. 241; *Hirsch v. New York & G. L. R. Co.*, 53 Hun (N. Y.) 633, 6 N. Y. S. 162; *Pennsylvania R. Co. v. Rogers (C. C. A.)* 244 F. 76; *Tubbs v. Michigan Cent. R. Co.*, 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320; *Karr v. Milwaukee Light, Heat & Traction Co.*, 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017; *Illinois Central Railroad Co. v. Daniels*, 96 Miss. 314, 50 So. 721, 27 L. R. A. (N. S.) 128, and note.

The foregoing cases distinguish the rule of the *Holmes Case*, which follows the general rule applicable at crossings, and the rule of the *Wilkinson Case*, which states the rule applicable at stations, as they were distinguished in *Choquette v. Key System Transit Co.*, supra. In the cases relied upon by the defendant either the general crossing rule of the *Holmes Case* was applicable to the particular facts, or, also as in the *Holmes Case*, the plaintiff was in fact so clearly negligent as to bar recovery as a matter of law. Such cases are *Bradley v. Davis*, 223 Mich. 275, 193 N. W. 819; *Byrne v. Boston Elevated Ry. Co.*, 198 Mass. 444, 85 N. E. 78; *Lynn v. Pittsburgh & L. E. R. R. Co.*, 267 Pa. 41, 110 A. 271; *Matthews v. Pennsylvania R. Co.*, 148 Pa. 491, 24 A. 67; *Twyman v. Baltimore & O. R. Co. (C. C. A.)* 295 F. 639; *Cranch v. Brooklyn Heights R. R. Co.*, 186 N. Y. 310, 78 N. E. 1078.

[7] It must be obvious that, when the applicable rule of the *Wilkinson Case* rather than the general rule of the *Holmes Case* is

considered and applied to the facts favorable to the plaintiff's case, the plaintiff cannot be considered guilty of negligence as a matter of law. The plaintiff took some measure of care for his own safety and the evidence is conflicting on the question whether the defendant's employees gave sufficient warning of the approach of the south-bound train, which was late. We are not persuaded that the appropriate rule is relaxed in the defendant's favor because Lomita Park was a flag stop for the north-bound train which the plaintiff desired to board. That fact can have a bearing only upon the quantum of care which the jury may find should have been exercised by the respective parties. We conclude that the issues of negligence and contributory negligence were properly for the jury on the record presented and that the judgment for the defendant notwithstanding the verdict was therefore erroneous.

The judgment is reversed.



3 Cal.2d 366

PEOPLE v. MAKOVSKY.

Cr. 3827.

Supreme Court of California.

April 25, 1935.

1. Weapons $\hookrightarrow$ 17(1)

Information charging violation of statute prohibiting sale of billies and stating type of instrument unlawfully sold in language sufficient to enable person of common understanding to know what was intended was sufficient, though not charging sale of instrument "commonly known" as billy (St. 1925, p. 542, § 1; Pen. Code, §§ 950, 951).

2. Criminal law $\hookrightarrow$ 37

Decoys may be used to entrap criminals and present opportunity to one intending to commit crime, but not to ensnare innocent persons into committing crimes.

3. Criminal law $\hookrightarrow$ 569

Evidence, in trial for unlawfully selling billies, that man acting under police department's instructions went to defendant's place of business, asked for dozen blackjacks, and later received three billies, procured by defendant from wholesale house, *held* not to establish entrapment requiring reversal of conviction (St. 1925, p. 542, § 1).

4. Weapons $\hookrightarrow$ 17(4)

Evidence *held* sufficient to support conviction of unlawfully selling billies (St. 1925, p. 542, § 1).

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Louis Makovsky was convicted of unlawfully selling billies, and he appeals.

Affirmed.

Prior opinion, 36 P.(2d) 118.

George Gelder, of Oakland (Myron Harris, of Oakland, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Setton, Deputy Atty. Gen., for the People.

CURTIS, Justice.

A hearing was granted in this case after decision by the District Court of Appeal, First District, First Division. We hereby adopt the following portion of the opinion rendered by said court in said case as a proper statement of facts and determination of certain of the issues involved herein.

Appellant was charged in an information containing two counts, one of which alleged the unlawful selling of blackjacks and the other the unlawful selling of billies, both contrary to the statute. St. 1923, pp. 695, 696, § 1, amended May 22, 1925, St. 1925, p. 542, § 1. Count 1 was dismissed. Defendant was found guilty upon the second count. This is an appeal from the judgment and from an order denying a motion for a new trial. Two main grounds are urged for a reversal of the judgment and order.

Appellant first complains that there was no evidence to show the instruments sold were billies. There is no merit in this contention. The instruments were produced at the trial and there is ample evidence in the record to show that they were commonly known as billies. Moreover, there is, according to the testimony, little if any difference between a billy and a blackjack, and the possession of either instrument is denounced by the statute.

[1] Appellant next complains that the count upon which he was convicted does not state facts sufficient to charge a public offense, in that it did not charge the sale of an instrument "commonly known" as a billy. The information charged the violation of a particular statute which was referred to, and it also stated the type of instrument which was un-

lawfully sold. The language employed was sufficient to enable a person of common understanding to know what was intended. Pen. Code, § 950. The information was therefore sufficient within the provisions of section 951 of the Penal Code.

[2, 3] And, finally, appellant claims the evidence establishes that a trap was deliberately set by police officers who caused his arrest and conviction. Upon this subject it appeared in evidence that in September, 1933, a man named Forts was working in the police department in the city of Oakland. He was not a regular officer but was paid so much for each case in which he procured arrests for offenses. In the present case he received the sum of \$7.50 for his services. On the day in question Forts, acting under instructions from the department, went to the defendant's place of business and told defendant that he was working on a certain boat; that a friend of his had informed him he could procure black-jacks from defendant. Forts stated he wanted a dozen. Defendant informed Forts that he did not have such instruments, but that he would try to procure them for him. Forts then left defendant's store and later returned and received from defendant three billies which defendant had in the meantime procured from a wholesale house. Forts paid defendant \$1.50 apiece for the articles, and later turned them over to police officer Pardee of the police department under whose direction he was acting. Forts was told by the officer to return to defendant's store with the billies purchased, and obtain more of them. While Forts and defendant were discussing the matter, Pardee entered the store and arrested defendant. It is appellant's contention that these facts present a clear case of entrapment. In support of this contention it is argued that there is no evidence in the record to show appellant had ever before been arrested or under suspicion of having committed this character of offense or of any other offense at any time, or that he was in the habit of selling the instruments in question or had them in his possession for sale; that the crime did not originate in the mind of appellant but rather in the minds of the officers who used persuasion and deceitful representations to induce and lure appellant into the commission of a criminal act.

It is unquestionably true that decoys may not be used to ensnare the innocent and law-abiding into the commission of crime when the criminal design originates not with the accused but is conceived in the minds of officers, and the accused is by persuasion, deceit-

ful representation or inducement lured into the commission of a criminal act. When an officer induces a person to commit a crime, which he would not have committed without such inducement, the law will not punish the person so lured into the crime. *People v. Malone*, 117 Cal. App. 629, 4 P.(2d) 287. Under such circumstances the government is estopped by sound public policy from prosecuting therefor. The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it. While decoys may be used to entrap criminals and to present opportunity to one intending to commit a crime, they are not permitted to ensnare the innocent into the commission of a crime when the criminal design originates not with the accused but is conceived in the minds of the officers, and the accused is by persuasion or inducement lured into a criminal act. *Newman v. United States* (C. C. A.) 299 F. 128; *People v. Malone*, supra. We are of the opinion that the facts of this case do not bring it within the rule announced in the cited authorities.

Defendant took the stand as a witness at his trial. He made no claim that he was lured or persuaded into making the sale to Forts. He took the position then as he did before the District Court of Appeal, and as he does now, that he had a lawful right to sell the type of weapon which he sold to Forts. Forts, however, testified that appellant stated to him, when approached by Forts to make the sale, "You know, young man, it is against the law, but I will take a chance so long as your friend sent you up here." Forts also testified that when Officer Pardee came into appellant's place of business, he asked him if he did not know it was against the law to sell black-jacks to any citizen, to which appellant replied, "Yes, it is against the law, but I took a chance, just the same." There is an absolute absence of evidence that any persuasion or inducement was offered to appellant to make said sale outside the ordinary transaction of purchase and sale between a willing purchaser and a willing seller. The facts of this case are much like those shown in the case of *People v. Rucker*, 121 Cal. App. 361, 364, 8 P.(2d) 938. In that case the defendant was asked to sell to a police officer morphine for which he was paid the sum of \$10. On being asked by the police officer for the drug, the defendant, evidently not having any, left the officer and went outside, purchased the morphine, and returning sold it to the officer. It was held that there was no entrapment of the defendant by the officer. To the same ef-

fect are: *People v. Barkdoll*, 36 Cal. App. 25, 171 P. 440; *People v. Tomasovich*, 56 Cal. App. 520, 206 P. 119; *People v. Heusers*, 53 Cal. App. 103, 207 P. 908; *People v. Rodriguez*, 61 Cal. App. 69, 214 P. 452; *People v. Caiazza*, 61 Cal. App. 505, 215 P. 80; *In re Moore*, 70 Cal. App. 483, 233 P. 805; *People v. Harris*, 80 Cal. App. 328, 251 P. 823; *People v. Ramirez*, 95 Cal. App. 140, 272 P. 608; *In re Wong Poy*, 113 Cal. App. 677, 298 P. 1029.

It is contended by appellant that there is no evidence that he was engaged in selling weapons, the sale of which was forbidden by law, or that he was even suspected of dealing in such weapons. It is true that there is no evidence that appellant prior to the sale herein involved had made sale of weapons of the type sold to Forts. Such evidence, if offered, would have been inadmissible, and no doubt would have been objected to by the appellant. The same may be said as to evidence that the appellant was suspected of dealing in forbidden weapons. The fact, however, that Forts was sent to appellant's place of business by the police department of the city of Oakland for the purpose of ascertaining whether he could buy a billy from the appellant is quite persuasive that appellant was not entirely free from suspicions by the police officers of said city.

[4] The evidence in our opinion is ample to support the finding of the jury that appellant is guilty of the crime charged.

The order and judgment are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.



3 Cal.2d 379

J. R. GARRETT CO. v. STATES et al.

Sac. 4775.

Supreme Court of California.

April 25, 1935.

1. Vendor and purchaser ⇨239(9)

Failure of consideration for deed, though valid defense to any action by immediate grantee against grantor to recover land, is no defense to action against grantor by innocent purchaser.

2. Mortgages ⇨154(3)

Vendor and purchaser ⇨232(1)

Generally, possession of realty is constructive notice to any intending purchaser or encumbrancer.

3. Mortgages ⇨536

Grantor's actual possession of land held notice of grantor's rights to remote assignee of mortgage executed by grantee, and hence assignee, having purchased at foreclosure sale, was not innocent purchaser, and since there was failure of consideration for deed, grantor was entitled to rescind (Civ. Code, § 1689, subd. 2).

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

On rehearing. Supplementing former opinion in 34 P.(2d) 474.

Judgment below reversed, with direction.

Fred W. Lake, of Los Angeles, for appellants.

J. A. Pardee, of Susanville, for respondent.

PER CURIAM.

The facts in this action were correctly stated in our former opinion as follows:

"This is an appeal by the defendants from a judgment for the plaintiff in an action to quiet title to certain parcels of land in Lassen county.

"The defendant S. J. States at all times involved herein was in actual possession of the property. His claim of possession initially was founded upon a patent issued to him by the United States Government in 1914. In 1918 one Barclay, then president of a Nevada corporation called Workers' Association, offered, on behalf of the corporation, to buy the property from States for the sum of \$500 cash and \$2,500 in stock of that corporation. States accepted the offer and on June 28, 1918, delivered to Barclay a deed to the property, whereupon Barclay agreed to return and deliver to the defendant States the cash and stock. Barclay never returned, nor was payment ever received. The deed was recorded on July 3, 1918. On October 9, 1918, the Workers' Association mortgaged the land to Poteet, to secure a loan of \$1,500. Poteet assigned to Fannie Barclay, who assigned to the plaintiff. The mortgage was foreclosed, and a commissioner's deed under foreclosure sale was delivered to the plaintiff and recorded on July 19, 1923.

"The plaintiff paid the 1919 taxes on the property. The 1920, 1921, 1922 and 1923 taxes were paid by States. He attempted also to pay the 1924 taxes, but the amount tendered was refused by the tax collector because the taxes had already been paid by the plaintiff. The plaintiff paid the taxes for all the subsequent years.

"The action to quiet title was commenced by the plaintiff in April, 1930. Both parties set up their respective claims. The defendants in addition pleaded, as a bar to the plaintiff's claim, section 318 of the Code of Civil Procedure, and that the defendant States had title by adverse possession. The trial court found for the plaintiff and entered judgment accordingly."

[1, 2] In that opinion we held that there was a legal and valid delivery of the deed from States to the Workers' Association, and that the plaintiff's action was not barred by the statute of limitations. We adhere to our former decisions of those questions. However, a further question has arisen, and that is whether the plaintiff was an innocent purchaser of said real property, as against the defendant States, who was in possession of said real property at the time of plaintiff's purchase. States never paid anything for his land by his vendee, the Workers' Association. There was a total failure of consideration for his deed to that corporation. As against his immediate grantee, he had a valid defense to any action that might have been brought against him to recover said real property, by reason of said failure of consideration. This defense, however, would not avail him in any action brought against him by an innocent purchaser of said real property. Was the plaintiff such an innocent purchaser? Plaintiff purchased said real property while States was in actual possession thereof. As a general rule, possession of real property is constructive notice to any intending purchaser or encumbrancer of said property. This rule is so well established that citation of authority is hardly necessary. We mention, however, the case of *Follette v. Pacific L. & P. Co.*, 189 Cal. 193, 205, 208 P. 295, 23 A. L. R. 965, where a long list of authorities is cited. This rule applied even in the case of a grantor remaining in possession after execution and delivery of a deed to his vendee. *Pell v. McElroy*, 36 Cal. 268, 272, 274; *O'Rourke v. O'Connor*, 39 Cal. 442; *Taber v. Beske*, 182 Cal. 214, 216, 187 P. 746; *Hopkins v. Garrard*, 7 B. Mon. (Ky.) 312.

In *Pell v. McElroy*, supra, the question presented in the instant case was before the

court, as appears from the following quotation from the opinion in that case: "In the present case the question arises, whether the fact of open, notorious, and exclusive possession of lands by a vendor thereof, after transfer of his legal title thereto by deed, is sufficient to put a subsequent vendee of the same premises, while so in possession of the original vendor, upon inquiry as to the equitable rights of such original vendor, and subject such subsequent purchaser to the same rules as when a stranger to the title of his vendor, as of record, is in possession." Continuing, the court, 36 Cal. 268, on page 274, says: "An absolute deed divests the grantor not only of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reason, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He cannot be regarded a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case." In the concluding paragraph of the opinion, the court reiterates the rule as follows: "The continued exclusive possession of a vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subject him to the general rule heretofore announced in case of the party in possession being a stranger to the title as of record." The case of *Pell v. McElroy*, supra, is cited with approval in many cases decided by this court.

The same principle is expressly approved in *Taber v. Beske*, supra. In that case Mrs. Beske, an ignorant woman, desired to borrow the sum of \$500 upon a lot owned by her. She so informed one Horsford, who fraudulently prepared a power of attorney in his favor, and represented to her it was a mortgage on her lot to secure the payment of \$500.

She, relying upon his statement and without reading the power of attorney, signed it, and Horsford gave her the sum of \$500. After a short visit to her old home in Europe she returned to her home here, and ever since that time had been in possession and occupancy of said lot, either in person or through her tenants. Horsford, acting under his power of attorney, conveyed the lot to one Dennison, who paid no consideration and who knew that the conveyance was unauthorized. Thereafter, and while defendant, Beske, was in the possession of said lot, Horsford and Dennison conveyed the lot to plaintiff for a valuable consideration. The trial court found that plaintiff acquired title to said real property with notice of the defendant's rights therein and rendered judgment in favor of the defendant. In affirming the judgment, this court said (182 Cal. 214, 217, 187 P. 746, 747): "Appellant contends that there is no evidence to support the finding that Taber, at the time he purchased and received the deed, was informed of the power of attorney and the circumstances of its execution. The finding that Mary Beske was in actual, open, exclusive, and adverse possession of the lot, by herself and her tenants, at the time Taber bought and paid for the lot, put him on inquiry as to her rights and claims upon the property and charged him with knowledge of all that such inquiry, if pursued, might have developed."

In Hopkins v. Garrard, supra, the opinion delivered by Chief Justice Marshall states the law upon this question as follows: "But the fact that, notwithstanding his deed to Hopkins, which acknowledged full payment, Garrard, the grantor, remained in possession of the land, was an indication that he had or claimed some interest in the land, and should have put the subsequent vendees on an inquiry, by which they would have easily learned that the purchase money was, in fact, unpaid, and probably that Garrard was holding the possession as a security for it. On the ground of notice, therefore, implied from this possession, the lien of Garrard for his purchase money, is considered effectual against the subsequent purchaser even beyond the effect of the lis pendens."

While the respondent, at the argument of this cause upon rehearing, was given time in which to present authorities upon the question as to whether States' possession was not notice to plaintiff of States' rights in said real property, it has not furnished us any authorities to refute those cited above.

[3] The trial court found that defendant "S. J. States for more than 15 years last past continuously has been, and is now in the actual possession of said land, and the whole thereof." This possession of States was notice to plaintiff of whatever right States had in said property at the time plaintiff purchased the same. Plaintiff was not, therefore, an innocent purchaser, but acquired said property subject to the rights of States therein. As the consideration for States' deed totally failed, he was entitled to rescind the sale. Civ. Code, § 1689, subd. 2. The evidence shows that States did so rescind. After waiting for Barclay to return with the \$500 and shares of stock for over a month, he made a trip to Nevada, called upon the Workers' Association, and demanded a return of his deed, with which demand the Workers' Association failed to comply.

As we have seen, the consideration for States' deed wholly failed. Defendant States filed a cross-complaint asking that his title be quieted. We think he is entitled to the relief prayed for. The evidence is without conflict. Nothing could be gained by a further trial. The judgment is reversed, and the trial court is directed to enter judgment in favor of the defendants and quieting defendant States' title to said real property.



3 Cal.2d 172

ETTLINGER v. ETTLINGER.

S. F. 14982.

Supreme Court of California.

April 16, 1935.

Rehearing Denied May 16, 1935.

1. Husband and wife ☞36

Husband and wife may contract with regard to their properties and their respective interests therein.

2. Divorce ☞236, 245(2)

Contract between husband and wife settling property interests, though not binding in first instance on court in which divorce action is pending, may be approved and confirmed by court, and if appropriately referred to and adopted in its decree, such decree, as to matters covered by agreement, becomes immune from subsequent modification (Civ. Code, § 139).

3. Divorce $\Rightarrow$ 245(2)

Where court granting divorce in its decree expressly confirmed and adopted property settlement agreement, it was without jurisdiction to thereafter modify provisions of decree in such respect (Civ. Code, § 139).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Millicent L. Sears Ettlinger against Isaac Lionel Ettlinger. Decree of divorce, and from a subsequent order modifying the monthly payments thereunder, plaintiff appeals.

Reversed.

John H. Crabbe and Nat Schmulowitz, both of San Francisco, for appellant.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

WASTE, Chief Justice.

In February, 1928, the plaintiff commenced an action against the defendant for separate maintenance. Defendant's assets at the time were valued at approximately \$265,000. On March 20, 1929, during the pendency of the action, the parties entered into a written agreement looking to the adjustment and settlement of their property rights. No question of fraud in the procurement or execution of this agreement is raised. Its provisions will be referred to hereinafter. Subsequently, and, as plaintiff contends, in consideration of the execution of this agreement, she agreed to, and did, change the form of her action from one for separate maintenance to one for absolute divorce upon the ground of desertion. Pursuant to the allegations of plaintiff's amended complaint, an interlocutory decree of divorce was entered in her favor March 28, 1929. This decree among other things provided:

"It is further ordered, adjudged and decreed that that certain agreement for the settlement of the property rights of the parties hereto, a copy of which is attached hereto and marked "Exhibit A" and by such reference made a part hereof with the same force and effect as if set out at length within the body of this decree be, and the same is, hereby ratified, approved and confirmed.

"And it is further ordered, adjudged and decreed that *in pursuance of the aforementioned agreement* the plaintiff do have and recover from the defendant the sum of Two

hundred fifty (\$250.00) dollars per month commencing with the month of April, 1929, and payable on the first day of each and every month until the death or remarriage of the plaintiff.

"And it is further ordered, adjudged and decreed that neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions or any of them, of said agreement hereinabove mentioned, a copy of which is hereto attached, and hereinabove approved, which agreement and all of its provisions shall remain in full force and effect."

As stated in the body of the decree, a copy of the agreement was attached thereto. This decree was permitted to become final without any attack having been made thereon by way of appeal or otherwise. The final decree of divorce was entered one year thereafter, and it likewise has become final without any assault having been made thereon. So far as material here, it provides:

"And it is hereby further ordered, adjudged and decreed that that certain agreement for the settlement of property rights of the parties hereto, a copy of which was and is attached to the interlocutory decree of divorce and marked Exhibit 'A' and by such reference made a part thereof with the same force and effect as if set out at length within the body of said interlocutory judgment or decree, be and the same is hereby ratified, approved and confirmed;

"And it is hereby further ordered, adjudged and decreed, that *in pursuance of the aforementioned agreement* plaintiff do have and recover from the defendant the sum of two hundred fifty dollars (\$250.00) per month commencing with the month of April, 1930, and payable on the first day of each and every month until the death or remarriage of the plaintiff;

"And it is further ordered, adjudged and decreed, that neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions, or any of them, of said agreement hereinabove mentioned, which agreement and all of its provisions shall remain in full force and effect."

For approximately 2½ years the defendant accepted and complied with the terms of the final decree. However, on March 7, 1933, the court below, over plaintiff's objection, granted defendant's request for a reduction of the monthly installments payable under the final decree by reducing the same from \$250 to

\$175 a month for the period of one year. This modification was asked for, and granted, on an asserted change in defendant's financial status.

Plaintiff opposed the same on the ground that the court, having theretofore approved, confirmed, and adopted the property settlement agreement entered into between the parties, and having incorporated the same in the interlocutory decree, and having awarded plaintiff the sum of \$250 a month "in pursuance of the aforementioned agreement," was without jurisdiction to modify the decree based on such agreement. She urges that the provision in the agreement for the monthly payment of \$250, though stated to be for her "support and maintenance," must reasonably be held to be in lieu of property rights. Defendant, on the other hand, urges that said provision constitutes but an agreement for the payment by defendant to plaintiff in monthly installments of permanent support and alimony which the court below, under the express provisions of section 139 of the Civil Code, may modify from time to time upon proper showing.

We cannot accept the defendant's theory. In its preliminary provisions the agreement recognizes that the parties were then living separate and apart, and that an action was then pending for plaintiff's separate maintenance. It goes on to declare it to be "the desire of both parties hereto that all of the property rights of the parties hereto respectively shall be finally adjusted, settled, and determined," and that the parties "have agreed to adjust, liquidate and settle between themselves all rights and claims of each as against the separate property of the other, there being no community property." Provision is then made that the agreement shall not in any manner interfere with the right of either party to thereafter institute or defend an action for divorce "save and except as to the property rights of the parties hereto and the maintenance and support of the [plaintiff] and the amount of the costs, expenses and attorneys fees and in those respects both of the parties hereto agree and stipulate as hereinafter set forth." Defendant thereupon undertakes to pay plaintiff \$1,500, to discharge certain debts incurred by plaintiff, to transfer and convey certain real and personal property to plaintiff, and "further agrees to pay to the [plaintiff] for * * * support and maintenance * * * the sum of two hundred and fifty dollars (\$250.00) per month * * * until the death or remarriage of the party of the first part in the event of a divorce between the parties hereto," which payments are ex-

pressly made a charge upon the estate of defendant in the event he predeceases plaintiff. Under the ninth clause of the agreement the plaintiff agrees and acknowledges "that the property hereinbefore described and referred to and the monies to be paid * * * and the said monthly payments as aforesaid so to be paid to her * * * is and are in full satisfaction and settlement of all claims and rights to property of every kind and nature which she might now or hereafter make or have or could otherwise now or hereafter make or have against the second party or his estate whether at law or in equity or probate and also in full settlement of all claims to community property which she might now or hereafter make or have or could otherwise now or hereafter make or have against the second party or his property and also as full provision for her support and maintenance and in full settlement of all claims which she might now or hereafter make or have or could otherwise now or hereafter make or have against the second party for alimony, award, expense money, costs or counsel fees, in any action for divorce or separate maintenance, or any other litigation which may hereafter arise between the parties hereto and the said first party hereby accepts the said property and money as aforesaid in full and final settlement of all present or future possible claims which said first party might now or hereafter make or have or could now or hereafter make or have or otherwise assert against the party of the second part or against the property of the second party whether real, personal or mixed, and wheresoever the same may be or held, of whatsoever kind or nature, or whether at law or in equity or in probate, save and except as herein provided, and all rights and claims of the party of the first part against the party of the second part and against his property are hereby waived, settled, liquidated, relinquished, abandoned, surrendered and released and no claim, right, demand or monetary benefit, homestead, probate homestead, homestead right, family allowance or any other property benefit or interest of any kind or character shall ever be claimed, asserted or sought by her, the said party of the first part, against the party of the second part or in or to his property except as in this contract provided." Except as to the "claims, demands and rights" created in the agreement, the plaintiff, under the fourteenth clause thereof, waived and surrendered all claims, past, present, and future, to any property then owned or thereafter acquired by defendant, including the right to claim such property, or any part of

it, to be community property. By the seventeenth clause plaintiff "agrees that she will not either in pending litigation or in any other litigation which may be hereafter instituted claim and she hereby waives and agrees to waive alimony to which she may be otherwise entitled whether temporarily or permanently save and except such claims as are herein created."

It is then "covenanted and agreed by and between the parties hereto that the execution of this agreement shall be and is intended to be a full, complete and final adjustment of all property rights of the parties hereto and that neither party hereto shall or will at any time hereafter make or attempt to make any other or further claims for himself or herself individually."

The agreement concludes by reserving to the plaintiff the right to enforce against the defendant, his heirs and assigns, "all claims herein created or based upon the provisions * * * of this agreement * * *."

We are satisfied from an examination of the entire agreement, having particular reference to the above-quoted provisions thereof, that it was the intention of the parties to definitely, fully, and permanently adjust and settle all of their property rights. The agreement indicates that the monthly payments to be made thereunder by defendant to plaintiff, stated to be for the latter's "support and maintenance," constituted an integral and important element in the amicable adjustment and liquidation of such property rights. In our opinion, the contract suggests that such payments were to be made to and received by plaintiff as part of the property settlement and in lieu of property rights. This would appear to have been recognized in both the interlocutory and final decrees of divorce, for each provides that "neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions or any of them, of said agreement hereinabove mentioned * * * which agreement and all of its provisions shall remain in full force and effect." Each decree thereupon directs the payment by defendant to plaintiff of \$250 a month "in pursuance of the aforementioned agreement."

[1, 2] That the parties may contract with regard to their properties and their respective interests therein is now settled. Though not binding in the first instance on the court in which the divorce action is pending, such contract may be approved and confirmed by the court, and if appropriately referred to and

adopted in its decree, as here, such decree, as to the matters covered by the agreement, becomes immune from subsequent modification. In *Armstrong v. Armstrong*, 132 Cal. App. 609, 611, 23 P.(2d) 50, 51, it is stated: "The power of the court to modify decrees of this character is statutory * * * and cannot be controlled by the parties; * * * if, by the terms of the property agreement, the rights of the parties are contractual, that is a matter which can be determined only in an action based upon the contract; * * * as it does not appear from the face of either decree that the property settlement was adopted by the trial court, the statutory power of the court to modify cannot be denied. * * *"

[3] The instant case, as distinguished from the one just cited, presents an express confirmation and adoption by the court of the property settlement agreement. The court was therefore without jurisdiction to thereafter modify its provisions.

In *Wallace v. Wallace*, 136 Cal. App. 488, 29 P.(2d) 314, 315, the parties to the divorce action had theretofore entered into a written property settlement agreement which, among other things, provided, as here, for the making of certain monthly payments by the offending husband to the plaintiff wife, the agreement concluding, as here, that the benefits thereof were accepted in complete satisfaction of all rights to support, maintenance, or alimony. This agreement was offered in evidence upon the trial of the divorce action, but was not referred to in either the interlocutory or final decree, though provision was made in each for monthly payments to the wife in amounts identical with those specified in the agreement. Subsequent to the entry of the final decree, the husband moved for a modification of the monthly payments designated in the decree. In denying such relief, the court found that the monthly payments were not in the nature of alimony, but represented sums due the wife under the property settlement agreement received in evidence upon the trial of the divorce action. In affirming the order, it was declared:

"Let us determine first the nature of the monthly payments, for if they are found to be a part of a property settlement entered into between the parties prior to the divorce it would be a complete answer to the present controversy.

"That a husband and wife may alter their legal relations as to property is well established (section 159, Civ. Code), and apparently with that in view the parties hereto at-

tempted to mutually adjust their respective claims to certain property. Regardless of any allegation in the complaint using the word alimony, a reference to the property settlement agreement discloses they were attempting to effect a complete adjustment of their property and the benefits thereof were to be accepted in full satisfaction of support, maintenance, or alimony. With that clause in the agreement it hardly seems probable that the allowance in the decree would have been by way of alimony, but rather as part of a property adjustment. This is further emphasized by the fact that the prayer of the complaint does not ask for alimony but merely that the property settlement agreement be approved, and by the further fact that the order of the court did not in form designate it as alimony and followed the agreement as to amounts and time of payment."

In *Atlass v. Atllass*, 112 Cal. App. 514, 517, 237 P. 53, 54, it is declared that "Had the court [upon application for modification] found the *provisions for support* [in the interlocutory and final decrees] to have been in fact by way of property settlement then the said provisions could not have been disturbed. * * *

In the course of the decision in *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 269, 11 Ann. Cas. 520, it is stated that "'Where a wife has obtained an absolute divorce carrying with it the privilege of a remarriage, and permanent alimony is decreed to her, it is generally held that the husband, upon her subsequent remarriage, may secure an order vacating the decree as to alimony.' * * * There is a qualification of this rule, generally adverted to in the cases cited, to the effect that such a remarriage does not authorize a vacation of the decree for alimony where it is given as a substitute for, or in lieu of, the wife's rights, at the time of the decree, in the property of the husband, or in the community property, or in property which he acquired from her by the marriage." This language is quoted with approval in *Hogarty v. Hogarty*, 188 Cal. 625, 627, 206 P. 79.

The conclusion we have reached makes it unnecessary for us to consider the point that a sufficient showing had not been made of changed circumstances warranting a modification, even if the power to modify, under the circumstances here presented, be conceded.

The order appealed from is reversed.

We concur: PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

HODGSON v. HODGSON.

Civ. 5336.

District Court of Appeal, Third District,
California.

April 26, 1935.

Rehearing Denied May 25, 1935.

Hearing Denied by Supreme Court
June 25, 1935.

Divorce (245(2))

Alimony allowance agreed upon in property settlement which was referred to, approved, and incorporated in interlocutory divorce decree held not subject to modification.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by Margaret W. Hodgson against Robert W. Hodgson. Final decree of divorce, and from a subsequent order modifying the interlocutory and final decrees and reducing amount for support of plaintiff and her children, plaintiff appeals.

Reversed.

Hearing denied by Supreme Court;
SEWELL, J., dissenting.

Newby & Newby, of Los Angeles, for appellant.

Hugh Ward Lutz, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Some time prior to the present controversy appellant and respondent were husband and wife. In 1929, and during their married life, they entered into a property settlement wherein it was provided, among other things, that appellant herein be granted the care and custody of their two minor children until they had attained the age of 21 years; it was also provided that she was the owner, as her separate estate, of a particular parcel of real property upon which was due certain payments which the husband agreed to pay as they fell due. It was also agreed therein that respondent herein would pay to appellant the sum of \$150 per month, of which sum \$80 was for her support and \$35 for the support of each of the two minor children, together with other conditions not here necessary for our consideration.

Shortly after entering into this agreement an action for divorce was commenced by appellant against Robert W. Hodgson, and upon his default an interlocutory decree was en-

tered. In this decree "it is further ordered and adjudged that all of the terms of said contract dated January 10, 1929, a copy of which is herewith filed, with reference to the property therein described and the financial obligations therein assumed shall be binding upon plaintiff and defendant, the same as if specifically incorporated in this decree."

Thereafter a final decree of divorce was entered and the terms of the interlocutory decree incorporated therein by reference. Some two or three years later, the defendant moved for a modification of the interlocutory and final decrees in so far as the same made provision for alimony and the support of the minor children. The application was resisted, but an order was made modifying the decrees and reducing the amount for support of plaintiff and her children from \$150 per month to \$135 per month.

An appeal was taken from that order, and the question as framed by respondent here is, "Has the Superior Court jurisdiction to modify an interlocutory and final decree of divorce insofar as the same make provision for alimony and support of minor children, the final decree approving the provisions of the interlocutory decree, the latter referring to a property settlement entered into between the husband and wife and approving the same, such contract not being attached to the decree nor set out in haec verba, the provisions of the decree that were modified being substantially the same as is the property settlement agreement?"

In the recent case of *Ettlinger v. Ettlinger*, 44 P.(2d) 540, the Supreme Court, speaking through the Chief Justice, held that a husband and wife may contract with regard to their properties and their respective interests therein, and although "not binding in the first instance on the court in which the divorce action is pending, such contract may be approved and confirmed by the court, and if appropriately referred to and adopted in its decree, as here, such decree, as to the matters covered by the agreement, becomes immune from subsequent modification."

It will be noted in the cited case that the interlocutory decree stated in several instances "that in pursuance to the aforesaid agreement" certain provisions were made. Although such language is not found in the decree here before us, there is sufficient reference thereto to show that the agreement was before the court, and was sufficiently identified in the decree to show that the same was approved, confirmed, and accepted by the court.

In the interlocutory decree, we find the following reference to the property settlement: "It further appearing to the court that the plaintiff and defendant entered into a contract dated January 10, 1929, by the terms of which their respective property rights, the custody of the two minor children of such parties, and the amount to be paid to the plaintiff by the defendant for the support of herself and her said two minor children were agreed upon, and it appearing to the court that said contract was and is reasonable, it is hereby approved." * * *

"It is further ordered and adjudged that the plaintiff is the owner, as her sole and separate estate, of the following described property * * *, subject to the reservations, restrictions and encumbrances now existing upon said property and subject to any contingent rights created in favor of defendant by the terms of said contract dated January 10, 1929."

"It is further ordered and adjudged that all of the terms of said contract dated January 10, 1929 (a copy of which is herewith filed), with reference to the property therein described and with the mutual obligations therein assumed shall be binding upon the plaintiff and defendant the same as if specifically incorporated in this decree."

These references in the interlocutory decree make a much stronger case than was presented in the case of *Wallace v. Wallace*, 136 Cal. App. 488, 29 P.(2d) 314, where a property settlement was offered in evidence, but no reference thereto made in the decree; nevertheless, this court there held that the installments to be paid were a part of a valid and binding property settlement and were not subject to modification.

We are likewise of the opinion here that upon the authority of the case of *Ettlinger v. Ettlinger*, supra, the property settlement in the instant case, having been accepted and adopted by the trial court, and incorporated in the interlocutory decree, became a binding settlement and is not subject to modification. What we have said relates only to the provisions of the agreement relating to alimony or support of the former wife—no attempt was made to reduce the amount of the allowance for the support of the minors, and that issue is not before us.

The order is reversed.

We concur: THOMPSON, J.; PLUMMER, J.

3 Cal.2d 342

MORAN v. MORAN.

S. F. 15055.

Supreme Court of California.

April 24, 1935.

1. Divorce ⇨245(2)

Property settlement agreement, incorporated in interlocutory divorce decree, cannot be modified by trial court after decree has become final.

2. Divorce ⇨245(2)

Order making payable to wife cash surrender value of policy on husband's life, which was awarded to children in property settlement agreement incorporated in divorce decree, *held* invalid as attempt to make additional property award to wife in contravention of agreement, notwithstanding money was claimed in behalf of children, in absence of showing that minors had no guardian and that their total estates did not exceed \$1,000 (Probate Code, § 1430; Civ. Code, § 138).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Mary Moran against Edward N. Moran. From an order purporting to modify a property settlement agreement incorporated in divorce decree, defendant appeals.

Reversed and remanded.

Edward M. Leonard, of San Francisco, for appellant.

Nicholas Barron, of San Francisco, for respondent.

PER CURIAM.

This appeal has been taken from an order of the superior court purporting to modify a property settlement agreement. The facts are not in dispute and are as follows:

Plaintiff secured an interlocutory decree of divorce from defendant in 1929. The interlocutory decree incorporated a property settlement agreement. The final decree was secured in 1932. Both decrees have long since become final. The property settlement agreement provided for a full settlement of all of the property rights of the parties, including the settlement of all claims for maintenance and support possessed by the wife against the husband. The agreement also disposed of a described life insurance policy on the life of the husband, it being provided that

the four minor children of the parties should be named beneficiaries of such policy.

The agreement in this respect provided as follows:

"Further, that that certain policy of insurance on the life of the second party hereto, shall be continued in force, and said policy shall be retained by the said first party, but that the beneficiary of said policy may or shall be changed to the names of Margaret, Cecilia, Edward and Elinore Moran, the children of the parties hereto, and in the event of the demise of the said second party the rights and benefits thereunder shall inure to the said children, each of said parties hereto waiving any and all claims thereto, or to the said policy of insurance."

It is to be noted that the above provision is silent as to who shall pay the premiums on the above policy. In July of 1933, plaintiff filed an affidavit in the trial court in which it is stated that she has paid the premiums on the policy; that she is now unable to continue paying such premiums; that the policy has lapsed; that the lapsed policy has a cash value of \$240. Plaintiff requested that defendant be compelled to join in releasing the cash value of the policy, the money to be for the "use and benefit of the minor children of the said parties, of whom affiant has the care, custody and control by virtue of the decree entered herein * * *." The trial court issued its order to show cause and subsequently—after a hearing—entered the order here appealed from entitled "Amended Order of Court re Life Insurance Policy." This amended order provided that the plaintiff should surrender the policy to the insurance company, and ordered defendant to sign an application with the insurance company for the surrender of the policy, "which said surrender shall direct the Metropolitan Life Insurance Company to pay the proceeds of said policy to said Mary Moran." The amended order continued as follows:

"It is further ordered that the said proceeds of the said policy be and the same are hereby made payable to the plaintiff above named, Mary Moran, and to her alone, and that the defendant, Edward N. Moran, be and he is hereby forever foreclosed from asserting any claim whatsoever to the said proceeds of the said Metropolitan Life Insurance Policy."

It is the contention of appellant that by the above order, and particularly by the provision that the cash value of the policy shall

be made "payable to the plaintiff above named, Mary Moran, and to her alone" the trial court has attempted to make an additional property award to the wife in contravention of the property settlement agreement.

[1] It is now well settled that a property settlement agreement, incorporated in the interlocutory decree, cannot be modified by the trial court after the decree has become final. *Armstrong v. Armstrong*, 132 Cal. App. 609, 23 P.(2d) 50; *Wallace v. Wallace*, 136 Cal. App. 488, 29 P.(2d) 314; *Atlass v. Atllass*, 112 Cal. App. 514, 297 P. 53; *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520; *Ettlinger v. Ettlinger* (Cal. Sup.) 44 P.(2d) 540, decided April 16, 1935.

Respondent, while conceding the correctness of the above rule, contends that the amended order was proper under section 1430 of the Probate Code. That section provides:

"If a minor has no guardian of his estate, money belonging to the minor not exceeding the sum of two hundred fifty dollars may be paid to a parent of the minor entitled to the custody of the minor to hold for the minor, upon written assurance of such parent that the total estate of the minor does not exceed one thousand dollars in value; and the written receipt of such parent shall be an acquittance of the person making such payment."

[2] It is respondent's contention that since, under section 138 of the Civil Code, the trial court, either before or after the final decree of divorce, has jurisdiction to make such orders for the support, care, maintenance, and education of the minor children as may seem necessary or proper, it was proper under section 1430 of the Probate Code to provide that the \$240 be paid to her for the benefit of the children. Respondent renounces any claim for the money on her own behalf, but claims the same on behalf of the children. Respondent would undoubtedly be correct in her position if the proper jurisdictional facts necessary to bring section 1430 into operation were shown to exist. In the present case there are four children, all of whom are presumably equally entitled. The amount involved is but \$240, well within the \$250 limit fixed by the above-quoted section. But the section only applies where the minor has no guardian of his estate, and where the parent entitled to custody gives written assurance that the total estate of the minor does not exceed \$1,000. Neither of these facts was shown by respondent to exist. In the absence of such a showing it was clearly

error to make the money payable to respondent and "to her alone."

In view of the allegations in the affidavit that the money is desired for the use and benefit of the minor children, it is obvious that the failure to make the required showing was due simply to inadvertence. There can be no reasonable doubt that upon this case being remanded to the trial court the proper showing will be made by respondent and the money involved paid to her for the use and benefit of the minor children. It is unfortunate that both parties should not have seen to it that the oversight was corrected in the trial court and thus saved the expenses of the appeal.

The order appealed from is reversed, and the cause is remanded to the trial court for further proceedings in accordance with the views herein expressed. Both parties to bear their own costs on this appeal.



3 Cal.2d 309

**TIMES-MIRROR CO. v. SUPERIOR COURT
IN AND FOR LOS ANGELES COUN-**

**TY et al.
S. F. 15220.**

**Supreme Court of California.
April 19, 1935.**

Rehearing Denied May 17, 1935.

1. Mandamus ☞31

Where proceeding is rightfully pending and trial court without legal reason refuses to proceed with trial, mandamus lies to compel trial court to proceed.

2. Estoppel ☞62(4)

Where condemnation proceedings were lawfully instituted on December 21, 1931, to condemn large newspaper property situated in civic center district which city and county had agreed with state to complete, interlocutory decree was filed on January 25, 1933, and reversed on October 4, 1933, and cause was reset for hearing beginning on July 16, 1934, and newspaper publisher after institution of proceedings constructed elsewhere another newspaper plant at expense of some \$4,500,000 so as to be able to continue publication, and neither property was adapted to any other use, city held estopped to dismiss condem-

nation proceedings (Code Civ. Proc. §§ 1239 et seq., 1251, 1255a).

3. Mandamus ☞154(2)

Allegations in petition filed in Supreme Court for mandamus which amount to conclusions of law must be disregarded, where defendants make motion to strike them out, but not allegations of facts constituting equitable estoppel.

4. Estoppel ☞97

A citizen or private party may, in exceptional cases where justice and right require, invoke principle of estoppel in pais against municipal corporation.

5. Equity ☞3

Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention.

6. Appeal and error ☞179(1)

Issue of equitable estoppel, as regards city's threatened dismissal of condemnation proceeding, *held* raised in trial court where defendants on city's motion to dismiss, referred to councilmanic and other official action inducing belief that proceeding would not be abandoned, and defendants' spending of great sum in reliance thereon.

7. Evidence ☞10(1)

Supreme Court will take judicial notice of location of state building in which it holds its sessions and of location of city hall, important streets, and of public buildings generally.

8. Estoppel ☞62(4)

Where city was estopped to dismiss condemnation proceeding, subsequent initiative petition repealing ordinances authorizing proceeding could not abrogate right of property owner to have proceeding continued (Code Civ. Proc. §§ 1239 et seq., 1251, 1255a).

In Bank.

Application by the Times-Mirror Company for a writ of mandate to be directed to the Superior Court of the State of California in and for the County of Los Angeles, and others, directing such court to set for trial, and proceed therewith to final determination and judgment, certain condemnation proceedings consolidated for the purpose of trial in such court.

Peremptory writ directed to issue.

Cosgrove & O'Neil and Frank B. Yoakum, Jr., all of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Robert F. Shippee, Asst. City Atty., and Arthur W. Nordstrom, and Walter L. Bruington, Deputy City Attys., all of Los Angeles, for respondents.

PER CURIAM.

This cause comes to this court on a petition for a writ of mandamus wherein petitioner prays for an order directing the superior court of the county of Los Angeles to set for trial and proceed therewith to final determination and judgment certain condemnation proceedings consolidated for the purpose of trial in the superior court of Los Angeles county. Said consolidated proceedings were instituted by the city of Los Angeles to acquire distinct portions of petitioner's real property. One was commenced to acquire the fee in that part sought to be taken for the use of public grounds and buildings, and the other proceeding was brought to acquire an easement in the remainder for street purposes. The trial court refused to reset the causes for trial after they had once been tried and reversed on appeal, and was threatening to enter a judgment of dismissal upon the ground that plaintiff had filed in court a written notice of abandonment of said proceedings, notwithstanding the fact that said notice was filed approximately one year and five months after the expiration of the thirty-day period provided by statute within which time such notice may be filed. Section 1255a, Code Civ. Proc. The alternative writ of mandate herein was issued on the application of petitioner, commanding respondents to show cause, and staying in the meantime the entry of a judgment of dismissal pending the hearing of said petition. The asserted right of the plaintiff to abandon the proceedings and for a judgment of dismissal based upon the filing of notice of abandonment long subsequent to the expiration of the thirty-day period reckoned from the day on which the interlocutory decree or final judgment was filed, and after petitioner, acting solely upon the understanding that its property would be taken for public uses, had constructed a building at another location suitable for its purposes at a great cost, which would not have been constructed and which would not have been necessary but for said understanding, based upon certain agreements and acts of the city of Los Angeles as hereafter set forth, are, in the circumstances of the proceedings had and taken in said condemnation proceedings, important questions presented by this petition.

While this is a mandamus proceeding in form, it is in reality a proceeding instituted for the purpose of compelling the continuation of the condemnation proceedings entitled *City of Los Angeles v. Klinker*, and *City of Los Angeles v. Times-Mirror Company*, reported in 219 Cal. 198, 25 P.(2d) 826, to a final order of condemnation as prescribed in section 1253, Code Civ. Proc. Both parties have cited said decision as bearing materially on the instant proceeding. It furnishes the ground upon which the arguments of opposing counsel are largely based in support of their respective contentions in the instant proceeding.

The record in the condemnation proceedings necessarily constitutes a part of the record in the instant proceeding.

It is not necessary to restate here in detail the facts from which this court concluded in said decision that the processing equipment and other machinery and mechanical devices and steel and cement construction as described became a part of the realty of the property sought to be condemned inasmuch as all the questions of law and fact are fully and carefully considered in said decision.

Briefly stated, said consolidated actions were brought by the city of Los Angeles against petitioner, the Times-Mirror Company, a corporation, to condemn and appropriate to public uses the real property, and the improvements thereon, situated at the northeast corner of Broadway and first streets, owned by petitioner herein, as provided by part 3, title 7, section 1239 et seq., Code Civ. Proc. The building which occupies said property site extends five stories above the ground level and three stories below the ground level and was especially designed and built for the production, publication and distribution of the Los Angeles Times, a modern metropolitan daily newspaper. The processing equipment was especially designed for installation in said building. Said processing equipment consisted of eight large printing presses, resting upon, imbedded in, and permanently fastened to massive concrete foundations and walls. The building was especially built to accommodate the press foundations and to withstand tremendous strain caused by the vibratory motion of heavy and rapid motion presses and machinery. It is apparent from the description as set forth in *City of Los Angeles v. Klinker*, and *City of Los Angeles v. Times-Mirror Company*, a Corporation, that said building was not suitable or adaptable to any of the other ordinary commercial or business purposes except that

for which it was constructed and that the various mechanical equipment, described in said opinion, became and were fixtures and are a part of the land to which they are affixed, and must be valued and paid for as such. It is so held and that holding is now the settled law of the case. The refusal of the trial court to treat said processing equipment and mechanical devices and machinery as a part of the real estate was the important question decided by the trial court from which the petitioner herein took an appeal to this court and procured a reversal of the judgment.

The complaints in the condemnation proceedings were filed December 21, 1931. The findings of fact and conclusions of law were filed January 25, 1933. The trial court found the value of the parcels of land sought to be condemned to be \$1,021,345. This was in full of all compensation and damage suffered. Plaintiff, respondent herein, caused the interlocutory decree, which is conceded by all parties to the proceeding to be in effect the "final judgment" referred to in section 1255a, to be filed January 25, 1933. Petitioner immediately perfected its appeal. The judgment of reversal was entered by order of this court October 4, 1933.

No question was raised on the part of petitioner by pleading or at the trial or upon appeal as to the right of the city to maintain the proceeding or as to the public convenience or necessity of the city as to the acquisition of said real property, as authorized by Ordinance No. 70,691 City of Los Angeles, approved December 7, 1931. In fact, petitioner expressly prayed by way of answer that "the court ascertain and assess the value of the property sought to be condemned * * * together with all improvements thereon pertaining to said land, together with the damages which will accrue to the portion of said larger or entire parcel of land * * * not herein sought to be condemned by reason of its severance from the portion sought to be condemned, and that the court determine and declare the market value of said land * * * sought to be condemned * * * and improvements thereon pertaining to said lands and determine the amount of damage which would accrue to the portion of said larger or entire tract not sought to be condemned by reason of its severance from the portion sought to be condemned" and that the payment of said sums to petitioner be made a condition precedent to condemnation, etc.

No questions were contested at the trial save only those which had to do with com-

pensation in some form, either as to land value or damage suffered by way of severance or from some other cause. The decision on appeal concluded the question as to the plaintiff's undisputed right to maintain the action, and it also fixed and determined the character of certain property in suit to be realty and not personalty.

After the going down of the remittitur the cause was reset for trial beginning on July 2, 1934. Counsel for the respondent city on that day appeared and asked for further time in which to prepare for trial, and upon stipulation of counsel, July 16, 1934, was selected as the day on which the trial should commence. At the appointed hour, July 16th counsel for respondent city addressed the court, stating that he had served upon defendant and filed in court a notice of motion to dismiss the proceedings; that the city council approved on July 12, 1934, ordinances abandoning said proceedings and repealing both of the initial ordinances, Nos. 70,690 and 70,691, approved December 7, 1931, authorizing the prosecution of said condemnation proceedings. Said motion of dismissal was based upon said abandoning and repealing ordinances without prejudice to appellant and was based upon "all of the files and papers" in the condemnation proceedings. The notice was dated July 14th, two days before trial day. Counsel for petitioner opposed the granting of the motion of dismissal made upon said written notice of abandonment, on the ground that it was not given or made within the time prescribed by section 1255a, Code of Civil Procedure, and on the further ground that said city was estopped by its acts and conduct from abandonment. The particular part of said section upon which both the respondent city and petitioner rely to support their respective counter contentions, reads: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

Section 1251, referred to therein and which bears upon the questions presented by this proceeding, is as follows: "The plaintiff must,

within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the state of California, or is a public corporation, and it appears by affidavit that bonds of said state or public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided, further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made."

The court took the motion under advisement until the following morning, expressing itself, however, as being inclined to grant the motion to dismiss. Upon convening on the following morning the court granted the motion to dismiss the proceedings. Counsel for the respondent city informed the court that he would prepare a formal judgment of dismissal to be submitted to the court at a later day. In the meantime petitioner applied for and this court issued an alternative writ of mandamus commanding respondent superior court to proceed with the trial of said condemnation proceeding or show cause why it failed to do so. It was further ordered that said superior court, pending the hearing upon said alternative writ of mandamus and until further order of this court, refrain from ordering or entering a judgment of dismissal in said condemnation proceedings.

The petition contains a lengthy history of the action taken by the state, the county of Los Angeles and more particularly the action taken by the city of Los Angeles through its council and officials to mark and lay out in an area in which petitioner's real property is situated, a civic center district in which all buildings of a public character, federal, state, and municipal, thereafter to be erected, should be located. The plan required the acquisition by the city, working in conjunction with the county, of several parcels of land held in private ownership and upon which were erected buildings of various types used for business and commercial purposes. First street marked the southerly limits of said civic center as planned and approved by the state, county, and city. By the plan of formation it was deemed necessary to widen First street to the extent of 42 feet along its northerly boundary in order to give proper effect to the stately buildings already constructed and to be thereafter constructed in said civic center area, as well as to accommodate in-

creasing traffic. The Times-Mirror Company's buildings, in which the Los Angeles Times is printed and published, occupied the land comprising the northeast corner of Broadway and First streets, fronting 182.86 feet on Broadway and 185 feet on First street. Other buildings of lesser importance used in connection with the publication of said newspaper also front on First street. Some five or six years since, the state, in compliance with its agreement to cooperate with and assist in carrying forward said civic center program, began the construction of a large and expensive building within said civic center in which the State Supreme Court, District Courts of Appeal, the Governor of the state and other state officers and employees, and state commissions of various kinds now have their offices for the transaction of the business of the state. The civic center plan had its inception in 1925 or 1926, and it has grown to be the settled policy of both the city and county, sponsored and aided by the chamber of commerce and numerous civic organizations and the public in general, as a means of beautification and improvement of the city. The new city hall, a pretentious and imposing building of recent construction, is located on an area of land facing the recently completed state building, both buildings being models of elegance in modern architecture. Other buildings have been constructed or are in contemplation of construction within the area dedicated to public buildings and grounds. The state building which stands crowded against the Times-Mirror building was so placed with the understanding between the Governor of the state and his and the state's representatives that the city and county would, in accordance with their agreements, acquire title to the Times-Mirror Company's property and transfer it to the state, to the end that the Times-Mirror building would be removed. Said building is not by any means an attractive one and its architectural construction in no way harmonizes with the public buildings for which the civic center district was created. The rough and unfinished rear of the Times-Mirror building abuts within 2 feet of and obstructs the view of said state building looking northerly or northeasterly from Broadway and First streets, and of course prevents the improvement and beautifying of the ground upon which it stands. It also blocks the completion of the main entrance which was designed to be from the First street side. The State building was located on its present site on the understanding that the Times-Mirror build-

ing should be removed. The city negotiated for the purchase of several parcels of land and instituted condemnation proceedings of other property to the end that the civic center area might be cleared of all obsolete buildings and the grounds beautified. The delay in these matters was called to the specific attention of the board of supervisors, and city council, by the Governor of the state, the director of finance, and others in authority on a number of occasions. As early as June 22, 1931, the Governor pointed out in a letter addressed to the board of supervisors that the state had done everything possible not only to provide adequate office space to serve the people of Los Angeles county but also to "put up a structure in keeping with your civic center plan," but that it was "still surrounded with antiquated structures which we hope will soon be removed." Other letters of similar import were written to the city council and in each case the city council gave assurances that the title to the Times-Mirror and other properties would be acquired by purchase or condemnation. The complaint on the part of the state because of the delay of the city and county in taking steps to cause title to said Times-Mirror real property to be vested in the state, in accordance with the agreements of said city and county, began in 1931 and continued until June, 1934. The state was becoming impatient at the delay and both the city and the county by resolutions on a number of occasions and by other acts recorded and declared their good faith in the premises and their intention of fulfilling their agreements with the state. The fixed policy of the city and county as to the creation of a civic center is well expressed by the adoption of identical resolutions by the city council of the city of Los Angeles and the board of supervisors on the same day, December 5, 1927:

"Whereas the New Hall of Justice of the county of Los Angeles and the New City Hall of the city of Los Angeles have been located within the area approved by the people of the city of Los Angeles for the location of the Civic Center in the city of Los Angeles, and whereas, it is the desire of the city council of Los Angeles as well as of the board of supervisors of Los Angeles county, to conveniently locate all of the public buildings in which will be housed the offices of the several governmental departments of the city, county and state in a given area to the end that an administrative center may be created in such manner as to give the greatest possible opportunity for harmonious treatment in the de-

sign of the public buildings to be erected as well as the public grounds and streets surrounding the same, and whereas in order to accomplish this purpose it will be necessary that additional lands be acquired by the several governmental departments involved, and whereas, while it is generally known and understood that the construction of such a proposed administrative center will entail the acquisition of such additional lands, the fact that the limits of such a center are vague, and uncertain, has resulted and will continue to result in preventing the improvement of property generally in the vicinity of such proposed center,

"Now Therefore be It Resolved by the City Council of the City of Los Angeles that the exterior limits of the proposed administrative center be now defined as follows, to wit: All that area of the City of Los Angeles, lying within the following boundary line, to wit: First street on the south; Hill street and its northerly prolongation to the intersection of Castellar and Ord streets on the west; Ord street on the north; and Main street on the east, and as per report of the Board of City Planning Commissioners of December 1, 1927."

Mr. Lyman M. King, state director of finance, on April 30, 1930, wrote a letter to Hon. Howard Davis, member of the city council and in charge of the proposed changes in regard to the city streets and block surrounded by Spring, First, Broadway, Court, and New High streets, in which he said: "The State needs to know definitely when you will begin proceedings to widen First street, and what arrangements are made to accommodate the Los Angeles Times until such date as possible for the paper to move. * * * The State is anxious to begin this fine improvement at as early date as possible. The Governor will appreciate any activity you may be able to initiate and carry forward looking to the clearing up of the property at the earliest possible moment. Please give me a statement covering what the State may expect." That it was the understanding between the board of supervisors and city council that it was absolutely necessary to the completion of the civic center plan that the Times-Mirror property be acquired, preferably by purchase, but by condemnation as a last resort, there is no room for dispute. On May 10, 1930, the director of finance wrote another letter to Hon. Howard W. Davis, chairman county affairs committee, city council, calling attention to the fact that the state must have a commitment as to the widening of First street

as to when it would be done; also "with regard to the ultimate turning over of the property of the Los Angeles Times with a statement as to the approximate date thereof." The letter concludes: "The state does not expect to begin actual construction until these matters have been definitely cleared." Other communications from heads of the state departments on the importance of the city and the county, which were working in unison in the acquisition of the Times-Mirror property, taking definite action that would assure the state that they would cause the title to the Times-Mirror property to pass to the state, are to be found in the correspondence which passed and the resolutions adopted by the city council and board of supervisors.

On October 8, 1931, the city council of Los Angeles adopted a resolution reciting the fact that the city and county are jointly interested in the civic center plan and thereupon resolved "that the city of Los Angeles proceed under eminent domain with the acquisition of the properties abutting on the north side of First street, between Spring and Hill streets, known as the 'Times' property and Klinker property, the city to acquire said entire parcel." The method of property adjustment between the two public corporations in the transaction are also set forth.

Said resolution further provided that upon the concurrence of the board of supervisors in said resolution, the city attorney and engineer be instructed to institute proceedings for the acquisition of the said Times and Klinker properties under the law of eminent domain. The board of supervisors, as above shown, afterwards joined with the city in adopting a concurrent resolution. The Klinker property was early acquired by the city.

Again on April 20, 1927, the street widening committee in its report to the city council recommended, as a part of the civic center improvement plan, among other things, that the council reaffirm its former action as to the widening of First street and the taking of the land from the north side necessary for such widening. The council adopted the report.

On September 11, 1928, Mr. Harry Chandler, president and manager of the Times-Mirror Company, addressed the following communication to the city council and the board of supervisors, which contains a counter proposition that would permit the Times to occupy practically its present location by the city adding to its northerly side the

amount of land taken from its southerly side, necessary for street purposes:

"Sirs:

"The continuing growth of the Los Angeles Times makes it necessary for us to plan on adding to the height of our present building at First and Broadway and expanding to the east by demolishing the small structures thereon and rebuilding to a limit height to conform somewhat with the present main building, wherein is accomplished the mechanical work of producing the Los Angeles Times daily and Sunday. More presses are urgently needed and we have no room in our present basement area to place them. The new structure on our east on ground now the property of the Times-Mirror Company would provide ample basement area for the anticipated growth of The Times during the next quarter of a century. It will undoubtedly take a year's time to put up a building and a like period to build the new, fast presses.

"The Times property, is, of course, not now included in the Civic Center, but there is a good deal of talk floating around that it will eventually be taken in by the County authorities.

"There has also been passed by the City Council an ordinance for the widening of First Street by fifty feet, to be taken from property on the north side. If and when this improvement is made operations of The Times at its present location could not continue for lack of ground area.

"The two dilemmas referred to in the preceding paragraphs confront us, and it will be obvious to members of the Board of Supervisors and the City Council that we must have a solution before The Times management can plan its future. Naturally, we would like to remain in our present location, but we do not wish to be a stumbling block in the path of City and County progress. If the County of Los Angeles is eventually to include our location in the Civic Center we should, in justice, know it without much further delay, and a decision on the part of the Board of Supervisors before any further improvements are made will be beneficial to the County.

"On the other hand, if we are allowed to remain here and the City Government proceeds with the First Street widening, we offer the suggestion that it might prove extremely economical for the authorities to provide an amount of space equal to that taken from our First Street frontage on the north of our present northerly property line. Here

we could build a structure similar in extent and construction to that which is destroyed by the First Street widening.

"I will be glad to meet with representatives of your respective bodies to discuss this whole question at any time that may suit your convenience to the end that a fair, equitable and proper arrangement can be made which will be right and proper for all concerned, or that we may have the assurance that we may go on with necessary improvements and extensions upon our present satisfactory site."

A number of communications passed between the president and manager of the Times-Mirror Company and the board of supervisors as to the fixing of the valuation of petitioner's real property. An appraisal board was named to determine values, which made its report, and other attempts were made to arrive at a valuation acceptable to all concerned. All negotiations as to values having failed, said ordinances of condemnation were approved December 7, 1931. The complaints in condemnation were filed two weeks later, to wit, December 21, 1931.

The interlocutory decree was entered January 25, 1933. The respondent herein deposited the amount of the award, \$1,021,345, and costs of suit with the clerk of the court within thirty days after the entry of said decree. The moneys so deposited with the clerk were withdrawn by respondent on November 13, 1933, by order of the court, over the objection of petitioner. On January 5, 1934, the city's attorney was authorized by the city council to employ three expert appraisers to place a valuation upon petitioner's property in conformity with the decision of this court, supra, which ruled that the processing equipment was to be valued as improvements pertaining to realty. Said appraisers fixed the valuation at \$1,875,000. The Times-Mirror Company offered as a compromise to reduce said figures to \$1,650,000. On May 14, 1934, the county affairs committee of the city council reported the state of affairs to the council and further advised that the county of Los Angeles was liable under its agreement made with the city in 1929 to pay 60 per cent. of the award or sixty per cent. of any sum that might be agreed upon by way of compromise. Said report also contained a recital that on April 18, 1934, said council adopted the report of the county affairs committee formally asking the board of supervisors for their recommendation as to whether the city should proceed with a new trial or consider the compromise offer of said Times-Mirror

Company of \$1,650,000; that said board of supervisors voted to recommend that said condemnation proceeding should be retried in accordance with the order of the Supreme Court; it was further recommended that said city council concur in an order for a retrial, and that the city attorney be instructed to proceed to retry said cause. The city council on May 14, 1934, agreeable to said report, adopted a resolution directing its city attorney to proceed with said retrial. Immediately thereafter, to wit, May 18th, said cause was set for trial July 2, 1934, and finally set by stipulation for trial beginning July 16th, whereupon the motion for abandonment was made and granted as heretofore set forth. As late as July 3, 1934, the city council adopted the recommendation of the county affairs committee prepared in response to a communication from the state director of finance dated June 8, 1934, calling the attention of the city and county to the fact that the future development and enlargement of the state building could not be completed unless the city and county of Los Angeles completed their agreements with the state to turn over this property (Times-Mirror Company) to the state. Said recommendation, adopted by the council, reads: "We recommend that the Director of the State Department of Finance be informed that the City has carried out all of its direct and implied obligations in connection with this matter, that condemnation action was started and judgment was rendered in the Superior Court. An appeal was then taken by the defendant from the decision of the superior court and the supreme court of the state on this appeal ordered a retrial. The council has instructed the city attorney to proceed with the retrial of the case, and same has been set for hearing in the month of July of this year, and as soon as adjudication has been accomplished, the city will use every endeavor to bring the matter to a final successful conclusion at the earliest possible date."

The city attorney filed a recommendation with the city council on July 5th, in which he discussed the policy as to whether the city should proceed with the condemnation proceedings as directed by the council by its action taken May 14, 1934. In his recommendation he stated that neither the city nor county contemplated in its negotiations the payment of any money whatever for processing equipment, but had in mind only payment for the land and buildings, together with a reasonable cost for moving; he also commented upon the reversal of the Supreme

Court which would enhance the value of said property and result in a larger judgment upon a second trial; also upon the cost to the city of a new trial and the questionable amount of public funds available to pay the judgment, the possibility of a compromise and the fact that an initiative petition incorporating an ordinance repealing said ordinances authorizing said condemnation proceedings had been circulated and had received a sufficient number of signatures to compel the council to either adopt it as their own or submit it to the electors at the next general election. Said city attorney stated that there was strong opposition to the acquisition of said property as he interpreted public feeling and the money could be spent for other properties, and that the council should determine whether the acquisition of said property "as a part of the civic center plan is proper to be carried out at these times of unusual business conditions or whether carrying out the civic center plan could well await a more propitious time for its consummation." He recommended abandonment and a reinstatement when there is "a public demand and money on hand sufficient to accomplish the ultimate desired plan for a civic center." When the question came before the council for action on July 11th, a number of its members openly expressed themselves on the subject. Hon. Howard W. Davis, president of said city council, in addressing himself to the question, said: "I realize that together with other members of the City Council I have given my word, written and spoken, to the Los Angeles Times and the State of California that the Times properties would be condemned, acquired by the City, delivered to the County and in turn delivered to the State of California. I fully realize that the Times has been placed in an impossible position, an unfair advantage of that institution has been taken, and that the promises that we made both to the Times and the State are being broken. My only reason for going back on my word is that I believe a large saving to the City in expenses in connection with the coming condemnation proceedings should be saved because due to an initiative petition already filed with the City Clerk an election on this matter would have to be had unless it is here abandoned. It is my opinion that if the matter appeared on the ballot that the lack of understanding among the general voting public would result in the abandonment. Because this matter would necessarily appear on the ballot after the conclusion of the present trial, it seems to me that only common sense necessitates the present abandonment."

Hon. Stephen W. Cunningham, chairman of the county affairs committee, city council, explained his vote as follows: "I have signed this resolution with many misgivings, as I realize it means the abrogation of gentlemen's agreements between the city, the State and the Times. I also realize that it leaves the Times with two pieces of property and a number of broken agreements. There is no question that we are breaking promises that should have been kept. However, it seems to me there is nothing else that we can do at the present time and it was with this in mind that I signed the report and am going to vote for its adoption."

Several other members expressed themselves regretfully at the turn matters had taken. One declared that the people who desired the condemnation proceedings are the same persons who were attacking the council for attempting to adjudicate the matter in court. Another said the public had been misinformed and the council was breaking faith with the state and the Times. The hope was expressed that the property might be acquired at a later period, at a reasonable figure. The mayor in expressing his regret at the action about to be taken said: "I realize this property is in the civic center and that sooner or later it must be acquired by the city." The repealing ordinance was adopted as heretofore set forth.

It may be timely to state here that the Larronde property fronting on the northerly side of First street, and immediately contiguous to the property of petitioner, was condemned and taken by the city in 1931, as a part of the civic center scheme and a strip forty-two feet in width was improved and is now used for street purposes. The buildings were removed from the remainder. Other property was acquired for a similar use.

Petitioner alleges that its president and officers were aware of the proceedings had and taken by the city council, board of supervisors, and all the executive, legislative, administrative bodies of said city and of the state of California and of all subsidiary bodies, and was aware of all acts which had a bearing on the development of the civic center plan, and also of the purpose to take the petitioner's property as necessary to said improvement, and that petitioner relied in good faith upon the various acts as shown by ordinances, resolutions, reports, recommendations, statements, and other documents herein referred to, and by reason of the same was made to believe and did believe that the taking of its property in the scheme of develop-

ing a civic center was inevitable and certain of accomplishment; that in due time after the institution of said proceedings of condemnation, petitioner, to the end that it might continue the publication of said Los Angeles Times, upon the respondent taking possession thereof, commenced the building and construction of a newspaper plant at the southwest corner of Spring and First streets, especially constructed as a modern newspaper plant, in which is installed a processing equipment, at a cost of approximately \$4,500,000; that said building is not suitable for any other purpose and would not have been constructed but for the action taken by respondent herein; that said building is now idle and unoccupied; that petitioner will be compelled to lose the use of one of said buildings unless respondent be required to prosecute said condemnation suits to final judgment, as neither of said buildings may be adapted to any other business or commercial uses except the use for which they were constructed; that there is no demand for said new building and plant as especially built, excepting the requirements of petitioner in the event said condemnation proceedings are prosecuted to completion; neither is there any demand for petitioner's property and plant now occupied by it, other than the needs and requirements of petitioner or the needs and requirements of said city to acquire the same as a site for public buildings and streets; that the abandonment by respondent city of said proceedings will result in irreparable financial loss to petitioner.

[1-3] Respondents have demurred to the petition on the ground that it did not state facts sufficient to entitle petitioner to the relief prayed for. They also filed a motion to strike out certain portions of the petition, and finally answered. The demurrer must be overruled if the proceeding was rightfully pending and the court without legal reason refused to proceed with the trial. City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726. Lindsay Strathmore Irrigation Dist. v. Superior Court, 121 Cal. App. 606, 610, 9 P. (2d) 579, 580, presented the same question in a proceeding in condemnation, wherein the trial court refused to set the case for trial, on the grounds that the complaint did not state a cause of action. The District Court of Appeal held that it cannot be assumed that the complaint may not be amended before the trial and directed the writ of mandamus to be issued as prayed for by petitioner. In speaking on the office of the writ it said: "A writ of mandate may be issued to require an inferior tribunal to perform a clear legal

duty which the law especially enjoins when not to do so would amount to an abuse of discretion. The writ has been employed to require a superior court to try a cause. Section 1085, Code Civ. Proc.; *Hill v. Superior Court*, 15 Cal. App. 307, 114 P. 805; *Moore v. Superior Court*, 20 Cal. App. 299, 128 P. 946; *In re Ford*, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; *Anderson v. Superior Court*, 187 Cal. 95, 200 P. 963. If, however, the act in question involves the exercise of judgment or discretion, mandamus will not issue to require its performance. 16 Cal. Jur. 809, and cases cited." To the same effect, see *Widrin v. Superior Court*, 17 Cal. App. 93, 118 P. 550; *Johnston Gas Furnace Corp. v. Superior Court*, 106 Cal. App. 166, 288 P. 808; *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249; *Hennessy v. Superior Court*, 194 Cal. 368, 228 P. 862; *Scott v. Shields*, 8 Cal. App. 12, 96 P. 385. We are of the view that the petition states facts sufficient to justify the issuance of the writ and the demurrer is therefore overruled. The motion to strike out certain portions of the complaint is good as to the allegations which amount to a mere conclusion of the pleader and which may be disregarded, but it is not good as to the material and substantial portions of the complaint, much of which is set forth herein in the form of resolutions, ordinances and other acts heretofore fully set out as grounds of equitable estoppel.

[4] The answer admits the allegations of numerous paragraphs of the petition either by express admissions or by failure to deny and as to the few direct denials the matters therein denied or questioned are not of sufficient materiality as to require a reference, as they would in no way change the result of our conclusion. The case of *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, 1003, determines the right of a citizen or private party to invoke the principle of estoppel in pais in exceptional cases where justice and right require. In that case, it was reported to the city council that the predecessor of defendant, who had laid the foundation for his building, was encroaching upon the public street in the erection of his building. The council referred the matter to the city attorney for investigation. The city attorney made a lengthy report to that body, holding that Temple (defendant's predecessor in interest) was the owner of the land. The report was ordered received and placed on file and a synopsis was entered upon the minutes of the board. The building was then erected to completion and nothing further was done by

the city until suit brought twenty years later. Conceding the dedication of the property as a highway resulting from the filing of a certain map as a public record, and conceding the filing of said map to have all the force and effect claimed for it and that a dedication to a public use ipso facto resulted therefrom, the court nevertheless holds that plaintiff's conduct was such that whatever merit it may have possessed years ago there was no merit in it in the light of the plaintiff city's conduct. The decision so well expresses the principles which equity impels us to apply to the facts of the instant case that we feel justified in quoting therefrom at considerable length:

"While municipal corporations do not own their public streets, and while the laches of municipal officers cannot defeat the rights of the public in those streets, yet individuals have some rights which, in the exercise of common justice, the municipality must respect. Its conduct towards a citizen, pertaining to the boundary line of one of its highways, may be such that it would be a violation of every principle of right and morals to allow it to recede from the stand taken or the agreement made.

"The foregoing principle is well illustrated, and strongly put, by Dillon in his work upon *Municipal Corporations* (section 675), wherein it is said: 'It will, perhaps, be found that necessities sometimes arise, of such a character that justice requires that an equitable estoppel shall be asserted, even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle; but there is no danger in recognizing the principle of an estoppel in pais, as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere process of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require.' The author cites many cases to support the text, and upon examination of these citations we find the principle recognized and approved, especially by the decisions of the Illinois court. In the later case of *Simplot v. Chicago, etc., Ry. Co.* [C. C.] 16 F. [350], 360, the text from Dillon is quoted with approval, and Judge Shiras says: 'In the latter cases (referring to cases like the present one) the courts may apply the doctrine or principle of an estoppel, and by

means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights.' This doctrine is also directly declared in the recent case of *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951 [34 Am. St. Rep. 752]; and while it is not for us to say whether or not the facts of that case were sufficient to justify an application of the principle of estoppel in pais as against the public, yet the law is there well declared, as follows: 'We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town which is a public highway, cannot confer a title; but, where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of the town, and expended his money in erecting buildings thereon, without interference on the part of the public, these, or perhaps other, circumstances connected with adverse possession for the statutory period, may afford good ground for estoppel.'

"To our knowledge, there is nothing to be found in the decision of the court opposed to the doctrine laid down in the text we have quoted from Dillon's work on Municipal Corporations, while in the case of *Fresno v. Fresno Canal & Irrigation Co.*, 98 Cal. [179], 182, 32 P. 943, the principle was stated, and incidentally approved. The question being a new one in this state, and a most important one, we will content ourselves with an application of it to the facts of the present case, and not attempt to promulgate any general rule by which every case invoking this doctrine may be weighed and measured. If we concede the existence of the principle of estoppel in pais against the public in certain exceptional cases, then this case is rightly decided, for this is an exceptional case. If this character of estoppel may be pleaded where justice and right require it, then it may be successfully pleaded in this case, for justice to these defendants demands it. There are limits beyond which even a city, in representing the rights of the public, may not go, and we think the city, in the present action, has gone beyond those limits. If the city had expressly agreed by its officers, with defendants' grantors, even in parol, that a certain line should constitute the boundary line between the street and the grantor's prop-

erty, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong; and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street.

"It is unnecessary to again detail the facts. Before the building was erected, with a knowledge and concurrence of the owner, the city instructed its agent to investigate and report to the council its rights in the land. The agent did investigate, and reported that the city had no claim or title. This report was received, placed on file, and entered, in substance, upon the minutes of the proceedings of the council. Nothing more was ever done by the city until this action was brought,—a period of 20 years later. Upon the reception of the report, and its filing among the records of the city, defendants' grantors at once proceeded to the erection of a large and valuable building, and there it stands at the present day. A judgment for plaintiff would result in a destruction of this property. These facts are potent in themselves, and in our researches we have found no case which may so well be termed an 'exceptional case.' We have found no case which, with better reason, should form a 'law unto itself.' It is a case where an estoppel in pais is properly pleaded."

[5] The unusual circumstances in this case would require the application of the doctrine announced in the *City of Los Angeles v. Cohn*, supra, even though no such precedent existed. Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. "It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 119 P. 82, 85, citing *Story's Equity Jurisprudence*, §§ 28, 439; 1 *Pomeroy's Equity Jurisprudence*, § 60.

Commenting upon Lord Hardwicke's statement as to the equitable principles which should govern chancellors (Pomeroy's Equity Jurisprudence 1, 4th Ed., note to section 60), the learned author makes the following observation: " * * * No chancellor was ever more governed in his judicial work by principles—but he would guard against the theory which locks these principles up in the already existing precedents, and limits their free application to facts, circumstances and relations similar to those which had been the subject-matter of former adjudications. In other words, Lord Hardwicke in this short passage states the same view which I had given in the text. Although equity is and long has been in every sense of the word a system, and although it is impossible that any new principles should be added to it, yet the truth stands and always must stand that the final object of equity is to do right and justice." The principles of equity, continues the same author, are based upon a divine morality and possess an inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization. It is upon this doctrine that the decision herein is given.

[6] It cannot be contended that petitioner raised for the first time the issue of equitable estoppel in its petition to this court. While the question of estoppel was not elaborated upon at length in the lower court, as was the objection that the provisions of section 1255a, Code of Civil Procedure, barred respondents' right of abandonment, nevertheless petitioner did upon the hearing of the motion to abandon state as an objection to the dismissal that:

"All the time the City taking various steps, indicating that the matter would go through, that the case would not be abandoned, and now at this stage of the proceeding, the City undertakes to abandon the proceeding.

"I have not recited by any means all of the circumstances in the way of councilmanic action, city official action, Board of Supervisors' action, action of the representatives of the city, including the Governor, to indicate that the action would not be abandoned. I have just mentioned a few to your Honor, in order that our position might be understood."

All of the proceedings had in the cause were before the court as the cause was still pending and the court had access to its own records. The fact that the judge who pre-

sided at the first trial did not preside when the case came before the court to be retried did not alter the situation.

There can be no doubt as to the sufficiency of the pleading in estoppel. Many of the matters therein alleged are material either as substantive matter or as tending to show the convincing effect they must have had upon the petitioner as evidencing a determined, unwavering purpose on the part of the city and the county to acquire its property as a part of a settled plan in conformity with the resolutions, ordinances and statements made by said city and county and their agents, and, finally, by the filing of the complaint on December 21, 1931. At no time was there a suggestion of the possibility of abandonment, but at all times and upon all occasions whenever the project was discussed it was treated as a foreclosed matter. In fact, properties adjoining petitioner's property, and within the area of the civic center, were either purchased or acquired by condemnation. Said properties without the acquisition of petitioner's property to complete the plan and design of the civic center has brought about an incongruous situation never contemplated by any one.

[7] The court will take judicial notice of the location of the state building in which it holds its sessions, and also of the location of the city hall, important streets, such as Broadway and First and of public buildings generally. The Times-Mirror Company's new building, a massive structure, is in close proximity and plain view of the city hall, the state building, courthouse and other public buildings. It was in the course of construction for many months in anticipation of forced removal from its old building. Notwithstanding the many conferences and communications with the president and manager of petitioner by the city and county and their agents, and without the slightest suggestion given to petitioner that there was a remote possibility of the abandonment of the plan, petitioner was led to believe that the taking of its property must inevitably ensue. We do not mean to say that the city or its agents or any of the parties promoting the project acted in bad faith or willfully intended to mislead the petitioner. In fact, it was the sincere enthusiasm with which the project was carried forward that inspired all with confidence that the completion of the plan was certain. This, however, does not remedy the damage suffered by petitioner. Petitioner had no part in the fortuitous circum-

stances which seemed to have been the cause of the dismissal of the action on the day it was called for retrial.

[8] Respondents have made as a part of their answer the initiative petition repealing the ordinances authorizing said condemnation proceedings; also a number of protests signed by certain individuals and civic bodies. Said initiative petition was filed in July, 1934, and said protests were made in June and July, 1934, after the completion of petitioner's new building. We have not been advised that an initiative petition may abrogate a legal right accrued before said proposed repealing initiative ordinance was adopted.

It unquestionably appears from the foregoing that petitioner in good faith constructed the new building upon the understanding that the site of the old building was included in the civic center plan and it was necessary from the nature of the business in which it was engaged that it should prepare in due time to relocate its plant. That it was justified in so concluding and that the city is bound by the rules of equity to prosecute said condemnation causes to final judgment seems wholly within the realm of reason. There is no reason to believe that an unreasonable or unjust appraisal of said properties will be assessed by the court trying the cause, or grounds to fear that an unconscionable sum would, if assessed, be permitted to stand.

Our decision, based on the ground of estoppel, is determinative of petitioner's right to have the trial proceed. This makes it unnecessary to decide the very important question discussed by both sides as to the proper construction of section 1255a of the Code of Civil Procedure and kindred sections in cases where the notice of abandonment is not filed within thirty days after the interlocutory decree is filed, notwithstanding the fact that the condemnee brought about a reversal of the case upon an appeal taken which raised only the issue of compensation. The petitioner contends that the thirty-day period, reckoned from the filing day of said decree, was intended by the legislature to limit the condemnor's right to abandon the cause under any and all circumstances; while, on the other hand, the respondents contend that the section means that the interlocutory decree must be a valid and subsisting one, unaffected by a reversal.

It is not necessary to go further into the arguments of counsel in this cause, as there

is now pending in this court causes which present the question of abandonment and the effect that an appeal may have upon it. We, therefore, reserve our decision on this issue for such time as the question may be squarely presented in said causes.

The petitioner is entitled to the issuance of a peremptory writ of mandate compelling the respondent superior court of the state of California, county of Los Angeles, to proceed with the trial of said condemnation proceedings entitled "The City of Los Angeles, a Municipal Corporation v. L. W. Klinker, The Times-Mirror Company et al., Defendants," No. 332649 and "The City of Los Angeles, a Municipal Corporation, Plaintiff, v. The Times-Mirror Company et al., Defendants," No. 332650, as consolidated.

It is so ordered.



3 Cal.2d 623

PEOPLE v. HAWKINS.

Cr. 3844.

Supreme Court of California.

May 14, 1935.

1. Criminal law ☞980(2)

Where trial court after plea of guilty had announced its opinion that defendant was guilty of murder of the first degree and that the penalty should be death, but had not formally pronounced judgment or sentenced defendant, court had discretionary power to reopen case to allow introduction of other evidence.

2. Criminal law ☞980(2)

Where evidence plainly showed killing in cold blood after frustrated robbery, and defendant did not testify, trial court's refusal to reopen case for the taking of further evidence, cumulative in character, after announcement that defendant was guilty of murder of the first degree and that the penalty should be death, but before formal pronouncement of judgment or sentence, held not abuse of discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

John Hawkins was convicted of robbery of the first degree, kidnaping for the purpose

of robbery, and murder of the first degree, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and Halford R. Thomas, G. A. Benedict, and E. E. Cuff, Deputy Public Defenders, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Appellant entered pleas of guilty to robbery, kidnaping for the purpose of robbery, and murder. The trial court found the robbery to be of the first degree; that in the kidnaping the victim did not suffer bodily harm; and that the murder was of the first degree. Sentences of imprisonment were imposed for the robbery and the kidnaping. The death penalty was imposed for the murder.

But one conclusion can be drawn from the evidence of the circumstances surrounding the killing. The victim was shot and killed in cold blood immediately following a bold, but frustrated, attempt of the appellant to rob the deceased. The several witnesses who saw and described the shooting agreed almost entirely in their testimony. They differed in only one particular—as to the number of shots fired by appellant, and as to whether appellant shot immediately after discovering the deceased was following him, or waited for a few seconds before shooting. The slight variance was immaterial. Appellant did not take the stand, and offered no evidence in his behalf. His story of the affair was related by a police officer to whom he made a statement as to what occurred.

After the evidence was closed, the trial court determined that the defendant was guilty of murder in the first degree, and the penalty should be death. The hearing was thereupon adjourned to a future date for sentence, at which time appellant made a motion to be allowed to reopen the case for the taking of further testimony—that of two witnesses who claimed to have seen the fatal shooting. The motion was denied, and appellant was duly sentenced. One of these witnesses had been subpoenaed by the people and, in the absence of any record to the contrary, we may assume, from the argument on the motion to reopen, was present at the trial, and therefore accessible to the defendant. The two witnesses, according to the argument of defendant's counsel in sup-

port of the motion, would have given evidence similar to the statement made by the defendant to the police officer. It was, therefore, to that extent cumulative.

[1, 2] While the trial court had already announced its opinion that the defendant was guilty of murder of the first degree and that the penalty should be death, it had not formally pronounced judgment or sentenced the defendant to pay the death penalty. Its discretionary power to reopen the case to allow the introduction of other evidence was not exhausted. Under the circumstances shown by the record, however, we are not convinced that there was any abuse of that discretion in the refusal.

The judgment of conviction and sentence is affirmed.

We concur: CURTIS, J.; PRESTON, J.; THOMPSON, J.; SHENK, J.



3 Cal.2d 345

LEWIS v. BOOTH.

L. A. 15015.

Supreme Court of California.

April 24, 1935.

1. Notaries ☞8

Notarial seal need not bear notary's name (Pol. Code, § 794).

2. Mortgages ☞224

Acknowledgment *held* not essential to valid assignment of trust deed.

3. Mortgages ☞235

Payee's indorsement of note secured by trust deed *held* to transfer such deed without other assignment thereof.

4. Liens ☞13

Lien is merely incident of debt secured and cannot be transferred apart therefrom.

5. Bills and notes ☞333, 363

Where, for parties' convenience, note and trust deed for legal services named attorney's secretary as payee and beneficiary, who subsequently became ill and, on attorney's request, indorsed note and signed blank assignment of trust deed, and blanks were subsequently filled in to assign trust deed to attorney, and secretary thereafter, while seri-

ously ill, was induced by client to assign note and trust deed, which remained in attorney's possession, to client's sister, sister held not "holder in due course," and was not entitled to cancellation of prior assignment to attorney (Civ. Code, §§ 3097, 3111, 3133).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Caroline H. Lewis against C. Morton Booth. Judgment for defendant, and plaintiff appeals.

Affirmed.

Chas. E. McGinnis and W. Frank Shelley, both of Los Angeles, for appellant.

Orloff, Katz & Signer, Albert J. Signer, and C. Morton Booth, all of Los Angeles, for respondent.

SEAWELL, Justice.

Plaintiff appeals from a judgment that she take nothing by her complaint. By the allegations of said complaint, plaintiff Caroline H. Lewis, claiming to be the assignee of a deed of trust, alleged that a prior assignment of said deed of trust held by defendant, C. Morton Booth, was a false, forged, and simulated assignment. She prayed that the assignment held by defendant be canceled, and that the record thereof be expunged from the Torrens title record.

The deed of trust in question was executed on August 23, 1932, by Leroy O. Schultz to secure payment of a promissory note for \$2,500. S. J. McElroy was named as payee of the note and beneficiary of the deed of trust. Said Mrs. McElroy was secretary to defendant C. Morton Booth, a practicing attorney. He testified that the note and deed of trust were executed in payment for legal services rendered and costs advanced by him for Schultz, and that Mrs. McElroy was named as payee and beneficiary to suit the joint convenience of Schultz and defendant. Mrs. McElroy testified that Booth promised her \$500 of the proceeds to augment the salary which he was able to pay her, but beyond that she had no beneficial interest in the note and deed of trust, which at all times remained in the possession of Booth. In June, 1933, Mrs. McElroy was ill and planning to go to the hospital. At the request of Booth, she indorsed the note and

signed her name to a printed form of assignment of deed of trust in which the blanks had not been filled in. She also procured a notary to sign a blank acknowledgment attached thereto. The blanks were subsequently filled in to assign the deed of trust to Booth as of July 3, 1933. Mrs. McElroy testified that she herself did not complete the assignment because she was too ill at the time, but that she had executed it in blank with the understanding that it was to be used to assign said deed of trust to Booth.

Subsequently, while Mrs. McElroy was seriously ill and in desperate need of funds, she executed the assignment dated July 26, 1933, to plaintiff Caroline H. Lewis, sister of Leroy O. Schultz, maker of the note and deed of trust. All negotiations for this assignment were conducted by Schultz. According to Schultz, he procured Mrs. McElroy to execute this assignment upon promising to pay her \$440, of which he then gave her \$30, and since has paid her about \$100. He testified that he procured the assignment to be made to his sister, plaintiff Caroline H. Lewis, because he was indebted to her in the sum of \$3,000 for money advanced to him. His testimony as to his indebtedness to his sister is not convincing, nor is her testimony on this point satisfying. Mrs. McElroy testified that she signed this assignment to Caroline H. Lewis, together with other papers presented to her by Schultz, when she was very ill. Included among the other papers which she signed was a purported dismissal of an action brought in her name against Schultz to obtain delivery of the Torrens title certificate covering the property. This prior action resulted in a judgment for plaintiff McElroy, from which Schultz appealed. Upon motion of plaintiff, the appeal was dismissed by this court for failure of appellant to appear. It is doubtful whether Mrs. McElroy fully understood the nature of her acts at this time. The note and deed of trust, which at all times remained in the possession and under the control of defendant, Booth, were not, of course, delivered to Schultz or to plaintiff Lewis. The assignment to plaintiff Lewis purported to also assign the note secured by said deed of trust and the money due and to become due thereon.

Plaintiff failed utterly upon the trial to establish the allegations of her complaint that the assignment from Mrs. McElroy to Booth was a false, forged, simulated, and fraudulent assignment. Mrs. McElroy testi-

fied that before the complaint was filed she informed plaintiff's attorney that her signature on the assignment to Booth was genuine. Nevertheless, the allegations charging that the assignment to defendant, Booth, a practicing attorney, was a forgery, were embodied in the complaint and in the amended complaint. Failing to show a forgery, plaintiff advanced the contention that Mrs. McElroy was the beneficial owner of the deed of trust, and that the blanks in the assignment were wrongfully filled in by defendant, Booth, or by his procurement, without the knowledge of Mrs. McElroy. There is not a scintilla of evidence to support this charge, which is directly contrary to the testimony of Mrs. McElroy and Booth that the assignment form, signed by Mrs. McElroy, was to be filled in to assign the deed of trust to Booth.

[1-4] Counsel for plaintiff on this appeal make much of the fact that the notary signed her name to a blank acknowledgment of a printed form of assignment, to which Mrs. McElroy had signed her name, but in which the blanks were not filled in, and the further fact that the impress of the notarial seal on said acknowledgment did not bear the name of said notary and was not in fact made with a seal owned by her, but with a seal bearing no name. It is not required that a notary's seal bear a name. Section 794, Pol. Code. Irrespective of the question of the propriety of the notary's conduct, an acknowledgment was not essential to a valid assignment of the deed of trust. The assignment form was completed when the blanks were filled in as intended by Booth and Mrs. McElroy. Furthermore, the indorsement of the note by Mrs. McElroy, named as payee, transferred the deed of trust without other assignment. A lien is but an incident of the debt secured, and cannot be transferred apart therefrom. A transfer of the debt carries with it the lien. *Union Supply Co. v. Morris*, 220 Cal. 331, 338, 30 P.(2d) 394, and cases there cited.

[5] Neither the note nor deed of trust were delivered to Schultz or plaintiff Lewis upon the subsequent assignment to said plaintiff, but said instruments at all times remained in the possession of defendant Booth. Under such circumstances, plaintiff could not claim to be a holder in due course. Sections 3097, 3111, 3133, Civ. Code. Schultz, who acted for his sister, the plaintiff herein, in procuring the assignment to her, was the maker of the note and deed of trust, and knew that the

note had been given to pay for legal services rendered for him by Booth, and that Mrs. McElroy had been named as payee for their joint convenience.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.



3 Cal.2d 225

In re DI CARLO'S ESTATE.

DI CARLO v. ANGELONI.

L. A. 13937.

Supreme Court of California.

April 18, 1935.

Rehearing Denied May 17, 1935.

1. Guardian and ward ⇨144

Probate court, which appointed uncle guardian of his niece's estate which consisted of money from two Ohio estates whose administrator paid such money without court order to uncle who then petitioned probate court for letters of guardianship, *held* to have jurisdiction to settle final account of guardian (Probate Code, § 1440).

2. Guardian and ward ⇨7

Guardian who has procured his own appointment is estopped from denying jurisdiction of court by order of which his appointment was made.

3. Guardian and ward ⇨141

Guardian was bound to faithfully administer trust not only as to ward's money from two Ohio estates whose administrator paid such money without court order to guardian who was in possession thereof when appointed, but also as to any other assets of ward thereafter coming into guardian's possession.

4. Guardian and ward ⇨141

Omission by guardian to promptly account to probate court for receipt of assets of ward could not relieve guardian from faithfully administering trust with respect thereto.

5. Guardian and ward ⇨58

On final account of guardian of ward's estate, which consisted of money from two Ohio estates whose administrator paid such money to guardian without court order, money paid by guardian to administrator for tax-

es accruing against estates of intestates held properly disallowed (Probate Code, §§ 1501, 1502).

6. Guardian and ward ⇨163

On final account of guardian of ward's estate, probate court could re-examine guardian's former account and disallow expenditures allowed in former account, notwithstanding doctrine of res judicata.

7. Appeal and error ⇨901

Appellate court need not search record to ascertain whether any contention of appellant should be sustained.

8. Guardian and ward ⇨161

Absent evidence in record, presumption exists that evidence was sufficient to justify conclusion reached by probate court in settling final account of guardian.

9. Guardian and ward ⇨161

Guardian cannot complain because on settling his final account probate court ordered him to pay 6 per cent. interest on ward's funds in his hands and not legal rate of 7 per cent. (Civ. Code, §§ 2261, 2262).

10. Judgment ⇨540

Principle of res judicata should not be applied so strictly as to defeat ends of justice.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate and guardianship of Triestina Di Carlo, a minor. On petition by Lorenzo Di Carlo to settle his final account as guardian, opposed by Pasquale Angeloni. From an order settling his final account, petitioner appeals.

Affirmed.

For prior opinion, see 29 P.(2d) 876.

Loucks & Phister and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Newlin & Ashburn and O'Melveny, Tuller & Myers, all of Los Angeles (A. W. Ashburn and Louis W. Myers, both of Los Angeles, of counsel), amici curiæ.

Entenza & Gramer, of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division One, in order to consider the single question, whether the settlement and approval of the intermedi-

ate, current or annual account of a guardian has the effect of a final judgment to the extent that the items thereof are not thereafter subject to re-examination in the settlement of later accounts or the final account. The matter was submitted for argument together with the case of Estate of Vucinich, (Cal. Sup.) 44 P.(2d) 567, in which the same question was involved. In our opinion, the proper rule is that such accounts are not conclusive against the ward, and may be re-examined. Accordingly, we adopt the following opinion of Mr. Justice Houser as part of the opinion of this court:

It appears that without having any authorization by any court order so to do, an administrator in the state of Ohio, of two different estates of deceased persons, there located, paid a considerable sum of money which was a part of the assets of said estates to one Lorenzo Di Carlo, who was an uncle of, but who at that time bore no official relation to, one Triestina Di Carlo, a minor, the latter of whom being the only heir of each of said deceased persons; and that thereupon the said Lorenzo Di Carlo brought the said money and his said niece to and within the county of Los Angeles; following which event, on his application to the probate court therefor, letters of guardianship of the person and the estate of said minor were ordered to issue and were issued by said court to the said uncle. More than ten months thereafter, the said uncle filed with said court his account current and report as said guardian, which account and report were subsequently approved and settled by said court. After having acted as said guardian for a period of approximately two and one-half years, the uncle resigned his position as such, and thereafter filed his final account and report in the matter of said estate; to which specified objections were interposed by one Pasquale Angeloni, who, following the resignation of said uncle, had been appointed guardian of the ward. On the issues thus presented, following a hearing had thereon, the probate court made its order by which certain items of the guardian appearing in said account were disallowed; besides which the uncle was charged interest on each of three different sums of money that had come into his possession as such guardian, during his administration of the estate of said ward. In addition thereto, the probate court reopened and reconsidered its former order by which the first account of the guardian had been settled and approved, and thereupon in its final order modified such former order by

reducing in amount a credit therein and theretofore thus allowed. It is from such order that the instant appeal is prosecuted by the former guardian of said estate.

[1, 2] Appellant's first general question as to whether the probate court had jurisdiction is answered in the affirmative by the express provisions of section 1440 of the Probate Code. The incidental point as to whether the probate court was authorized to try the assumed issue of title to the assets of the estate is not properly involved in this inquiry. The purported assets of the estate of the minor (being a part of the assets of the two Ohio estates, of which said minor was the only heir) had been delivered to and received by the guardian; he had brought them and the person of the minor into the county of Los Angeles; on his petition therefor, he had been regularly appointed guardian of such estate; and for two and one-half years he had assumed to act and had acted as such. In such circumstances, whether the guardian, or the administrator of the two estates in the state of Ohio, was legally entitled to the possession of such assets was immaterial. The court had general jurisdiction of the person and the estate of the minor, and all it was attempting to do was to determine whether the guardian had faithfully and legally administered his trust. Many authorities attest the rule that a guardian who has procured his own appointment is estopped from denying, and will not be heard to deny, the jurisdiction of the court, by the order of which his appointment was made. *Fox v. Minor*, 32 Cal. 111, 112, 120, 91 Am. Dec. 566; *Harbin v. Bell*, 54 Ala. 389; *Bryan v. Walton*, 14 Ga. 185; *Hines v. Mullins*, 25 Ga. 696; *Portis v. Cummings*, 21 Tex. 265; *Anderson v. Anderson*, 45 Okl. 653, 146 P. 709; *Bombeck v. Bombeck*, 18 Mo. App. 26; 28 Cor. Jur. 1160; and other authorities in such cases respectively cited.

[3, 4] The guardian appointed by the probate court having qualified and having conducted himself as such regarding the assets of the minor then in his possession was bound to faithfully administer the trust, not only as to those assets of the estate, but as well as to any other assets that might thereafter come into his possession, and which purportedly were the property of the minor and which were so received and subsequently so recognized and treated by said guardian. The fact that he omitted promptly to account to the probate court for the receipt of such assets could not relieve him from his responsibility in that regard. In other words, he

may not avail himself of his own wrong in the premises as a legal cause for thereafter not being compelled to perform his duty.

[5, 6] Appellant predicates prejudicial error on the fact that on the hearing of the final account of the uncle as guardian of said estate no allowance was made for alleged expenditures made by him and a companion in traveling from Los Angeles to Ohio, hotel bills and return railroad fare for himself, the minor, and her nurse to the city of Los Angeles; also for certain sums of money paid by the guardian to the administrator of the two estates in Ohio for and on account of taxes which had accrued against those two estates. Especially as to the latter item, that an order by the probate court disallowing such items was within its power is not only indicated by the provisions of sections 1501 and 1502 of the Probate Code, but as well is inferentially recognized by the ruling in each of the cases of *In re Ceas' Estate*, 134 Cal. 114, 116, 66 P. 187, and *In re Eschrich*, 85 Cal. 98, 24 P. 634. However, following the decision in the case entitled *In re Beisel's Estate*, 110 Cal. 267, 40 P. 961, 42 P. 819, it well may have been within the province of the probate court, upon a proper showing in the evidence adduced relating thereto, to make an allowance for the first of such items. That item was as follows:

"Paid for tickets for Lorenzo Di Carlo and Domenick Jafraty to go East to take charge of Alex Di Carlo's Estate, expense of seven weeks in Steubenville, bringing Triestina Di Carlo from Steubenville, ticket for Triestina and nurse to San Pedro, California, \$1,000.00."

It appears that such item was included within the first account and report by the uncle as guardian of the estate of the minor, and that by order of the probate court it was settled and allowed.

In the case of *In re Wells' Estate*, 140 Cal. 349, 353, 73 P. 1065, where several authorities are cited in support of the rule there announced, it was held (syllabus) that "the court had no power to re-examine and revise settled items of the guardian's former accounts. * * *" Citing *Brodrib v. Brodrib*, 56 Cal. 563, 564, 566; *Lataillade v. Orena*, 91 Cal. 565, 576, 27 P. 924, 25 Am. St. Rep. 219; *In re Estate of Adams*, 131 Cal. 415, 417, 63 P. 838; *In re Estate of Grant*, 131 Cal. 426, 429, 63 P. 731. But an examination of such authorities reveals the fact that each of them is clearly distinguishable, not only from the cited case, but as well from the case at bar.

In the first case (*Brodrrib v. Brodrrib, supra*), it was held that as to a final account, the bondsmen of a guardian would not be permitted to question its correctness; in the second (*Lataillade v. Orena, supra*), that in a separate action, following the rendition of a final account by guardian, the ward was permitted to attack it on the ground of alleged fraud practiced upon him by the guardian; in the third case (*Estate of Adams, supra*), an executrix of an estate was allowed an item of credit to herself which she had omitted to itemize and claim in a former account rendered by her; and in the last case (*In re Estate of Grant, supra*), it was held that in an executor's account an order by the court by which an item was allowed was not subject to attack on the rendition by him of a subsequent account.

On the other hand, in the case of *In re Guardianship of Cardwell*, 55 Cal. 137, it was directly held that the settlement of the guardian's "intermediate account" is not conclusive; but that it is "merely prima facie evidence of its correctness, subject to be inquired into." In that case it was also held that, although by the terms of section 1789 of the Code of Civil Procedure all the proceedings as to accounting and the settlement of accounts of guardians must be had and made as required concerning estates of deceased persons, that statute did not make applicable to the accounts of guardians the provisions of section 1637 (erroneously stated in the case as section 1738; now in substance included in section 931, Probate Code), which at that time provided that "the settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive * * * saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account. * * *" The attention of this court has been directed to no other statute by the provisions of which the settlement by the probate court of an intermediate account of a guardian is made conclusive.

In the absence of any statute by which either the conclusiveness of the guardian's account might be provided, or the right of re-examination of such account might be made available, and taking into consideration the lack of uniformity in the decisions of the courts of this state which relate to the question here involved, a reference to other authorities may not be unprofitable.

In Mr. Woerner's work on "The American Law of Guardianship," after what would appear to be a fairly complete summary of

views that affect the general subject, on page 325 he says:

"It seems clear on principle, and the current of authority unaffected by special statutory enactments, is decidedly to the effect, that the allowance by the court of a partial or periodical accounting or settlement, made by a guardian without notice to the parties concerned, and particularly where the ward has not been authoritatively represented, can constitute no adjudication, and is therefore conclusive of nothing, but operates as an admission against interest by the guardian, and is therefore prima facie evidence against him; while the evidence upon which the court bases its decision in passing, or allowing, the account is a sufficiently solemn showing to support it as prima facie evidence, liable to be corrected, rebutted, or explained by parol proof or otherwise, in a final settlement, or in a suit between competent parties."

In 12 Ruling Case Law, at page 1154, it is said: "The annual account is a part of the regular administration of the court, is intended to inform the judge and also interested parties of the status and general conduct of the guardianship, and is usually accepted and filed ex parte and without a hearing. Besides, the ward, who is the party in adverse interest, is legally and usually actually incapable of protecting his own interests, and the one whom the law charges with the duty of asserting and protecting his rights is in this matter the adverse party. It would therefore be grossly unjust to make the annual accounts conclusive against the ward, though they have been accepted by the court. They are prima facie evidence of the state of the account, but are subject to re-examination in settling later accounts."

And in 28 Corpus Juris, at page 1239, the rule is expressed as follows: "Annual or partial accounts of a guardian, although approved by the court, have not the force and effect of a final judgment and are in no sense conclusive of the correctness thereof, unless made so by statute, although the rule has been qualified in some jurisdictions. These accounts may be reviewed and corrected at any time before final settlement, or on final settlement of the accounts, at which time the guardian's whole administration of the trust is subject to challenge and examination."

See, also, section 522 of the subject of Guardian and Ward in the Century Edition of American Digest; and §160 of the same subject, as treated in the several Decennial Editions of the same work.

From a consideration of the foregoing authorities, this court is of the opinion that the weight of authority favors the conclusion that by its order of settlement of the former account rendered by the guardian, the probate court was not precluded from a re-examination thereof, and that on such re-examination it had power and authority to correct, revise, or modify in amount any item or items of expenditure theretofore settled, allowed, or approved by it, or to entirely disallow and withhold its approval or settlement of such item or items.

[7, 8] Finally, appellant complains of the fact that in adjusting his final account the probate court ordered that he pay 6 per cent. interest on certain funds in his hands and which funds were the purported property of the estate of the ward. In that connection, it is noted that his exception to the order is that the item "is not justified by the evidence." No authority in support of his position in that regard is cited by appellant. Of what the evidence consisted is not stated; nor is this court directed to any place in the record wherein or whereat the evidence which related to the question presented may be found. In such circumstances, it is a well-settled rule of procedure that on appeal from a judgment no duty rests upon an appellate court to search the record for the purpose of ascertaining whether any contention on the part of the appellant should be sustained. It must therefore be assumed that the evidence was sufficient to justify the conclusion reached by the probate court. Moreover, the duty of a trustee with regard to trust funds in his possession, and the penalty for his failure to perform such duty, are prescribed in sections 2261 and 2262, respectively, of the Civil Code, as follows:

"2261. A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

"2262. If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is willful."

In addition thereto, in the case of *In re Guardianship of Cardwell*, 55 Cal. 137, 142, it is said: "Where a guardian acts in good faith, does not make any use for himself of the funds, and makes no profit to himself, the law does not fix a penalty in the nature of 'smart money,' but charges him with the statutory rate of interest only. * * *"

To the same effect is the language found in *Re Dow's Estate*, 133 Cal. 446, 450, 65 P. 890; also, *Estate of Cousins*, 111 Cal. 441, 44 P. 182.

[9] The point made by appellant that, since the legal rate of interest in this state is 7 per cent. per annum, the court had no authority to charge him at the rate of 6 per cent., is not well taken. He certainly has no cause for complaint because the probate court did not exact from him the legal rate of interest.

It would seem to be apparent, from the foregoing discussion, that the rule laid down is reasonable, and necessary for the protection of the ward. The rights of the guardian are sufficiently safeguarded by considering the approved account as *prima facie* correct, thus placing the burden of proof upon the party attacking it. To make it conclusive in favor of the guardian and against the ward would mean that the rights of a person under disability would be completely cut off, with no representation of him except by a party whose interest may be adverse. The representation given the ward by the court in these situations is largely illusory. The court should satisfy itself of the correctness of the account before approving it; but the account is prepared by the guardian, and the court has neither opportunity nor facilities for making a critical and extended examination of its frequently complex and detailed items.

But appellant and amici curiæ contend that the conclusion reached herein is inconsistent with the rule which obtains with respect to two other fiduciaries. These are, first, the executor or administrator, and, second, the trustee of a testamentary trust. In both situations this court has held that the intermediate accounts are conclusive. In *re Estate of Grant*, 131 Cal. 426, 429, 63 P. 731; *Security-First National Bank v. Superior Court*, 1 Cal. (2d) 749, 37 P.(2d) 69. It is now contended that all of these proceedings, including those in guardianship, are "matters of probate" and in rem; that they are initiated by similar notice and carried on by similar hearing; and that the rule of *res judicata*, which is applied to the accounts of executors, administrators, and testamentary trustees, is equally applicable to the accounts of guardians.

[10] It may be conceded that the proceeding by the guardian has the character of a probate proceeding and is in rem. *Smith v. Fidelity & Deposit Co.*, 130 Cal. App. 45, 19 P.(2d) 1018. But we do not agree that this

designation necessarily compels the holding that an intermediate account of a guardian is conclusive against the ward. The Legislature has expressly made it so in the case of executors, administrators, and testamentary trustees. Prob. Code, secs. 931, 1123. The absence of such a declaration in the case of guardians leaves the matter open to the courts to determine the proper rule. There is, no doubt, some force in the analogy of the estate and trustee cases. Nevertheless, they are distinguishable in one important respect, namely, that the ward is a person under legal disability and ordinarily unable to protect himself against overreaching or other improper conduct of the guardian. This distinction is sufficient to justify an exception to the normal application of the principle of *res judicata*. That principle is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy, and we think that this case calls for such an exception. In reaching our conclusion, we are following our own prior decision in *In re Guardianship of Cardwell*, supra, as well as persuasive authority elsewhere. Language in the case of *In re Estate of Wells*, 140 Cal. 349, 73 P. 1065, in conflict with these views, is hereby disapproved.

The order is affirmed.



3 Cal.2d 235

In re VUCINICH'S ESTATE et al. *

ANGELICH v. VUCINICH.

L. A. 14523.

Supreme Court of California.

April 18, 1935.

As Modified on Rehearing April 30, 1935.

1. Guardian and ward ☞163

Orders settling guardians' accounts are not *res judicata*, and probate court may re-examine accounts and correct, revise, or modify in amount or entirely disallow items of expenditures previously approved by it.

2. Guardian and ward ☞161

Probate court's finding on conflicting evidence that item of expenditure in guardian's

account was not supported by proper and authentic vouchers cannot be disturbed on appeal from order settling account.

3. Guardian and ward ☞157

Evidence that minors' uncle in foreign country returned to their guardian in state draft secured from latter, with request, complied with by guardian, for new one, after time for negotiation of original draft, held insufficient to support probate court's finding that amount of new draft was duplication of similar item in bank's statement of amounts transmitted by guardian to uncle for wards' support.

Record of bank transactions showed no item or group of items in amount similar to that of draft and evidence clearly indicated that new draft was substituted before earliest bank transmittal.

4. Guardian and ward ☞157

Probate court's disallowance of credit to minors' former guardian for sums transmitted to their uncle in foreign country for their support held erroneous, in absence of substantial evidence that such sums were sent on guardian's personal account to purchase foreign currency, for which guardian stated in letter of different date to uncle that guardian was sending draft for different sum.

5. Guardian and ward ☞144

Superior court, sitting in probate, has jurisdiction to determine amount of minors' money or property in their guardian's hands for purpose of charging him therewith and all necessarily incidental issues (Probate Code, § 1606).

6. Courts ☞200½

Probate court's power to determine what money or other property of minors' estate is in their guardian's hands for purpose of charging him therewith is limited, where title thereto is in controversy, to cases in which guardian claims property as individual (Probate Code, § 1606).

7. Courts ☞200½

Superior court, sitting in probate, is without jurisdiction to try question of title to property as between minors' guardian and strangers to their estate (Probate Code, § 1606).

8. Courts ☞200½

To oust probate court of jurisdiction to determine what money or property of minors is in possession of their guardian, asserting claim of another thereto, existence of actual serious question as to whether property belongs to estate or stranger thereto must appear.

9. Courts ⇨200½

Superior court, sitting in probate, had power to determine claim, asserted by minors' former guardian, that money, left with him by their custodian, belonged to latter and to surcharge guardian's account with amount thereof.

10. Courts ⇨202(5)

Minors' former guardian, not demurring to or objecting to form or substance of written objections to allowance of his final account at trial, which proceeded on theory that issue of title to money, with which account was surcharged, was before court, waived contention that pleadings were insufficient to put such title in issue and cannot first raise such issue on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

In the matter of the estate and guardianship of Voslave Vucinich and others, minors. From an order settling the final account of Bozo Angelich, former guardian, after a hearing, at which Vladimir Vucinich, present guardian, filed objections, the former guardian appeals.

Modified and affirmed as modified.

For prior opinion, see 37 P.(2d) 175.

Henry E. Carter, of Los Angeles, for appellant.

Vladimir Vucinich, of San Francisco, and Jennings & Belcher and Frank B. Belcher, all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division Two, in order that the question of the effect of approval and settlement of intermediate, current, or annual accounts of a guardian might be considered in connection with the case of Estate of Di Carlo (Cal. Sup.) 44 P.(2d) 562, involving the same question. In the Di Carlo Case, we held that such accounts were not conclusive against the ward, but were subject to re-examination. The reasoning set forth in the opinion in Estate of Di Carlo, supra, is consequently applicable herein. See, also, Estate of Giambastiani (Cal. App.) 37 P.(2d) 142. Accordingly, we adopt the following opinion of Mr. Justice pro tem. Willis in the instant case as the opinion of this court:

This is an appeal by the former guardian of the estate of three minors from an order settling his final account. He was appointed guardian on June 9, 1920, and rendered his first account on October 5, 1927, which was settled without objections on November 1, 1927. Up to this latter date he had been authorized to expend the sum of \$150 per month for the support of the minors, and on such date the court by order reduced that amount to \$100 per month. In his first account he claimed credit for, and was allowed on settlement thereof the sum of \$9,600 for support during the elapsed period. He was also allowed at this time \$150 for attorney's fees. On August 25, 1932, he filed his second account, which, after objections heard, was approved and settled on January 20, 1933. In this account he claimed credit for, and was allowed for support of the minors, the sum of \$2,550, covering the period from filing of first account in August, 1927, to September, 1929, and the additional sums of \$606.11, cash advanced to, and of \$1,200 for support of one of the minors, who had been returned to his personal custody, and the further sum of \$1,185.70 for moneys advanced for the other two minors (who were during the period in Jugoslavia) from September 19, 1929, to July 29, 1932. By the order approving this second account, the guardian was allowed the further sum of \$350 for attorney's fees, and his compensation as guardian was fixed at the sum of \$1,200. Also by this order he was surcharged the sum of \$206.37 for overcharge for street assessments and taxes. In making its order settling this account the court therein did so "without prejudice on final settlement to the said objections being re-presented." The record herein fails to show any objections on file to this second account, but the order approving it recites that the minors had filed objections.

On February 14, 1933, appellant filed his third and final account, which included only one new item, and to allowance thereof the minors filed certain objections in writing. At the hearing, over appellant's objection, evidence was received touching expenditures and items settled in the first and second accounts, and by the order of settlement certain changes and reductions were made therein. In addition, appellant was surcharged in the sum of \$7,715.16 as and for cash belonging to the minors and which had come into his possession and not by him returned in his inventory or reports or accounted for. The items of \$350 for attor-

ney's fees and \$1,200 for guardian's services were again allowed and settled. By this order the court allowed \$3,000 in lieu of \$9,600 in the first account, allowed the items of \$606.11 and \$1,200 in the second account, and disallowed the items of \$2,550 and \$1,185 therein, thus reducing the total claims for support of the minors as allowed in the two previous accounts from \$15,141.81 to \$7,451.11, and adjudged that the difference between these two latter sums, to wit, \$7,690.70, be added to his charges together with the surcharge of \$7,715.16, making a total of \$15,405.86, to be added to the inventoried real estate liabilities of \$24,000, making a total charge against the appellant of \$39,405.86, less \$256.04 deficit as shown in final account. From this was deducted the amount on hand in the form of inventoried and appraised real estate, to wit, \$24,000, leaving the sum of \$15,149.82, in which amount the court found appellant was indebted to the estate and which the court ordered paid by appellant to his successor as guardian of the minors along with delivery of the real estate shown in the inventory and reports.

From this order, this appeal is prosecuted, appellant assigning as error (1) the disallowance of the \$9,600 item for support as allowed in the first account, except as to \$3,000 thereof; (2) the disallowance of items of \$2,550 and \$1,185.70, previously allowed in the second account; (3) the deduction of \$1,500 from the total of bank remittance statements of \$4,145; (4) in charging appellant with \$7,715.16, cash not inventoried or accounted for; (5) in finding that appellant was indebted to the estate in the sum of \$15,149.82; (6) in disallowing the first and second accounts as formerly settled; (7) in not giving credit for the sums of \$585.30 and \$160, transmitted through the banks for support of said minors.

In an orderly and logical process of consideration of the matters brought forward by this appeal we must first consider and determine point 6, which embodies the proposition that the court erred in reopening, over appellant's objection, and considering the first and second accounts and disallowing items thereof formerly allowed and settled, in turn reflected by specifications of error numbers 1 and 2 above.

[1] Unlike orders settling accounts of executors and administrators, when final, those settling guardians' accounts do not come within the rule of *res judicata*. The probate court is not precluded from a re-examination of former accounts rendered by a guardian of estates of minors, and on such re-examina-

tion it has power and authority to correct, revise, or modify in amount any item or items of expenditure theretofore settled, allowed, or approved by it, or to entirely disallow and withhold its approval or settlement of such item or items. Such is the rule first announced in this state in the case of *In re Guardianship of Cardwell*, 55 Cal. 137.

[2] Under this rule the authority or power of the probate court to disallow items in the first and second accounts at the hearing on the final account must be conceded; and as to those items, the single remaining question relates to the sufficiency of the evidence to sustain the court's action. We have examined the transcript of evidence and proceedings given and had at the hearing and find therein ample support for the court's conclusions, except in two particulars reflected in the third and seventh specifications, hereinafter disposed of. It appears therefrom that from the date of his appointment on June 9, 1920, until November 1, 1927, the guardian was authorized to expend the sum of \$150 per month for the support of the three minor children, which amount was reduced by the order of November 1, 1927, to the sum of \$100. During all of this time, excepting for the first seven or eight months, the children were in the actual custody of their uncle, George Vucinich, in Jugo-Slavia, and from time to time appellant transmitted moneys to the latter for the support of the children. In his first and second accounts the guardian claimed credits for amounts equaling the result of multiplying months elapsed by \$150 or \$100, as the case might be, and presented voucher receipts purporting to cover each of such months. He admitted that these receipts were given to conform to the order of allowance and were not in truth related in point of time or amounts to the actual payments or transmittals of money. At the hearing on the final account the amount of those transmittals was inquired into, and, as a result of the evidence adduced at the hearing, the probate court disallowed the former item for support of \$9,600 with its vouchers in the first account and allowed in lieu thereof the sum of \$3,000, which had been delivered in cash to the uncle on his leaving for Europe, and disallowed the items of support of \$2,250, with vouchers, and \$1,185.70 in the second account, and allowed altogether as and for support over the entire period the sum of \$7,451.11. The item of \$1,185.70 appearing in the second account was claimed by appellant to have been sent to Jugo-Slavia in many small amounts for support of the minors from September 19, 1929, to December 18, 1930, and

was supported by a voucher purporting to be signed by the widow of George Vucinich, the latter having died in 1932. The court found that this item was not supported by proper and authentic vouchers and that such expenditures were not made. This finding of the probate court we cannot here disturb, as the evidence relating thereto was conflicting; and the burden resting on appellant to support his claims with satisfactory vouchers, it was the exclusive province of the probate court to weigh the evidence and decide.

[3] In dealing with the claims of appellant for support money sent to Jugo-Slavia, both appellant and objectors introduced evidence as to the manner, dates, and amounts of actual transmittals of money. The principal proof came from bank statements, which showed on their face the amounts transmitted by appellant. The court found that these aggregated the sum of \$4,145, less the sum of \$1,500 which the court found was a duplication. The evidence amply supports the finding that \$4,145 comprised the whole amount sent by appellant through the two local banks to George Vucinich over the period of guardianship, but there does not appear in the record any evidence sufficient to support the finding that \$1,500 thereof was a duplication of a similar item. There was some evidence to the effect that George Vucinich, some time after he went to Jugo-Slavia in 1920, sent back to appellant a \$1,500 draft which he had secured before leaving and had carried with him but had kept too long for negotiation, with a request that appellant have a new one substituted for it. This appellant did; and the objectors claim and the court found that that item of \$1,500 constitutes part of the \$4,145 of total bank transactions. The record of those transactions failed to show any similar item or group of items equivalent thereto and all the evidence given on the subject indicates clearly that this draft substitution took place in 1920, while the earliest local bank transmittal is dated May 15, 1925, and covers a period from that date to August 29, 1932.

[4] The foregoing disposes of specifications numbered 1, 2, 3, and 6, and closely related thereto is specification number 7, concerning the disallowance by the court of credits for \$585.30 and \$160, transmitted by appellant to George Vucinich and supported by receipts of Slavonic Immigrant Bank of New York city bearing dates of June 29, 1921, and September 16, 1920, respectively. There was evidence in the form of a letter of appellant, dated December 1, 1920, to George Vucinich,

showing that appellant was sending a draft at that time for \$500 to be changed into dinars (a Jugo-Slavian monetary unit) for profit on expected rise in value. Appellant testified that the receipts were for moneys he sent George Vucinich for support of the minors. The record fails to reveal any substantial evidence in support of respondents' claim that these moneys, of entirely different amounts and sent at other dates, were sent on personal account for the purchase of dinars. In rejecting them the court erred.

This leaves for determination the fourth specification, relating to the surcharge of \$7,715.16. Appellant's contention is twofold: First, that the evidence is insufficient to support the finding that that amount of cash came into his hands as guardian, and, second, that the probate court was without jurisdiction to determine title thereto. The evidence is quite sufficient to sustain the finding that this amount of money was delivered by George Vucinich to appellant before the former left for Jugo-Slavia, and that it was money which had come from the estate of the deceased father of these minors.

[5-7] The superior court sitting in probate has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto. The power to determine as against the executor what money or other property belonging to the estate has come into his hands is implied in the power to settle his accounts and determine what remains in his hands to be distributed. *Estate of Burdick*, 112 Cal. 387, 44 P. 734; *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512. This power, however, is limited, in cases where title thereto is in controversy, to those where the executor or other personal representative claims the property in his individual capacity. In *re Estate of Kelpsich*, 203 Cal. 613, 265 P. 214; *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820; In *re Estate of Roach*, 208 Cal. 394, 281 P. 607. It is undoubtedly the rule that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. *Ex parte Casey*, 71 Cal. 269, 12 P. 118; *Estate of Haas*, 97 Cal. 232, 31 P. 893, 32 P. 327. It will be readily noted from these citations that the line of demarcation between jurisdiction and nonjurisdiction of the probate court to determine what money or property, title to which is disputed, belongs to the estate, is deter-

mined by the status of the claimant. If it is claimed by the executor in his individual capacity, the probate court has power to consider and determine the validity of that claim. But if claimed by or on behalf of a stranger to the estate, the probate court has no jurisdiction to determine the controversy. It appears obvious that the foregoing rules affecting proceedings on accounts of executors and administrators of estates of decedents also apply to those of guardians of estates of minors. This is made manifest by the terms of section 1606 of the Probate Code, wherein it is provided that "when not otherwise specially prescribed in this division [guardian and ward], practice and procedure and the making and entry of orders under this division shall be governed by the provisions of division III of this code [Administrator of Estate of Decedents], so far as they are applicable."

[8] To all rules, however, there arise exceptions to its literal application, by reason of some basic fact upon which the rule is founded being absent. Herein it appears that before the probate court is ousted of jurisdiction to determine what money or property belonging to the estate has come to the possession of the guardian, it must appear that there exists in fact an actual and serious question as to whether the property belongs to the estate or some stranger thereto. In short, the claim, if asserted by the guardian on behalf of a third person, must appear to be a bona fide claim, not one asserted and adopted by the guardian as a means to escape liability to account for such property. In the case of *In re Burdick's Estate*, supra, 112 Cal. 387, 44 P. 734, cited by respondents, the court said: "Still, since the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate, if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum. Where there is in the hands of the executor money which the executor claims does not belong to the estate, he should himself take steps to test the right, if serious question exists; and, if he is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached." The effect of the foregoing decision respecting duty of the court upon ascertaining the seriousness of the claim, is considerably altered by the language of the court in the later case of *In re Estate of King*, 199 Cal. 113, 248 P. 519, 520, wherein a stranger made claim to part of an estate at time of distribution. The court said: "That the probate court has no ju-

risdiction to determine adverse claims to the properties of an estate in course of administration before it when asserted by a stranger to said estate has been fully determined in numerous decisions by this court. * * * This being so, the administratrix of said estate had cast upon her no duty to take any action whatever upon the asserted right of the appellant to have delivered over to her the properties of said estate, and it follows that her failure to take such action in no way impeded the right of said administratrix when said estate was otherwise in a condition for distribution to present her petition for the distribution thereof."

[9] At the hearing on appellant's final account, respondent, as new guardian of the minors, filed written objections thereto and sought to have the account surcharged with the amount of cash that George Vucinich had left with appellant and which the court later found to be in the sum of \$7,715.16. At the close of the hearing, the court was clearly justified in surcharging appellant's account. There was no proof of any claim to the money in question being asserted by George Vucinich in his lifetime and covering a period of twelve years from the time he left the money with appellant, nor any proof that his widow or heirs or any personal representative had ever asserted any claim thereto. The sole source of any such claim was the asseverations of appellant, which, in the light of his admissions by word of mouth and by letter, could not be reasonably deemed a serious claim or a claim of sufficient weight and verity to oust the jurisdiction of the probate court to determine whether this property belonged to the estate. If claims of such character as were made herein were adjudged sufficient to render the probate court powerless to decide them, the doors would be open to fraud to be practiced upon the beneficiaries of such estates. We think the lower court, sitting in probate, had power to determine the claim asserted by appellant and to surcharge his account.

[10] There is no merit in appellant's final contention that the pleadings herein are insufficient to put in issue the title to the surcharged moneys. No demurrer or objections to the form or substance of the written objections as filed were presented or urged at the trial, which proceeded on the theory that such an issue was before the court, and the point must be deemed waived by appellant (*In re Estate of Randall*, 188 Cal. 329, 205 P. 118) and may not be raised for the first time on appeal (*In re Estate of Marre*, 127 Cal. 128,

59 P. 385). Furthermore, the objection as filed clearly stated the contention of the objectors, and called to the court's attention a matter which it was under duty to carefully scrutinize and, as we have hereinabove decided, to determine by its order. This the lower court did, and its decision thereon finds ample support in the evidence.

The court below is directed to credit the guardian's account with the sum of \$2,245.31 in accordance with this opinion, and, as so modified and corrected, the order settling the account is affirmed, without costs to appellant.



3 Cal.2d 246

ADAMS v. MARTIN.

L. A. 14855.

Supreme Court of California.

April 18, 1935.

1. Guardian and ward ☞163

Final account of guardian, when settled and approved, is res judicata even as against ward, where no attack is made thereon by appeal or other proper proceeding.

2. Courts ☞475(6)

Jurisdiction to determine accounts of guardians is exclusively in probate court.

3. Guardian and ward ☞163

Order of probate court settling and approving guardian's account held conclusive in action against guardian, brought after revocation of letters of guardianship, to recover assets claimed to have been misappropriated, in which former guardian was charged with testifying falsely as to expenditures, where successor guardian was represented at hearing of final account.

4. Judgment ☞376

Perjury is intrinsic, and not extrinsic, fraud, and constitutes insufficient basis for equitable relief against final judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Kathleen M. Adams, as guardian of the estate of Clyde Lindsay, an incompetent person, against Ralph Martin.

From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

For prior opinion, see 32 P.(2d) 416.

Edward O. Mills, Harold J. Hunter, Mills, Hunter & Dunn, and D. Z. Gardner, all of Los Angeles, for appellant.

Newlin & Ashburn and O'Melveny, Tuller & Myers, all of Los Angeles (A. W. Ashburn and Louis W. Myers, both of Los Angeles, of counsel), amici curiae.

Crail, Shutt, Penprase & Miller and Crail, Shutt, Penprase & Crail, all of Los Angeles, for respondent.

PER CURIAM.

This is an action against a former guardian of an incompetent to recover money allegedly misappropriated by him.

The defendant became the guardian of Clyde Lindsay, an incompetent in 1920, and acted as such until 1929. During this period he filed four current accounts in the probate court, claiming credit for various expenditures including board, lodging, and laundry of the ward at the rate of \$120 per month. On October 15, 1928, plaintiff filed a petition for appointment as guardian ad litem of the ward, asserting that her investigation had disclosed false charges and excessive credits by the defendant. Her petition was granted. On November 16, 1928, defendant filed his final account. On November 19, 1928, plaintiff, as guardian ad litem, filed a petition for the removal of defendant as general guardian, and for her own appointment in his place, setting forth the same allegations of improper charges and credits by defendant. On January 16, 1929, defendant's letters of guardianship were revoked, and plaintiff was appointed general guardian. At the same hearing (notice having previously been posted as required by statute on November 28, 1928), the final account of defendant was heard and settled, the order approving it being made on January 24, 1929. The court determined that there was a balance of \$64.04 in the estate, and ordered it paid over to the new guardian. No appeal was taken from this order, nor was any other attack made on it by motion or otherwise.

In June, 1929, plaintiff brought this action in the superior court, alleging the same misconduct set forth in the previous petitions, and seeking a money judgment on behalf of the ward. Defendant's demurrer was over-

ruled, and at the trial, upon conflicting evidence, the court found that the various accounts filed by defendant did not contain a true statement of expenditures, and that the latter had misappropriated the sum of \$3,917. Judgment was rendered for plaintiff and against defendant in that sum, and defendant brought this appeal.

[1-3] In the cases of *Estate of Di Carlo* (Cal. Sup.) 44 P.(2d) 562, and *Estate of Vucinich* (Cal. Sup.) 44 P.(2d) 567, we held that intermediate or current accounts of a guardian, approved and settled by the probate court, were not conclusive against the ward, but might be re-examined by said court upon the hearing of a subsequent or final account. These decisions are plainly distinguishable, and the rule which they lay down is not applicable here. We have before us in the instant case, not an intermediate, but a final account, approved and settled; and the re-examination attempted here is not by the probate court in the guardianship proceeding, but by the superior court in an independent action. Under such circumstances, the judgment in favor of plaintiff cannot be sustained. The established rule is that the final account of a guardian, when settled and approved, and not attacked by appeal or other proper proceeding, is *res judicata* and conclusive even against the ward. In *re Estate of McGue*, 180 Cal. 413, 181 P. 637; *Brodrick v. Brodrick*, 56 Cal. 563. It is likewise settled that the jurisdiction to determine the accounts of guardians is exclusively in the probate court. *Smith v. Fidelity & Deposit Co.*, 130 Cal. App. 45, 19 P.(2d) 1018; *Cook v. Ceas*, 143 Cal. 221, 77 P. 65. The action brought by plaintiff is improper for both of these reasons.

[4] It should be observed, as plaintiff concedes, that this is not a suit in equity to set aside a final judgment on grounds of extrinsic fraud. It is not contended that the defendant concealed property of the ward and failed to account for it; nor was there any fraudulent prevention of a hearing which might justify equitable intervention. See *Simonton v. Los Angeles T. & S. Bank*, 192 Cal. 651, 221 P. 368; *Lataillade v. Orena*, 91 Cal. 565, 27 P. 924, 25 Am. St. Rep. 219. The statutory notice was given, and counsel for the new guardian were present at the hearing of the final account. The complaint is that the defendant testified falsely as to his expenditures on behalf of his ward. It is uniformly held that perjury is intrinsic, and not extrinsic, fraud, and therefore does

not constitute a sufficient basis for equitable relief against a final judgment. *La Salle v. Peterson*, 220 Cal. 739, 32 P.(2d) 612; *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; see note, 23 Cal. L. Rev. 79.

Plaintiff does not present any authority in point, nor does she suggest any tenable theory upon which recovery may be based. The judgment is accordingly reversed, with directions to the trial court to enter judgment for defendant.



3 Cal.2d 396

ALAMITOS LAND CO. v. SHELL OIL CO.

L. A. 13867.

Supreme Court of California.

April 26, 1935.

Rehearing Denied May 24, 1935.

1. Mines and minerals — 79(5)

Lease requiring lessee to deliver one-sixth of "petroleum oil," asphaltum, or other hydrocarbon substances saved from demised premises to lessor, or to purchase royalty oil from lessor at current price, *held*, in view of context and custom of trade, to require lessee's delivery or purchase of crude petroleum well fluid in its natural state with water and other foreign matter emulsified therein, less free water, and lessee was not required to clean wet oil and then apply gravity test to cleaned fluid (Civ. Code, §§ 1644, 1646).

"Wet oil" in the petroleum trade means such a petroleum liquid as carries in cohesion with it more than 3 per cent. by volume of water and sediment, while "clean oil" or "dry oil" is such a petroleum liquid as carries 3 per cent. or less of these impurities, and base or impure content of a liquid is known in the trade as the "cut" of the oil.

2. Mines and minerals — 73

Lessee under oil lease *held* not bound by interpretation of lease in its behalf unless lessor relied on interpretation to its injury.

3. Mines and minerals — 79(1)

Lessee under oil lease did not by removing all gas from leased premises to central absorption plant waive provision of lease authorizing deduction from royalty payments of gas used or consumed in carrying on produc-

tion operations, where dry gas resulting from absorption process was returned to and used on leased premises.

4. Mines and minerals ☞79(7)

Evidence held insufficient to establish basis for allowance of damages to lessor under oil lease for lessee's use of alleged faulty methods of arriving at net volume of oil production.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Alamitos Land Company against the Shell Oil Company. From the judgment, defendant appeals, and plaintiff cross-appeals, and defendant appeals from an order denying a motion to vacate the findings and judgment.

Reversed on defendant's appeal, and affirmed on plaintiff's appeal and cause remanded.

See, also, 217 Cal. 213, 17 P.(2d) 998.

Oliver O. Clark, of Los Angeles, Raymond J. Kirkpatrick, of Long Beach, and Sherman Anderson, of Los Angeles, for plaintiff and respondent and appellant Alamitos Land Co.

Hanna & Morton and Harold C. Morton, all of Los Angeles, amici curiæ.

J. M. Mannon, Jr., F. F. Thomas, Jr., Edwin S. Pillsbury, William E. Wright and McCutchen, Olney, Mannon & Greene, all of San Francisco, for defendant and appellant and respondent Shell Oil Co.

Humphrey, Searls, Doyle & MacMillan and William F. Kiessig, all of San Francisco, amici curiæ for Associated Oil Co.

Paul M. Gregg, L. W. Andrews, and A. V. Andrews, all of Los Angeles, amici curiæ for Union Oil Co.

A. L. Well, of San Francisco, amicus curiæ for General Petroleum.

Charles C. Stanley and R. K. Barrows, both of Los Angeles, amici curiæ for Texas Co.

PRESTON, Justice.

Plaintiff and defendant, corporations, are respectively the lessor and lessee under an oil and gas lease touching lands in Los Angeles county, a part of the Signal Hill oil field. The lease is dated January 3, 1921, and was amended in certain particulars, respecting the production of gas only, on March 14, 1924. This action by plaintiff is one in equity to impeach as insufficient and fraud-

ulent the accounting made by defendant to plaintiff respecting its one-sixth owner's royalty interest in the oil and gas produced and saved from the demised premises and to secure the confirmation, by decree, of a forfeiture of said lease by reason of said fraudulent accounting thereunder. Issues were framed and a prolonged trial followed, beginning June 23, 1931, and ending October 10th of the same year. A voluminous transcript resulted and the questions discussed cover a wide range. The court made 155 separate findings. The judgment disposes of issues presented in nine numbered paragraphs as follows:

(1) Plaintiff is awarded \$486,613.53 and interest on \$388,451.68 at 7 per cent. per annum from June 15, 1931, to and including April 20, 1932, amounting to \$23,094.22, because of failure of defendant to account and pay to plaintiff its royalty share of oil produced and saved under the lease.

(2) Plaintiff is awarded an additional amount of \$4,192.22, together with \$328.50 interest thereon, because of charges made by defendant against it for dehydrating or otherwise cleaning plaintiff's royalty oil produced and saved under said lease between and including September 1, 1930, and June 30, 1931.

(3) It is provided that defendant, if reinstated under said lease, shall not be entitled thereafter to charge plaintiff for the cost of dehydrating or otherwise cleaning plaintiff's royalty oil, whether taken in kind or sold to the lessee.

(4) It is provided that defendant, if reinstated under said lease, shall hereafter determine the quantity of oil produced and saved under said lease by testing the oil at the time of its purchase by defendant from plaintiff under said lease, by a test or combination of tests reasonably adapted to the testing of oil, which will accurately determine the amount of water and other foreign substances in the gross fluid produced on the premises under the lease.

(5) It is provided that defendant, if reinstated under said lease, shall account to plaintiff for its royalty oil thereunder and shall pay plaintiff for such royalty oil as defendant shall purchase thereunder, on the basis of the actual gravity of said oil.

(6) It is provided that plaintiff do not have or recover judgment against defendant for any quantity of oil produced and saved under the lease prior to September 1, 1930, and not

accounted and paid for by defendant to plaintiff.

(7) It is provided that plaintiff do not have or recover any judgment against defendant on account of any natural gas produced and saved under said lease and removed from said demised premises prior to April 19, 1932.

(8) It is provided that plaintiff have judgment declaring the forfeiture and termination of all right, title, interest, and equity of defendant in and to said lease of January 3, 1921, and said contract of March 14, 1924, provided, however, that defendant shall be relieved of such forfeiture in the event that it pays to plaintiff, on or before August 29, 1932, all sums for which judgment is given herein.

(9) That plaintiff have and recover of defendant its costs and disbursements.

We are confronted with cross-appeals. Defendant has appealed from all those portions of said judgment represented by paragraphs 1, 2, 3, 4, 5, 8, and 9 thereof. Defendant has also appealed from an order denying its motion to vacate the findings and judgment first entered in the case and to reopen it for further evidence and for leave to file an amended and supplemental answer. Plaintiff has appealed from all those portions of the judgment represented by paragraphs 6 and 7 thereof.

The period covered by the accounting in question is from January 1, 1923, to September 1, 1930; also certain phases of an accounting for the period from September 1, 1930, to June 30, 1931, the entire period covering about eight and one-half years. Oil was discovered on said property in June, 1921, and some 39 wells are now in active production on the premises. The amounts involved are large and the issues are important.

Defendant's Appeal.

[1] Our study of the cause has brought us to the conclusion that the controlling question presented is that of a proper interpretation of the oil and gas lease in the light of undisputed facts and trade usages. In this connection the following language of the lease is important:

"The Lessee shall deliver to the Lessor on said demised premises, as royalty hereunder, the equal one-sixth (1/6) of all petroleum oil, asphaltum or other hydro-carbon substances produced and saved from said demised premises by said Lessee, and said Lessor shall have the option to take its royalty in kind, and if it so elects, the same shall be delivered as produced and saved into tanks or other

containers maintained upon said demised premises by said Lessee for that purpose, and such royalty oil may be stored without charge in such tanks or containers for a period of not to exceed thirty days, but at said Lessor's sole risk. At said Lessor's option, Lessee will purchase said royalty oil from said Lessor, and shall pay said Lessor therefor the current price paid by the Lessee for oil of like grade and gravity at the wells of production in the same vicinity."

"The royalties from oil and gas produced hereunder from said lands, or the proceeds thereof as aforesaid, shall be delivered and paid to and received by the Lessor as rent of said demised premises, and not otherwise; and when said royalties are paid in kind under the provisions hereof, the said petroleum oil shall be divided hereunder and said royalty delivered in kind to the Lessor on said demised premises, as hereinbefore provided."

"All royalty oil which shall be sold to the Lessee hereunder, under the terms hereof, shall be paid for by it to the Lessor on or before the 20th day of the calendar month next succeeding that in which delivery of such oil shall have been made to the lessee under such sale, and all royalty paid in kind shall be delivered to the said Lessor from time to time as the same is produced on said premises and stored and handled as herein provided."

It should first be noted that in all operations under this lease plaintiff elected to require defendant to purchase its royalty oil for cash.

Defendant uniformly, until September 1, 1930, purchased the royalty oil upon what is known as the "observed gravity-net quantity" basis and paid therefor the posted price of the Standard Oil Company for oil of such grade and gravity, which said price was its own current price. But plaintiff insists that such a system of accounting is not only in violation of the terms of the lease but is erroneous to such a degree as to make it fraudulent. Defendant insists that inasmuch as the lease neither in terms nor by necessary implication requires it to clean or otherwise process the royalty oil produced, it is the duty of plaintiff to accept the oil in kind as produced and saved or else to accept its current price in the field for unprocessed oil of like gravity.

To more accurately grasp the issue between the parties, it is necessary to state that the terms "wet" oil and "clean" or "dry" oil have a well-understood meaning in the trade. Wet oil is such a petroleum liquid as carries in cohesion with it more than 3 per cent. by volume of water and sediment. Clean or dry oil

is such a liquid as carries 3 per cent. or less of said impurities. The base or impure content of the liquid is also known in the trade as the "cut" of the oil. When the gravity of the fluid in its crude state is taken, it is called its "observed" gravity. Free water found in the liquid is not considered a part of the gross fluid for the purpose, as it is easily drained off from the bottom of the tanks. Usually also a well, when first put upon production, carries only dry or clean oil, but with increased pumping the encroachment of water becomes greater, and larger percentages thereof are emulsified with the petroleum. Oil is marketed upon the basis of its gravity as tested by the hydrometer. The instrument is immersed in the liquid as is likewise a thermometer. The readings on both instruments are taken and then, by use of Standard American Petroleum Institute tables, the hydrometer reading is corrected to conform to measurement at a temperature of 60° Fahrenheit. Upon this gravity reading as corrected, the prevailing price is applied to the net quantity of oil in the product. The net quantity of oil is found by actual dehydration of the entire volume of fluid or else by taking proper samples, applying to such samples the recognized A. S. T. M. standard tests, which disclose the percentage of water and other impurities; then by applying such percentage of deduction to the total volume of fluid, the approximate net quantity of oil is found.

Plaintiff insists that under the lease here involved it is the duty of defendant to clean the wet oil, either actually or theoretically, and then apply the gravity test to the cleaned fluid, which will thus give it a higher gravity reading than in its wet state. In other words, plaintiff contends that it was the duty of defendant to base its gravity test upon the same net substance that constituted the quantity or volume purchased. Upon the soundness of this view rests practically plaintiff's entire case.

It will be noted that the lease is silent both as to how the quality and how the quantity tests shall be made. Likewise, the lease fails to require defendant to prepare the royalty oil for pipe line shipment in the event it is delivered in kind. To provide tanks for the storage of plaintiff's royalty oil is the only express obligation imposed. If delivery in kind is made, it is to be as produced and saved or as produced and stored in tanks on the premises. If this means a delivery of the gross fluid as produced, it certainly follows that, if required to purchase it, defendant must pay its own current price for the same substance. If the duty to theoretically clean

is absent when the royalty oil is delivered in kind, it is absent when the royalty oil is to be purchased.

We are constrained to hold that the words "petroleum oil" and "royalty oil" found in the above-quoted paragraphs of the lease mean the crude petroleum well fluid as produced, less the free water therein, that is, the petroleum fluid together with such water and other foreign matter as may be emulsified therein—the fluid in its natural state. We are strengthened in this conclusion by the context of the lease, wherein, in 38 or more places, these words or similar words are found. For example, by said lease the land was demised, together "with all petroleum, gas and all other hydro-carbon substances contained therein." The term of the lease was to be 20 years "and so long thereafter, not exceeding 10 years, as oil or gas is found thereon or therein in paying quantities," subject, however, to certain conditions, "for the purpose of drilling and boring for petroleum, oil, natural gas, and all other hydro-carbon substances of whatsoever kind or character." Again, the following language is found in said instrument: "Upon the discovery of oil in paying quantities in any one of said test wells," etc. Again, "a well shall be deemed completed when drilling has ceased and said well shall either produce oil in paying quantities, or shall have been drilled to a depth of 3,500 feet or more"; "for the purposes of this lease, a well shall be deemed to produce oil in paying quantities when it shall produce oil and/or gas in quantities sufficient to pay to pump, or otherwise secure and save." The lease provides what shall be done within 90 days after oil shall have been discovered on the leased premises in paying quantities. Another paragraph relates to pumping operations and provides that defendant shall pump and operate all the wells to full capacity so long as the same "produce oil in paying quantities, except when the price of oil in Southern California, similar in quality to that produced hereunder, is depressed to 50 cents or less per barrel of 42 gallons each at the wells of production, as hereinafter set forth."

No one can say that the "cleaned" or "dry" product is referred to by the above language. Our construction of the lease conforms to the commonly understood meaning of the terms and is in every respect a reasonable deduction. In *Hammett Oil Co. v. Gypsy Oil Co.*, 95 Okl. 235, 218 P. 501, 502, 34 A. L. R. 275, it is said: "There was no evidence as to what the word 'oil' includes, when used in an oil and gas lease, or how the parties to the lease understood it, but a large amount of

litigation has arisen over oil and gas leases, and the construction of such contracts, and the word 'oil' as used in an oil and gas lease, has always been referred to by the courts and understood to designate the oil produced from a well, or crude petroleum in its natural state. There is nothing either in the contract or in the evidence to disclose that the parties in this lease contract used it in any other sense, but the contract does support the contention that it was used in its ordinary and popular sense, and refers to crude oil as it was produced from the mouth of the well."

The fact that the lessee was to have the right to erect a cleaning plant on the premises does not affect this conclusion. All wet oil must be thus processed before refining can take place. Whether defendant did this processing on the leased premises or elsewhere is unimportant.

[2] Nor is plaintiff's contention sound based upon a letter of defendant signed for it by one J. U. Stair, dated May 11, 1923, wherein it is stated: "We think that the proper interpretation of the 'Oil Produced and Saved' clause is the actual clean oil which is delivered to the marketing company or pipe line." The subject of this letter was a net quantity accounting which plaintiff had questioned. The question of wet oil had not arisen as the wells at that time were producing only clean oil or oil with less than 3 per cent. impurities, the average for said year being only 1.65 per cent. The writer stated that he referred to "settled" oil and had no reference to the basis for gravity reading. But anyway this writer's view of the meaning of said clause of the lease, standing alone, would not bind defendant to his interpretation thereof in the absence of reliance thereon by plaintiff to its injury.

Now, with failure of the parties to specify how or when the gravity and quantity tests should be made, we are compelled to refer to the customs and usages of the trade. Civ. Code, §§ 1644, 1646. It is not in dispute that as to quantity, the net oil content is the basis of sale. Neither is it disputed that the major portion of the oil produced in the Signal Hill field has been purchased, whether in the open market from lessors or from others, by defendant and its predecessor companies and the following companies: Union Oil Company of California, the Texas Company, Associated Oil Company, General Petroleum Corporation, Richfield Oil Company, Standard Oil Company of California. Nor is it in dispute that these concerns, during the whole of the

time in question prior to January 1, 1930, paid for the oil purchased upon the "observed gravity-net quantity" basis and this was true irrespective of the percentage of water and sediment therein. This the court especially found to be true. Many millions of barrels of wet oil were purchased in this manner. And this prevailing custom could easily have been ascertained by any interested or even casual inquirer and this the court likewise in effect found. The posted prices of the Standard Oil Company were used and applied to the gravity of the wet oil. Indeed, although the Standard Oil Company had no leases in this field, yet it was a large purchaser of wet oil therein and even at one time assigned a special pipe line to the transportation of wet oil and uniformly bought it upon the observed gravity basis. Again, the evidence is not in conflict that defendant yielded to plaintiff the exact accounting it made to all other lessors with whom it was in the relation of lessee and to all others from whom it purchased wet oil. With each of them the gravity was taken of the gross fluid and the barrelage from the net oil content.

We have then this situation: Defendant has accounted to plaintiff upon the basis of the "current price paid by the Lessee for oil of like grade and gravity at the wells of production in the same vicinity." Not only this, but it has accounted to it for the full market price of the royalty oil. It therefore becomes unnecessary to consider the secondary defenses of defendant such as account stated, accord and satisfaction, estoppel, waiver, laches, and limitations, or the further defense that the damages, if any, have not been properly measured. The same observation applies to the appeal from the order denying the motion to vacate the findings and judgment.

This conclusion also makes superfluous a consideration of the specifications upon which plaintiff relies to show fraudulent conduct on the part of defendant. Our conclusion is that defendant has followed the lease as well as the usages and practices of the trade and no evidence whatsoever of fraud is present. It may well be that a net oil content instead of a gross oil content would be the fairer base of the gravity reading. But such was not the usage or custom at any time prior to the year 1930 and many of the larger companies still follow the old method. And those concerns which during 1930 did change their system of testing for gravity, made against the owner or seller a charge for dehydration. The slightest diligence on the part of plaintiff would have disclosed to it the uniform prac-

tice in the Signal Hill field as well as the same practice by defendant.

From what has been held above, it follows that paragraphs 1, 3, 4, 5, 8, and 9 of the judgment are erroneous. Paragraph 2 is also erroneous in decreeing a refund to plaintiff of charges for dehydration made by defendant for the period between September 1, 1930, and June 30, 1931. This is true because defendant was not required to pay upon the dry gravity of the oil unless the custom or usage obtaining in the field changed and, assuming that after January 1, 1930, it did so change, it is equally true that, in making the change, a charge was made for dehydration. This is the charge ordered refunded to plaintiff by said paragraph 2 of the judgment and for the above reason such allowance cannot be sustained.

The foregoing discussion being based upon uncontroverted facts applied to our construction of the written lease, it follows that each of the several findings of fact inconsistent with the conclusion announced is without evidentiary support.

Plaintiff's Appeal.

As already noted, plaintiff complains of the failure to secure a judgment for further relief upon two of its contentions, which failure is evidenced by paragraphs 6 and 7 of the judgment. Our conclusion is that the court's action in each instance was so clearly correct that only a brief discussion of the points made is required.

[3] The first contention arises under the terms of the amendment to the lease of March 14, 1924, which required the defendant to purchase the royalty gas produced under the lease and removed by it from the demised premises, at the rate of 10 cents per 1,000 cubic feet. But under a separate provision defendant was exempted from the wet or dry royalty payments with respect to all gas used or consumed in carrying on its production operations on the property. During all times here in question, to wit, from March 14, 1924, to September 1, 1930, defendant, with the full knowledge and presumed acquiescence of plaintiff, did not use wet gas in said operations, but, on the contrary, conducted all gas produced to a central absorption plant off the premises, where such gas was commingled with other gas produced elsewhere; then after all gas was submitted to the absorption process, a certain amount of the resultant dry gas was returned to the leased premises and there used by defendant. In accounting to plaintiff, defendant treated the dry gas so

used as though it were wet gas and deducted the amount from the gross yield and paid plaintiff for its aliquot part of the net amount after such deduction. The court found, upon sufficient evidence, that dry gas was the more effective and the more economical and further that plaintiff was benefited by the practice because if wet gas had been used, an equal amount, at least, would have been consumed. The technical contention that by removing all gas from the premises, defendant lost its claim for deductions to cover gas used on the lease, is wanting in substance. The finding that plaintiff has not been damaged in the sum of \$30,841.40, or any other sum, must be sustained.

[4] Lastly, plaintiff insists that a loss occurred to it during the period from January 1, 1923, to September 1, 1930, in the sum of \$75,641.26, and interest thereon to June 15, 1931, as a necessary consequence of the faulty system used by defendant in arriving at the net quantity volume of oil produced and saved under the lease. The court in effect found that such a loss occurred, but this finding was offset by the further finding that no feasible method existed by which such loss might be measured. The lease itself is silent as to the method by which said test shall be made. All parties agree that one standard test at least was the centrifuge test, aided by the use of a solvent or diluent. So far as here pertinent, it may be stated that such test is founded upon the principle that water and other foreign substances are heavier than oil. By placing a sample of the oil in a rapidly rotating tube, centrifugal force will have the effect of shattering or breaking up the emulsion of oil and foreign substances therein and when the process of rotation is completed, the water and foreign matter will be at the bottom of the tube and the oil on top, where appropriate readings may be taken thereof. If the breaking up process is incomplete, necessarily oil will be included in the waste matter or the "cut," and this oil will be lost in estimating the net oil volume.

To aid the above process and insure greater success, diluents or solvents are mixed with the oil at the initiation of the test. Prior to August, 1926, the solvent employed was equal parts of bisulphide and gasoline; subsequently the use of benzol was instituted. The test with either of these solvents was a standard method, producing about equivalent results. Benzol as a solvent or diluent was indorsed as a substitute for gasoline and bisulphide in 1926 by the American Society for Testing Ma-

terials, an institution universally recognized as the exponent of methods of testing materials. Defendant continued to use benzol from 1926 until about June 28, 1930, at which time, with some of the other companies, it substituted therefor the use of phenol as such diluent. During the entire period here involved the current method used by defendant had the indorsement of the American Petroleum Institute, the United States Bureau of Mines, and the above-mentioned American Society for Testing Materials.

Another test would have been what is known as a distillation test and it could have been employed, but it was not generally used prior to 1930, and, moreover, such test extracts only water and does not remove solid foreign matter present in the sample. This test is also susceptible of much error and is more or less impracticable for field laboratory work. The use of phenol in the centrifuge test came about by a slow process of experiment and it did not become an acknowledged substitute, in the Signal Hill field at least, until about June 28, 1930.

Plaintiff rests its full contention upon the claim that it was the duty of defendant either to adopt the distillation test or earlier employ phenol as a solvent in the centrifuge test. Enough has been said to show that defendant was at all times diligent, employing standard tests, and no substantial basis exists for claims at this late date that better methods could have been employed. We therefore see no reason for considering the highly speculative methods employed by plaintiff in estimating the saving that might have resulted from the use of some other testing method.

Moreover, we concur in the view of the trial court that no proper basis was shown for estimating such losses, if it be assumed that they have occurred. This issue, as well as the whole case, suggests the absence of ordinary diligence on the part of plaintiff in ascertaining the unconcealed practices of the trade and of defendant respecting the basic elements of its contract.

The appeal of defendant is sustained in toto and the appeal of plaintiff denied in toto. Accordingly, the judgment is reversed as to paragraphs 1, 2, 3, 4, 5, 8, and 9 thereof and as to paragraphs 6 and 7 thereof it is affirmed. The cause is remanded for further proceedings in accord with the holding hereinabove outlined.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

BARNES v. BARNES. *

Civ. 9646.

District Court of Appeal, First District,
Division 2, California.

April 25, 1935.

Rehearing Granted May 25, 1935.

1. Divorce $\S$ 331

In action on foreign judgments for accrued alimony, such judgments were entitled to full faith and credit under Federal Constitution, and trial court was without power to annul or modify them (Const. U. S. art. 4, § 1).

2. Appeal and error $\S$ 1078(1)

Appellate court will not pass on question decided adversely to appellant, where appellant does not discuss the question.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Virginia Kift Barnes against Frederick Balston Barnes. From all of a judgment except that part awarding plaintiff counsel fees and costs, plaintiff appeals.

Affirmed in part, and reversed and remanded with directions in part.

Theodore M. Monell, of San Francisco, for appellant.

Frank V. Campbell and L. H. Schellbach, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff is the wife of defendant, and she previously brought an action in the state of New York to obtain a decree of separation from defendant. Plaintiff prevailed in the New York action, and judgment was entered in November, 1932. It provided, among other things, "that defendant pay to the plaintiff the sum of Twenty-Five (\$25.00) Dollars per week, as permanent alimony, from the date of the judgment herein for the support and maintenance of said plaintiff during her natural life. That in case any event shall occur, materially changing the circumstances or conditions of the said parties, or either of them, an application may be made, on the foot of this judgment, by any party in interest, for such modification or annulment of the provisions of this judgment touching the said allowance for support, as may be just." It was further decreed: "That the defendant pay to the plaintiff the sum of Six hundred and twenty-five dollars (\$625.) the amount of the unpaid temporary alimony at the rate of

Twenty-five (\$25.) dollars per week from the 1st day of June, 1932, to the 23rd day of November, 1932, and also the sum of Two hundred and fifty (\$250.) Dollars as the unpaid counsel fees and the sum of \$146.05 costs and disbursements as taxed, making in all the sum of \$1021.05 and the said plaintiff have execution therefor." In June of 1933, pursuant to the practice in the state of New York, said plaintiff obtained another judgment in the New York action in the sum of \$725 for the accrued and unpaid alimony from November 23, 1932, to June 14, 1933. No appeal was taken from either of said judgments, nor had said judgments ever been modified in any manner.

Thereafter plaintiff brought the present action to enforce said judgments in this state. Her complaint was in two counts. The judgment first above mentioned was the basis of the first count, and the judgment second above mentioned was the basis of the second count. The prayer of the complaint was for a money judgment in the sum of \$1,746.05, with interest. It will be noted that said sum was the total amount calculated by adding the sum of \$1,021.45 mentioned in the first judgment and the sum of \$725 mentioned in the second judgment. The answer of defendant made certain denials and set up certain alleged affirmative defenses for the purpose of seeking a modification or annulment of said judgments. A motion was also made for that purpose, which motion was heard at the time of the trial. The cause was tried by the court sitting without a jury, and the trial court found that plaintiff had obtained the judgments as alleged, and that no part of said judgments had been paid, but it denied any recovery to plaintiff except for the sum of \$396.05, together with interest, being the amount allowed by the New York court for counsel fees and costs. The trial court also made certain findings with respect to the facts alleged by defendant in seeking a modification or annulment of the New York judgments, and included in its judgment the following provisions: "It is ordered, adjudged and decreed that all orders and judgments for the payment of Twenty-five (\$25.00) Dollars per week as temporary and/or permanent alimony, made by the Supreme Court of the State of New York, in and for the County of New York, in an action entitled 'Virginia Kift Barns, Plaintiff, v. Frederick Balston Barns, Defendant,' numbered 7833 in said Supreme Court of the State of New York, in and for the County of New York, be and the same are hereby annulled as to all installments accrued hereunder, and as to all future installments; and the order of said Supreme Court of the

State of New York, in and for the County of New York, made on the 23rd day of November, 1932, is hereby annulled except as to the provisions therein for the payment of counsel fees and costs; and the order or judgment of June 21st, 1933 made by said Supreme Court of the State of New York, in and for the County of New York, in said action, is hereby annulled." Plaintiff appeals from all of the portions of said judgment except that portion awarding her the amount specified for counsel fees and costs in the New York judgment of November, 1932.

[1] Appellant contends that the trial court had no power to annul or modify the judgments of the New York court for accrued alimony, and in our opinion this contention must be sustained. The right to accrued alimony is a vested right, and judgments for accrued alimony are enforceable as any other final judgments entitled to the protection of the full faith and credit clause of the Federal Constitution. Article 4, § 1, Constitution of the United States; *Bruton v. Tearle*, 117 Cal. App. 696, 4 P.(2d) 623; *Cummings v. Cummings*, 97 Cal. App. 144, 275 P. 245; *Rinkenberger v. Rinkenberger*, 99 Cal. App. 45, 277 P. 1096; *Creager v. Superior Court*, 126 Cal. App. 280, 14 P.(2d) 552; *Sistare v. Sistare*, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; *Harris v. Harris*, 259 N. Y. 334, 182 N. E. 7; *Krauss v. Krauss*, 127 App. Div. 740, 111 N. Y. S. 788; *Brice v. Brice*, 225 App. Div. 453, 233 N. Y. S. 366; *Van Horn v. Van Horn*, 196 App. Div. 472, 188 N. Y. S. 98; *McPartland v. McPartland*, 146 Misc. 672, 261 N. Y. S. 844. We therefore conclude that appellant was entitled to judgment for the accrued alimony as prayed in the complaint, and that those portions of the judgment purporting to annul the New York judgments as to accrued alimony must be reversed.

[2] While this appeal was taken from all portions of the judgment purporting to annul the judgments of the New York court, appellant does not seem to seriously question the power of the trial court to annul the New York judgment of November, 1932, in so far as it relates to future installments of alimony. No mention is made of this proposition in the question as stated on the first page of appellant's brief, and we find no heading in the briefs devoted to a discussion thereof. In the absence of any appropriate presentation of this question, we do not feel called upon to discuss the propriety of the portions of the trial court's judgment relating to future installments of alimony. The affirmation

of these last-mentioned portions of the judgment should not, however, be construed as an expression of opinion by this court as to the propriety thereof.

The judgment is affirmed, except as to those portions thereof purporting to annul the New York judgments for accrued alimony, and, as to said portions, the judgment is reversed, with directions to the trial court to enter judgment in favor of plaintiff. Said plaintiff will recover her costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.



6 Cal.App.2d 567

DI REBAYLIO et al. v. HERNDON et al.
Civ. 9297.

District Court of Appeal, Second District,
Division 1, California.
May 3, 1935.

Rehearing Denied June 1, 1935.

Hearing Denied by Supreme Court
July 1, 1935.

1. Automobiles ⇨244(22)

That at time of accident one is driving automobile belonging to another is not, of itself, sufficient to establish that driver was driving automobile with permission of owner, so as to impose liability on owner (Civ. Code, § 1714¼).

2. Automobiles ⇨192(6)

Automobile owner held not liable for injuries caused by driver whom owner permitted to use automobile on certain day and to return next day, where accident happened a day after such time expired, at which time driver was not driving with express or implied permission of owner (Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Abbie L. di Rebaylio and another against Harry Herndon and another. From a judgment, plaintiffs appeal.

Affirmed.

Ben F. Griffith, LeRoy Anderson, and Malcolm Archbald, all of Los Angeles, for appellants.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiffs who are husband and wife sued for personal injuries sustained by the wife in an automobile accident. It was stipulated that the accident was caused by the negligence of the defendant Herndon in operating an automobile owned by the defendant Franklin Motors, Inc. The jury returned verdicts in favor of the plaintiffs against the defendant Herndon, and, by direction of the court a verdict in favor of the owner of the car and against the plaintiffs. Plaintiffs have appealed from the judgment entered upon the directed verdict.

The first question presented is the liability of Franklin Motors, Inc., under section 1714¼ of the Civil Code. Ralph Hamlin, president of the respondent corporation, and Herndon, were each called as witnesses by the plaintiffs under the provisions of section 2055 of the Code of Civil Procedure. Their testimony was, substantially, that on the Friday before the accident occurred, the automobile had been purchased by the respondent from a dealer on the recommendation of Herndon who was not, and had never been an employee of respondent; that on the same day, after the automobile was purchased, Herndon requested permission from Hamlin to use the automobile; that this permission was granted upon condition that Herndon would return it to the garage the next morning; and that Herndon did not return the automobile as promised by him. Herndon testified that he did not return the automobile on Saturday morning as promised by him because he was feeling ill; that he endeavored to communicate with Mr. Hamlin after noon on Saturday but did not reach him; that he talked with no other person connected with respondent; and that he drove the automobile the following day when the accident occurred.

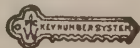
Appellants contend that the stipulated facts concerning the ownership of the automobile and its use by the defendant Herndon raised an inference that such use was with the consent of the owner; that this inference was sufficient to establish a prima facie case for the plaintiffs; and that the jury should have been permitted to pass on the question of the permissive use of the automobile from a consideration of the inference on the one hand and the testimony of Herndon and Hamlin on the other.

[1, 2] The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car

with the permission of the owner. *Bradford v. Sargent*, 135 Cal. App. 324, 333, 27 P.(2d) 93. Also, it is undisputed that the only permission given Herndon to use the car was that he might have it for a particularly specified period. The accident happened a day after this time expired. To hold that Herndon was then driving the car with either the express or implied consent of the owner would require us to disregard the plain agreement of the parties. The time within which Herndon had permission to use the car having expired, he was not driving it thereafter with the permission, either express or implied, of the owner. *Union Trust Co. v. American Commercial Car Co.*, 219 Mich. 557, 189 N. W. 23.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 476

**ASSOCIATED INDEMNITY CORPORATION
v. INDUSTRIAL ACCIDENT COM-
MISSION et al.
Civ. 1397.**

District Court of Appeal, Fourth District,
California.

April 25, 1935.

As Modified June 3, 1935.

Master and servant ☞361

Where owner of ranch taken over by bank and operated by bank through another company was employed as foreman thereon under supervision of company's field manager, and foreman took laborer from ranch to assist in building farm on neighboring ranch also owned by foreman, such laborer *held* "employee" of company which was liable for compensation for injury to laborer while constructing barn, where barn was being constructed for benefit of both ranches, field manager consented to arrangement, and company paid all wages while men were engaged in such work.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Proceedings under the Workmen's Compensation Act by James Cagle, opposed by the Associated Indemnity Corporation and Ernie Briscoe. From an award of compen-

sation by the Industrial Accident Commission, the Associated Indemnity Corporation petitions for certiorari.

Award affirmed.

R. O. Purvis and Varnum Paul, both of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

BARNARD, Presiding Justice.

The petitioner, who was the insurance carrier for Assets Corporation, seeks to annul an award of the respondent commission in favor of the respondent Cagle.

The respondent Briscoe was the owner of two ranches in Fresno county situated about one-eighth of a mile apart, one consisting of 120 acres, which will be hereinafter referred to as parcel 1, and the other of 20 acres, which will hereinafter be referred to as parcel 2. The Security-First National Bank of Los Angeles held a trust deed covering parcel 1 but was not interested in parcel 2. Some two or three years before the time here in question, Briscoe, being in default on this trust deed, made an arrangement with the bank whereby the management and control of parcel 1 was turned over to the Assets Corporation, a company with which the bank had a working agreement for the purpose of handling and operating a large number of farms which had been taken over by it. Under this arrangement the Assets Corporation paid all the expenses of farming parcel 1 with the understanding that the proceeds therefrom should be applied first to the repayment of the sums thus advanced and then to reduce the amount of Briscoe's other indebtedness to the bank.

Briscoe was employed by the Assets Corporation as foreman on parcel 1 at a salary of \$100 per month, and was under the direct supervision of a "field man" employed by that corporation and under the indirect supervision of its higher officials. Briscoe owned a team of mules which was kept on parcel 1 and mainly used thereon, although occasionally used by him on parcel 2. On a few occasions when they were not otherwise needed, these mules were loaned by Briscoe to neighbors for use on their ranches. The cost of feeding these mules was charged as one of the expenses of farming parcel 1, and later, during some two years, Briscoe took hay which he had raised on parcel 2 and hauled the same to parcel 1, where it was used in feeding the mules. During these two years,

with the knowledge and consent of the officers and agents of the Assets Corporation, he took its employees from parcel 1 and used them to cut the hay on parcel 2 and later to haul the same to parcel 1. At such times the wages of these men were paid by the Assets Corporation, and no charge was made for the hay by Briscoe, as any saving thus effected inured to his benefit in reducing his indebtedness.

In April, 1934, Briscoe used certain of these employees of the Assets Corporation in hauling some material from parcel 2 to parcel 1 which was used in erecting a tool shed thereon. About the same time he took certain of the employees of the Assets Corporation, including the respondent Cagle, over to parcel 2 and used them in enlarging a barn thereon, to be used for storing the hay which he intended to later haul to parcel 1 for the purpose of feeding the mules. While the men were thus engaged in building this barn on parcel 2, a scaffolding broke and Cagle was injured. This injury led to the award here in question.

The only point raised is that there is no evidence to support the finding of the respondent commission that Cagle was employed by the Assets Corporation at the time of his injury. The petitioner contends that, while Briscoe was an agent of the Assets Corporation in connection with parcel 1, he was acting entirely on his own behalf in connection with anything done on parcel 2, and that, since Cagle was injured while building a barn on parcel 2, he was at the time an employee of Briscoe and not of the Assets Corporation.

While Briscoe apparently failed to keep the affairs of the two ranches as separate and distinct as might be desired, we think there is sufficient evidence to sustain the finding complained of. It clearly appears that Briscoe had been in the habit of taking men from parcel 1 to cut the hay on parcel 2 and to haul the same to parcel 1, where it was used to feed mules which were mainly used upon that ranch, that the Assets Corporation knew of this custom, and had consented thereto, and that it paid the wages of the men so used. The use of this hay reduced by so much the amount which the Assets Corporation was obligated to advance. Cagle had been on the pay roll of the Assets Corporation and regularly employed on parcel 1 for some seven months before the accident. Briscoe was foreman on that ranch, with the right to employ and discharge men, and, while he received instructions from his superiors, he alone gave orders to the men as

to what work was to be done. On the day of the accident, several men who were engaged in irrigating and hoeing vines on parcel 1, including Cagle, were taken by Briscoe to parcel 2 and directed to assist in putting a roof on the barn. Within an hour thereafter the accident occurred. The time of these men for that day, including the time spent working on the barn, was turned in to the Assets Corporation by Briscoe and their wages were paid by that corporation as on former occasions when such men had been taken to cut and haul the hay raised on parcel 2. Cagle was employed by and was on the pay roll of the Assets Corporation, he was subject to the orders of its foreman Briscoe, and he was directed to do the work in question by that foreman. He was taken for that work at an odd hour in the middle of the morning while he was working on parcel 1. The immediate purpose of the work on the barn was to protect the hay which was to be used on parcel 1, and, notwithstanding the fact that the improvement would add something to the value of parcel 2, it was also of benefit to the work being done on parcel 1. Not only did Briscoe have full authority to direct the operations of these employees, but the evidence sufficiently indicates that the building of the barn on parcel 2 for the purpose mentioned was authorized by the field manager of the Assets Corporation. One of the field managers of the Assets Corporation testified that Briscoe had the right to hire men and to do anything that would be an advantage to parcel 1. Briscoe testified that he talked over the matter of building a tool shed on parcel 1 and a barn on parcel 2 with another field manager for the Assets Corporation, and that this manager told him it would be all right for him to use the men from parcel 1 on the job on parcel 2 and charge the expense to the Assets Corporation. This manager testified that Briscoe told him that he had arranged with the other manager to bring hay from parcel 2 over to parcel 1 and to take men from parcel 1 over to parcel 2 in return for the hay, and that he told Briscoe he thought this would be fair. There is evidence of a conversation between Briscoe and a field manager for the corporation in which Briscoe told the field manager he wanted to build both the toolhouse on parcel 1 and the barn on parcel 2. The only inference reasonably to be drawn from this conversation is that the manager knew and understood that Briscoe intended to use these employees for a day or two in building the barn, and that the manager consented to this. While the evi-

dence is conflicting in some respects and not too satisfactory in others, taken as a whole, with the reasonable inferences therefrom, it supports the finding made.

For the reasons given, the award is affirmed.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 480

ASSOCIATED INDEMNITY CORPORATION

v. INDUSTRIAL ACCIDENT COM-

MISSION et al.

Civ. 1398.

District Court of Appeal, Fourth District,
California.

April 25, 1935.

Master and servant Ⓒ361

One who had borrowed mules from manager of ranch operated by corporation under agreement to pay therefor in work held not "employee" of corporation so as to be entitled to compensation for injury, where mules were property of manager and claimant was injured while assisting in building barn on manager's own ranch.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Proceedings under the Workmen's Compensation Act by John Foster, opposed by the Associated Indemnity Corporation and Ernie Briscoe. From an award of compensation made by the Industrial Accident Commission, the Associated Indemnity Corporation petitions for certiorari.

Award annulled.

R. O. Purvis and Varnum Paul, both of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

BARNARD, Presiding Justice.

The respondent Foster was injured at the same time and place and in the accident involved in the case of *Associated Indemnity Co. v. Industrial Accident Commission*, 1 Cal. App. (2d) —, 44 P.(2d) 582, this day decided. After due proceedings had, he was

awarded compensation by the respondent commission.

The sole question raised is whether the evidence is sufficient to support the finding of the respondent commission that the applicant John Foster was employed by the Assets Corporation at the time of his injury.

The general background of this case is the same as that of the companion case referred to, and need not be here repeated. However, a different state of facts appears with respect to the employment of the respondent Foster.

Foster was a neighbor of Briscoe, and on several occasions had borrowed the two mules which belonged to Briscoe and which were kept on the farm being operated by the Assets Corporation. Under an agreement that he would pay for the use of the mules with his own labor, he owed three or four days' work to Briscoe. On the day of the accident, at Briscoe's request, he came to the 20-acre ranch owned by Briscoe, and was assisting in putting a roof on the barn when the accident occurred and he was injured. He had never been an employee of the Assets Corporation, had never been on their pay roll, and was not included on the pay roll which was turned in by Briscoe shortly after the accident. The mules were owned by Briscoe, and, while they were mainly used on the farm operated by the Assets Corporation, he had the right to and did use them on the 20-acre place owned by him. He also allowed them to be used by others when not needed on either of the two farms referred to. Briscoe testified that, if Foster had rented the mules and paid for their use in money, he would not have felt obligated to turn the money over to the Assets Corporation, but would have considered it as his own. There is no evidence in the record indicating that the Assets Corporation had any right to the use of the mules other than as they were needed on the ranch which that corporation was operating.

While we held in the preceding case that the barn where the accident occurred was being erected in part for the benefit of the other ranch, it is also true that it became a part of the smaller ranch owned by Briscoe and that it would also be beneficial to that ranch. In view of this situation, in which Briscoe was interested both as the owner of the smaller ranch and as foreman of the larger ranch, which latter ranch he hoped to save by working out his indebtedness thereon, it is both

consistent and natural that he should be willing to furnish a part of the labor required to build the barn while another part was being furnished by the Assets Corporation. We can find nothing in the evidence to justify the inference that in allowing Foster to pay for the use of the mules in this manner Briscoe was acting as an agent of the Assets Corporation or that he was exercising his right to employ men for that corporation. On the other hand, we think the evidence conclusively shows that Foster was employed by Briscoe and only by way of allowing him to repay an obligation which he owed to Briscoe in his private capacity.

No award was entered as against the respondent Briscoe, as the respondent commission found that Foster was an employee of the Assets Corporation and that he was not an employee of Briscoe.

For the reasons given, the award is annulled.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 484

RITCHIE v. NATIONAL NIC-NAC STORES,
Inc., et al.
Civ. 9914.

District Court of Appeal, Second District,
Division 2, California.
April 26, 1935.

1. Limitation of actions § 51 (1)

Agreement, dated May 10, 1929, providing for installation of pneumatic tube service in corporation's store, conditioned on acceptance by corporation within ten days and approval of agreement by officer of contractor, and agreement, dated May 24, 1929, covering proposals in contract, and signed by corporation and officer of contractor held parts of one agreement which became effective on officer's acceptance on May 24, 1929, as respects running of statute of limitations (Code Civ. Proc. § 359).

2. Contracts § 313(2)

Action of corporation's president in informing representative of company which had installed pneumatic tube service in corporation's store for ten-year term under rental

arrangement with acceleration provision in case of default in payments of rent, when representative sought to collect payment, that corporation could not continue service held to authorize action to accelerate remaining payments on ground of breach of contract that could not be remedied by delayed tender of installment, notwithstanding absence of statement in contract that time was of the essence.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by E. Ritchie against the National Nic-Nac Stores, Inc., and G. L. Veatch. From a judgment for plaintiff as against both defendants, G. L. Veatch appeals.

Affirmed.

Tudor Gardiner, of Los Angeles, for appellant.

Flint & MacKay, Irving G. Bishop, and Donald W. Hamblin, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

A money judgment was made and entered in favor of plaintiff against both defendants. G. L. Veatch alone appeals. The complaint was filed May 21, 1932.

The plaintiff and respondent herein is the assignee of the Lamson Company, Inc., a corporation. As the facts relate to this company and not to the nominal plaintiff, we shall refer to plaintiff-respondent as the Lamson Company.

The National Nic-Nac Stores, Inc., was a corporation conducting a so-called chain store business of merchandising. G. L. Veatch was the owner of 99/100ths of the stock, was a director and president thereof, controlled it completely while other members of his family made up the directorate.

[1] Under the date of May 10, 1929, the Lamson Company submitted a detailed contract and plan for the installation of a pneumatic tube service in one of the "Nic Nac Stores" to "National Nic-Nac Stores Inc." at the bottom of which is the following paragraph: "The foregoing proposal is void at the option of the contractor (Lamson Company) unless accepted within 10 days from date and is subject to the approval of an executive officer of the contractor, at Syracuse, New York. Submitted May 11, 1929. The Lamson Company, Inc., A. M. Coquengnoit, Selling Representative."

Another document, in effect an agreement between the parties covering the proposals in the document dated May 10, 1929, was signed as follows: "National Nic-Nac Stores, Inc. By G. L. Veatch, President who represents that he is duly authorized to sign this agreement. (Corporate Seal) Accepted at Syracuse, N. Y. May 24, 1929. The Lamson Company Inc. By F. D. Weeks Asst. Treasurer. (Corporate seal)." This later document was signed by Nic-Nac Stores and Veatch at the same time as the other document was signed, to wit, May 10, 1929.

It seems too obvious to argue about it that these two documents are actually but parts of one agreement and that they became effective as a contract when accepted by the eastern company on May 24, 1929. This was the trial court's finding and is important principally because appellant claims the statute of limitations runs from May 10 instead of from May 24. We think the statute began running on the later date, as the trial court found.

[2] In view of the issues upon this appeal, it will be well to here state that the service of the tube installation and not the apparatus installed was sold or rented for a ten-year term payable \$165 quarterly in advance and that the contract contains the following provision: "These presents are upon the condition that in the event of a breach by the User of any of the covenants or agreements herein contained, or if during the term of this agreement, or any extension thereof, bankruptcy or insolvency proceedings are commenced by or against the User, or if the User makes an assignment for the benefit of creditors, or if action is taken by or against the User to accomplish any of these ends, or if receivers are appointed to take possession of the business of the User, or if action is taken to accomplish this end, or if the User discontinues business in these premises, voluntarily or involuntarily, all unpaid amounts to the end of this agreement, or any extension of it, shall, without notice or demand by the Owner, be at once precipitated and become due and payable, and in addition thereto the Owner may enter the premises, forcibly if necessary, take possession of and remove this system and thereby terminate all rights and interests of the User therein. It is agreed that the User's interest therein shall be valued at a sum equal to twenty per cent. of the amount of the payments for said unexpired term, and that this amount shall be al-

lowed in deduction of the User's obligation herein."

The service was installed and put in operation and a quarterly payment fell due March 1, 1932, and was not met although a cashier's check purchased by Geo. L. Veatch personally for \$165 was tendered May 14, 1932, and was declined. Lamson Company considered the contract breached and brought this action praying for an acceleration of the remaining payments. This tender of the March payment was after Veatch had told the Lamson representative before March 1, 1932, that it would be impossible for the National Nic-Nac Stores to continue with the tube service; that the company could not pay any more money for tubes; and that the Lamson representative should see the company's attorney. The Lamson representative testified that at the same time Mr. Veatch stated to him "that he wishes us to remove the system because the National Nic Nac Stores did not have a dime, and that it was not possible for them to make any further payments; that they did not intend to do anything that they couldn't do." This, it appears to us, constitutes a breach of the contract that could not be remedied by a mere delayed tender of the current installment even though the contract does not contain a definite statement that time was of the essence.

The trial court also found upon competent evidence: That on January 28, 1932, Veatch as president of Nic-Nac Stores sold all the stock in trade of the stores conducted by it to himself individually at less than the true value and on February 3, 1932, as president of the Nic-Nac Company, executed to himself individually a bill of sale to all of the fixtures owned by Nic-Nac Stores; that Veatch continued to conduct the same general kind of business in the premises in which the Lamson tubes were installed; that such sale and such mortgage were fraudulent; that the Nic-Nac Company was the alter ego of Veatch; that section 359 Code Civ. Proc. (statute of limitations) began to run as of the 24th day of May 1929, and that the action was not barred; that there was a breach of the contract that accelerated the payments and entered judgment accordingly. The evidence amply supports the court's findings and the judgment that was entered thereupon.

The judgment is affirmed.

I concur: CRAIL, J.

**BOURDIEU v. BAKER et al. (BOURDIEU,
Intervener).
Civ. 1377.**District Court of Appeal, Fourth District,
California.

April 12, 1935.

Rehearing Denied May 11, 1935.

Hearing Denied by Supreme Court
June 10, 1935.**1. Specific performance ⇨57**

Agreement constituting only option to purchase land could not be specifically enforced until offer to sell contained therein was accepted by payment or tender of money on or before date specified in accordance with time limit contained in agreement.

2. Specific performance ⇨25

Acceptance of offer to sell land must be unconditional, and in accordance with terms of offer, and an acceptance based upon terms varying from those offered constitutes rejection as respects right to specifically enforce agreement (Civ. Code, § 1585).

3. Specific performance ⇨97(3)

Where agreement for sale of land made no provision for escrow, the placing of money required by terms of agreement in escrow in bank, even if notice thereof was given to vendor, would not constitute tender or offer of performance within statute authorizing offer of performance in event person to whom offer is to be made cannot be found with reasonable diligence (Civ. Code, § 1489).

4. Vendor and purchaser ⇨170

Where agreement for sale of land called for unconditional payment to vendor of certain amount on or before named date, deposit in escrow requiring vendor to furnish deed and title and authorizing bank to deduct amount not authorized under agreement held not tender or sufficient offer to perform (Civ. Code, § 1500).

5. Specific performance ⇨119

Burden rested on purchasers, if they desired to exercise option to buy land, to pay money to vendor, or to make unconditional tender in manner provided by law.

6. Vendor and purchaser ⇨18(3)

Deposit of money in escrow with bank as agent of depositors, to be paid only on unauthorized conditions to vendor in agreement for sale of land, not in compliance with terms of option agreement, was not sufficient tender or offer of performance.

7. Vendor and purchaser ⇨187

Vendor in agreement for sale of land did not by suggesting change in terms and in allowing purchasers to endeavor to secure his wife's signature to deed waive right to un-

conditional payment within time named in agreement, since contract was at an end theretofore by reason of the fact that money was not paid or sufficient tender made on or before required date.

8. Estoppel ⇨52

There can be no waiver as to a right that has been lost.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Edward Bourdieu, also known as Ed Bourdieu, against R. C. Baker and others, wherein Marie Bourdieu intervened. From the judgment, plaintiff and intervener appeal.

Reversed, with directions.

William H. Metson, of San Francisco, and J. W. Coleberd, of South San Francisco, for appellants.

Everts, Ewing, Wild & Everts, of Fresno, and Fred Eugene Butler, of Coalinga, for respondents.

BARNARD, Presiding Justice.

The plaintiff brought this action to quiet title to approximately 820 acres of land in Fresno county. The defendants set up a claim to the land under an option to purchase the same, which reads as follows:

"Coalinga, California,

"October first, A. D. 1928.

"Received of Hans R. Sumpf the sum of ten dollars, as part payment for the following described real property situate County of Fresno, State of California (description). The entire price to be paid for said above described real property is \$25,000.—(twenty-five thousand dollars), and to be paid as follows:

"\$3000.—on or before thirty days from date hereof, the balance to be paid on or before six months from date hereof, or purchaser to assume mortgage of \$22,000.—and clear other property also included in said mortgage.

"Title to be perfect; good and sufficient deed to be executed and delivered by the said Ed Bourdieu to Hans R. Sumpf or his assigns on or before the first day of March, A. D. 1929, together with an abstract showing a merchantable title.

"Provided, however, that the payment of \$3,000.—is paid at said date, but if not paid on or before the said first day of November A. D. 1928, then this contract to be of no effect

and in that event the said \$10.—to be retained by Ed Bourdieu as liquidated damages.

"Time is of the essence of this contract.

"Ed. Bourdieu,

"Hans R. Sumpf.

"Witnessed by Sophie M. Sumpf."

It is alleged that this agreement has been assigned by Sumpf to a partnership composed of the four individual defendants. It is further alleged that on or about October 29, 1928, the defendants caused the sum of \$3,000 to be placed with the Coalinga branch of the Security-First National Bank of Los Angeles, with instructions to deliver the same to Ed Bourdieu upon demand. Another allegation is that the defendants had performed all acts necessary to be performed in accordance with the terms and conditions of the contract referred to and "still stand ready, able and willing to perform any further and additional terms thereof." The wife of the plaintiff filed a complaint in intervention based upon the fact that the real property in question was the community property of herself and the plaintiff, and that she had not consented to the execution of the option agreement.

While the court found in favor of the defendants, it found that the land was community property and that the plaintiff had acquired title to an undivided two-thirds interest therein after July, 1917. As a conclusion of law, it was found that the agreement in question was binding with respect to an undivided one-third interest in said land, but that the same was not binding with respect to an undivided two-thirds interest. Judgment was entered quieting title in the plaintiff, as such community property, with respect to an undivided two-thirds interest in the land and ordering the plaintiff to convey to the defendants an undivided one-third interest therein upon the payment to him of the sum of \$1,000 and upon the payment to the party holding a mortgage on the land of the sum of \$7,333.33. From the judgment in favor of the defendants, both the plaintiff and the intervenor have appealed.

The main point urged in support of the appeal is that the evidence is insufficient to support a portion of the findings wherein the court found "that within the time provided by the said agreement the said R. C. Baker, J. Zwang, Adolph Kreyenhagen and Hans R. Sumpf tendered and offered to pay to the plaintiff the sums specified in said agreement to be paid on account of the purchase price therein provided, and have truly kept and performed all the covenants and conditions of the said agreement on their part to be kept

and performed; that plaintiff refused said tender and offer of payment, has at all times refused, and does now refuse said tender and offer." While the respondents concede that the sum of \$3,000 was not paid to the plaintiff within the time named in the option agreement and that the same has never been paid to him, it is their contention that they made a timely offer of performance "in substantial conformity with the provisions of the contract."

The evidence relied upon to show an offer of performance in substantial conformity to the option agreement is as follows: On October 29, 1928, the defendant Sumpf wrote a letter to the plaintiff reading as follows:

"October 29, 1928.

"Mr. Ed. Bourdieu, Coalinga, California

"Dear Sir: Please be advised that in pursuance of that certain Contract of Purchase dated October 1st, 1928, covering your Polonero Ranch, consisting of approximately 820 acres of land; there has been, this day, placed in escrow at the Coalinga Branch Los Angeles First National Trust & Savings Bank, the sum of three thousand dollars (\$3,000.00).

"I suggest that you see me as early as possible in order that we may complete arrangements for closing the transaction.

"Yours very truly,

"Hans R. Sumpf.

"P. S. I am leaving this afternoon for Los Angeles, but will return to Coalinga, and can see you Saturday, November 3rd, and if it is convenient for you I suggest that you see me on that day so we may close the entire transaction."

This letter was received by the plaintiff on November 1, 1928. On October 29, 1928, the manager of the bank in Coalinga received from Sumpf and two of the other defendants, the following instructions:

"We hand you herewith:

"(a) Three thousand dollars (\$3,000.00).

"(b) Copy of Contract, Receipt and Option, between Ed. Bourdieu and Hans R. Sumpf dated October 1st, 1928.

"(c) Copy of assignment of Option between Hans R. Sumpf and Sophie M. Sumpf, and R. C. Baker, J. Zwang, and Adolph Kreyenhagen, a copartnership.

"You are hereby instructed:

"First. To order preliminary report on the title of the property described as follows: (description).

"Second. To ascertain from the Bank of South San Francisco the amount due said

bank as interest on any mortgage or mortgages existing against the above described property, up to the first day of November, 1928.

"Third. When you have in your possession a good and sufficient deed conveying the above described property from Ed. Bourdieu and Mary Bourdieu, husband and wife, to R. C. Baker, J. Zwang, and Adolph Kreyenhagen, and Hans R. Sumpf, a copartnership, and the preliminary report above, which are first to be approved by us, then and in that event you are to deliver to Ed. Bourdieu or order any amount out of said three thousand dollars (\$3,000.00) which may remain, after payment of interest due to November 1st, 1928, on a mortgage or mortgages which we understand now exists against said property, and now held by the Bank of South San Francisco, and any taxes or other lien which may be against the said property, the preliminary report of title and also one-half of your fees in connection with this escrow.

"Fourth. The copy of Contract, receipt, and Option and Assignment of Option handed you herewith are for your information only and upon fulfillment of instructions under paragraph Third above, you are to deliver these two documents to Hans R. Sumpf.

"Fifth. Upon satisfactory proof to you that the above requirements as to the payment of the balance of twenty-two thousand dollars (as per the Option Agreement) or the assumption or clearing of said mortgage have been satisfactorily complied with, then and in that event you are to deliver said deed to Hans R. Sumpf, et al.

"Yours very truly,

"Hans. R. Sumpf,
"A. Kreyenhagen,
"J. Zwang."

This manager testified that after receiving these instructions he wrote to the plaintiff as follows:

"This is to notify you that there has been deposited in this office the sum of \$3,000.00 for payment to you on the contract which you signed with Hans R. Sumpf and Sophie M. Sumpf, on the first day of October, 1928. The said contract covering (description of the property).

"Will you kindly call at your earliest convenience and greatly oblige."

He testified that this letter was mailed on October 29, 1928, but does not say who mailed it, and the plaintiff denied that he ever received it. Another letter is in evidence, reading as follows:

"We hand you herewith three thousand dollars (\$3,000.00), also copy of contract dated October 1st, 1928, and entered into between Ed. Bourdieu and Hans R. Sumpf.

"Said three thousand dollars (\$3,000.00) is the payment due on or before November 1st, 1928, and you are therefore instructed to turn said amount over to Ed Bourdieu, or order, upon demand.

"Yours very truly,

"Hans R. Sumpf."

This was handed to the manager of the bank on October 29, 1928, but whether before or after he had written the letter to the plaintiff, above set forth, does not appear. In any event, nothing in relation to its contents was ever communicated to the plaintiff.

There is evidence that the defendants deposited \$3,000 in their own account in this bank on October 29, 1928. On October 30, 1928, the bank issued a cashier's check for \$3,000 payable to the plaintiff, but kept this check in the escrow in the bank. On November 3, 1928, Sumpf met the plaintiff on the street and asked him if he had received his letter. The plaintiff replied that he had received the letter, and said: "It is not in accordance with our agreement, Mr. Sumpf. You agreed to give me \$3,000 in cash if you took my place—if you bought my place, I mean, and you failed to do so, so I call the option void."

Some time in November or December of that year, the plaintiff told the defendants that his wife would not sign a deed. At the suggestion of the defendants, some time later, some of the parties went to see Mrs. Bourdieu at San Jose and endeavored to get her to sign a deed, which she refused to do. There is evidence that at the conversation when the plaintiff told the defendants that his wife would not sign a deed he asked them whether he could retain twenty acres of the land which surrounded his sheep camp, and the defendants told him that if he would place this deed in escrow, in accordance with the escrow instructions, they would give him a deed for that twenty acres. On January 4, 1929, the defendants executed and delivered to the bank a note for \$22,000, in which the date of the note and the time of payment were left blank, whereupon the manager of the bank wrote to the plaintiff advising him that \$22,000 had been deposited in that office for payment to him in connection with the contract of October 1, 1928. On April 4, 1929, the defendants were allowed by the bank to indorse the cashier's check which had been placed in the escrow in the bank, and to with-

draw the \$3,000 represented thereby, at which time the defendants substituted and left with the bank a note for that amount without date, and in which the time of payment was left blank. The manager of the bank testified that the bank has ever since held this note under the escrow instructions relative to the Bourdieu property and at all times has been ready to turn over the money upon presentation of the deed by the plaintiff.

[1, 2] It is conceded by both parties, as it must be, that the agreement here in question constituted only an option to purchase the land referred to therein. *Johnson v. Clark*, 174 Cal. 582, 163 P. 1004. In effect, it was an offer to sell the land which would become a binding contract when the offer was accepted by the payment or tender of the money on or before November 1, 1928, in accordance with the time limit contained therein. Until so accepted, it was not an agreement which could be specifically enforced. *California Land Security Co. v. Ritchie*, 40 Cal. App. 246, 180 P. 625. Under well-settled principles, the acceptance of such an offer must be unconditional, must be in accordance with the terms of the offer, and an acceptance based upon terms varying from those offered constitutes a rejection of the offer. *Lambert v. Gerner*, 142 Cal. 399, 76 P. 53; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 P. 366, 68 L. R. A. 226; Civ. Code, § 1585.

No money was paid to the plaintiff within the time limit prescribed by the contract, and the only question remaining is whether a tender or offer of payment was made within the time which was a sufficient compliance with the agreement, which was unconditional or which the plaintiff was bound to accept.

[3] Section 1489 of the Civil Code provides where an offer of performance may be made in the event the person to whom the offer is to be made cannot be found with reasonable diligence. There is no evidence in the record before us that the plaintiff could not be found, that any effort whatever was made to find him or to make to him any tender or offer of performance other than by placing the money in escrow in this bank. The agreement made no provision for any such escrow and even if notice thereof was given to the plaintiff within the time it did not constitute a tender or an offer of performance. Section 1500 of the Civil Code provides that an obligation for the payment of money may be extinguished by due offer of payment if the amount is immediately deposited in the name of the creditor in some bank and notice thereof is given to the creditor. Not only was there no obliga-

tion here until one was created by an acceptance of the offer and a sufficient tender, but no money was deposited in the bank in the name of the plaintiff nor was he ever notified that such a thing had been done. The only money deposited in this bank was in the name of the defendants and while a cashier's check was issued the next day, it was placed in escrow in the bank and the plaintiff was never even notified that it had been issued.

[4] While the agreement called for the unconditional payment to the plaintiff of \$3,000 on or before November 1, 1928, the only deposit which was made in the bank even after the cashier's check was issued was held in escrow and the bank was instructed not to deliver any of the money to the plaintiff until it had ordered a preliminary report on the title and ascertained the amount due as interest on the mortgage on the property, and then not until after it had received a deed conveying the property and the defendants had approved the preliminary report on the title. Even at that time the bank was not to turn over the full sum of \$3,000 but was to deduct not only the amount of any interest and outstanding liens, but also the cost of the preliminary report on the title and one-half of the bank's fees in connection with the escrow. The last item, at least, the plaintiff had never agreed to pay. While the agreement provided that the plaintiff was to receive \$3,000 not later than November 1, 1928, and that he was to have until March 1, 1929, to furnish a deed and title, the terms under which the bank held the money required him to furnish a deed before he received such part of the \$3,000 as might remain after the payments named. These instructions entirely changed the terms of the contract and the evidence entirely fails to show any tender or sufficient offer to perform.

[5] A further consideration is that even these changed terms were not communicated to the plaintiff within the time allowed. On the last day on which the performance could be made the plaintiff received a letter from one of the defendants, the one with whom he had made the agreement, advising him that \$3,000 had been placed in escrow at the bank and suggesting that he see this defendant as early as possible in order that they might complete arrangements for closing the transaction, but advising him that he could not do this until November 3. So far as is shown by the evidence, this was the only thing received by the plaintiff which even indicated that any attempt was being made to comply with the agreement. This was far from a

tender or offer of performance and, at best, could only inform the plaintiff that the amount which was to be unconditionally paid on that date had been placed in escrow in the bank. The only possible effect of this was to advise the plaintiff that the money had been placed there upon some condition when no condition was authorized by the agreement. In effect, the plaintiff was thus told by the only party interested, so far as he knew, that the money had been deposited upon some condition the nature of which was not disclosed, that it would not be paid to him before November 3, and not then unless something else was done. If it be assumed that the letter which the manager of the bank says was mailed on October 29 was also received by the plaintiff, it could not be presumed that it was received before November 1, the date on which the plaintiff received the letter from Sumpf, since the only testimony is that both letters were mailed at Coalinga on the same day. If this letter from the bank was received by the plaintiff, and no matter when it was received, it merely advised him that the sum of \$3,000 had been deposited in the bank for payment to him on the contract, and asked him to call at his earliest convenience. It did not purport to advise him that the money had been deposited to his account or that the money would be paid to him if he did call. It adds nothing to the letter he did receive from the defendant Sumpf, and the plaintiff would be fully justified, if he considered the letter at all, in considering it as a confirmation of Sumpf's statement that the money had been placed in the bank in escrow. The letter handed to the bank by Sumpf on October 29, 1928, stating that \$3,000 was inclosed therewith together with a copy of the contract, that the same was the payment due on the contract on or before November 1, 1928, and that the bank was instructed to turn said amount over to the plaintiff upon demand, was never called to the plaintiff's attention and if it be considered as changing instructions to the bank, which was acting as the agent of the defendants, it certainly had no effect in so far as making the money available to the plaintiff is concerned and, regardless of any instructions to the defendants' agent no tender or offer of performance is shown to have been made to the plaintiff. The bank was unknown to the plaintiff, so far as this transaction is concerned, and no obligation rested upon him to go to that bank or to make a demand for the money even if he had been notified that such a demand might be honored. The burden rested upon the defendants, if

they desired to exercise the option, to pay the money to the plaintiff, or to make an unconditional tender in the manner provided by law.

The respondents seek to bring this case within the rule laid down in *Kofoed v. Gordon*, 122 Cal. 314, 54 P. 1115, in which it was held that the provisions of section 1501 of the Civil Code are broad enough to include within their scope not only the thing offered, but also the conditions upon which the offer of performance is made to depend, and that if it is accompanied by improper conditions, which the creditor is not bound to perform, and no objection is made thereto by the creditor, all objections to the improper conditions are waived. This case has no application here. The burden was upon the defendants to make a sufficient tender or offer of performance and to make this to the plaintiff within the time named. The one attempt at performance of this obligation did not constitute a tender or offer of performance, but the money was placed in escrow with a third party upon conditions which the defendants had no right to make, and the plaintiff was not even informed what the conditions were or given any opportunity to object to the same.

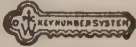
[6] The deposit of this money with the bank as agent of the depositors, to be paid to the plaintiff only on unauthorized conditions, did not comply with the terms of the option agreement and is not a sufficient tender or offer of performance. *Segno v. Segno*, 175 Cal. 743, 167 P. 285; *Righetti v. Righetti*, 5 Cal. App. 249, 90 P. 50. No tender was made, no sufficient offer of performance was brought to the attention of the plaintiff, and we think the evidence entirely fails to sustain that portion of the findings which is here attacked.

[7, 8] It is further urged that the plaintiff, by suggesting a change in the terms and in allowing the defendants to endeavor to secure his wife's signature to a deed some time during November or December, recognized the continued existence of the contract and waived his right to an unconditional payment of the \$3,000 within the time named. There can be no waiver as to a right that has been lost. *San Bernardino I. Co. v. Merrill*, 108 Cal. 490, 41 P. 487; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 99 P. 994. The contract was at an end when the money was not paid or a sufficient tender made on or before November 1. The evidence indicates nothing other than further negotiations in an effort to make a different contract, which were never completed.

Under the view we take of the main issue presented, the other points raised by both appellants require no consideration.

The finding essential thereto being unsupported by the evidence, that portion of the judgment which is in favor of the defendants is reversed, with instructions to the trial court to make findings in accordance with the view herein expressed and to enter a judgment in favor of the plaintiff.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 430

WOODRUFF v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 10360.

District Court of Appeal, Second District,
Division 1, California.

April 25, 1935.

Certiorari Ⓒ31

Writ to review order revoking void order which purported to release from lien of attachment property owned by petitioner was denied, where justification of sureties and approval thereof by commissioner rendered effective prior order which ordered release of attachment upon filing of such undertaking.

Petition by Leonard J. Woodruff for a writ of review of an order made by the Presiding Judge of the Superior Court of Los Angeles County, in an action wherein petitioner was defendant.

Writ denied.

Edward Fitzpatrick and George F. Talbot, both of Los Angeles, for petitioner.

PER CURIAM.

The petitioner herein asks for a writ of review of an order made by the presiding judge of the superior court of Los Angeles county on April 19, 1935, in an action wherein petitioner was defendant. The order of April 19th is an ex parte order revoking and setting aside an order of April 18, 1935, purporting to release from the lien of an attachment, certain real property of the defendant Woodruff.

We understand that the order of April 18th so set aside is the order of that date signed by Judge Bishop, and not the prior order of the same date made by the court commissioner upon the justification of sureties on undertaking given for release of said property from attachment.

We are of the opinion that said order signed by the judge on April 18th was void on the face of the record, and at least for that reason the order of April 19th is valid. The justification of sureties and approval thereof by the commissioner completed all that was necessary to make effective the order of March 22, 1935, wherein the court had determined the amount of undertaking for release of said property from attachment, and had ordered that the attachment be released upon the filing of said undertaking.

For the foregoing reasons the petition for writ of review is denied.



6 Cal.App.2d 277

PEARSON et al. v. REED et al.

Civ. 8968.

District Court of Appeal, Second District,
Division 1, California.

April 19, 1935.

Hearing Denied by Supreme Court
June 18, 1935.

1. Malicious prosecution Ⓒ42

City prosecutor, acting solely in his official capacity, is not liable in damages for criminal prosecution instituted without his knowledge, but maintained and carried on maliciously and without probable cause.

2. District and prosecuting attorneys Ⓒ8

Authority of city prosecutor, who is a quasi judicial officer and also an executive officer, to investigate facts before acting, is unlimited, and matter rests in his own discretion.

Whenever an act undertakes to determine a question of right or obligation or of property as foundation on which it proceeds, such act is, to that extent, a "judicial" act. Wherever discretionary judgment depends for its guidance upon evidence to be heard, that judgment will be "judicial" in its nature.

[Ed. Note.—For other definitions of "Judicial," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Genevieve Pearson and others against G. E. Reed, Charles P. Johnson, and others. From a judgment for plaintiffs, defendant Johnson appeals.

Reversed, with directions.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and John L. Bland and Thatcher J. Kemp, Deputy City Attys., all of Los Angeles, for appellant.

L. H. Phillips, of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal by defendant Charles P. Johnson from three separate judgments after verdict awarding plaintiffs damages for malicious prosecution.

Defendant Johnson was city prosecutor of the city of Los Angeles. Plaintiffs Genevieve Pearson, Cora Skeen, and J. L. Skeen were arrested and charged in the municipal court of Los Angeles with the crime of petty theft. They were imprisoned for about two and one-half hours, released upon their own recognizance, tried, and found not guilty of the crime charged. They instituted this action for malicious prosecution and false arrest against defendant Johnson and others; the case was tried before a jury; and they recovered damages on the cause of action for malicious prosecution. From the judgments entered on the verdicts in favor of each of the plaintiffs, defendant Johnson appeals.

A question involved, which is determinative of the case, is whether defendant Johnson is liable in a civil action for damages sustained through prosecution of a criminal action maintained by him with malice and without probable cause. The defendant, in addition to other defenses, claims immunity from such liability because the acts with which he was charged were performed in his capacity of city prosecutor, in which office it was his duty to cause criminal complaints to be filed and to conduct prosecutions for violations of city ordinances and for other misdemeanors.

Plaintiff Genevieve Pearson was the owner of an apartment house in the city of Los Angeles which was managed for her by plaintiffs Cora Skeen and J. L. Skeen. Defendants G. E. Reed, Alice M. Reed, and Lucille Reed were tenants in the apartment house, and were indebted to Mrs. Pearson for rent in the sum of \$205, much of which was long

overdue. While the Reeds were absent from their apartment, plaintiffs Skeen, at the direction of Mrs. Pearson, removed the personal property and effects of the Reeds from their apartment into a vacant apartment, and they thereafter refused to surrender the same to the owners thereof, claiming the right to hold it under a lien in the amount of the unpaid rent. The Reeds demanded possession of their property, but did not pay, or offer to pay, the debt. The Reeds then applied to a deputy city prosecutor, one Wygant, who issued a complaint for petty theft. Plaintiffs, upon being arrested, communicated with their attorney, who in turn communicated to Johnson the fact that the complaint had been issued and the defendants in said complaint arrested. This attorney requested that Johnson cause the complaint to be dismissed, which Johnson refused to do. Johnson had known before the complaint was issued that it had been applied for and that his office had notified some or all of the persons against whom the complaint was lodged to come to his office and give their side of the story, which request had been refused. He had personally talked over the telephone with Mrs. Pearson, and had invited her to come into the office to discuss the merits of the complaint. It appears further that Johnson had previously discussed the law with the same attorney, who was representing an association of apartment house owners and managers, and he had assigned the special work of handling cases dealing with the lien law in question to the deputy who subsequently issued the complaint. Johnson did not know that a complaint was to be issued, nor did he learn that it had been issued except from the attorney who communicated that fact to him. There was testimony to the effect that Johnson had discussed with the attorney for the Apartment House Owners Association the law dealing with the lien rights of apartment house operators upon the baggage and other personal effects of their tenants, and that he had been furnished with a brief of the law on the subject and had expressed the opinion that such a lien right existed.

The record contains evidence of later conversations between Johnson and the attorney and others, in which statements were made by Johnson which were relied upon at the trial, and which are relied upon here, as evidence of malice toward the plaintiffs. It is not necessary to set forth the substance of these conversations. We have related sufficient facts leading up to the issuance of the criminal complaint to show that the case came to defendant Johnson in the usual

routine of his office as city prosecutor. His relation to the case was that of a public officer and none other. He acted throughout in his official capacity. He had no personal interest in the questions involved and had no previous acquaintance with the accused persons.

[1] In considering the sufficiency of the facts thus stated to charge Johnson with liability for damages for malicious prosecution, we will assume that the findings of the jury that the prosecution was malicious and without probable cause are sustained by the evidence. There is thus clearly presented the question whether a public prosecutor, acting solely in his official capacity, is liable in damages for a criminal prosecution instituted without his knowledge, but maintained and carried on maliciously and without probable cause.

Principles of public policy declared and expounded by courts which have given the subject exhaustive consideration lead irresistibly to the conclusion that no such liability exists. No policy has been declared and maintained more firmly than the one which preserves the independence and freedom of action of judicial and quasi judicial officers acting in official capacity. The exemption runs as to liability for damages resulting from official acts, although they be done without probable cause and with malice. There are but few cases in which the courts have been called upon to decide whether the immunity is extended to a prosecuting officer. The latter question has not been decided in California. In approaching a consideration of the question, it will be helpful to review briefly the principles underlying the rule.

In *Bradley v. Fisher*, 13 Wall. (80 U. S.) 335, 337, 347, 20 L. Ed. 646, 647, Justice Field used the following language: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. [*Taafe v. Downes*, 3 Moore, P. C. 41 n.] The principle, therefore, which exempts judges of courts of su-

perior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

* * * The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

In *Cooley on Torts* (3d Ed.) vol. 2, p. 795, the author says: "Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer. The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive and others whose authority is exceedingly limited."

In *Spalding v. Vilas*, 161 U. S. 483, 16 S. Ct. 631, 637, 40 L. Ed. 780, the court had under consideration an action for damages against the Postmaster General, founded upon the circulation with alleged malicious motives of a false and misleading circular. In an opinion written by Justice Harlan, which reviewed the earlier American and English

cases relating to judges and other officers, it was held that the immunity should be extended to the Postmaster General as a defense to the charges against him. The following language was used: "We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply, to a large extent, to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. * * * In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. * * * In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as postmaster general. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial."

In *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489, it was held that a similar action could not be maintained against the members of the board of pilot commissioners for alleged malicious actions performed in the course of their official duties. The court held that the powers of the board members were quasi judicial and that they were not answerable in a civil action for damages, and the case was disposed of with a statement reading: "Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment."

Upon the reasoning of the court in *Bradley v. Fisher*, supra, our Supreme Court decided, in *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep.

48, that grand jurors are not liable in civil actions for damages, for the reason that to subject them to such liability would be against the policy of the law. It was said in that case, in approving the holding in *Downer v. Lent*, supra, that pilot commissioners were quasi judicial officers: "This is equally true of grand jurors. They have certain duties to perform under the law of a quasi-judicial character, and in the performance of such duties the law invests them with judgment and discretion. The grand jury was an essential part of the machinery of the County Court. They were not volunteers, but were engaged in the performance of a duty that was compulsory. In finding the indictment complained of, they acted within the legitimate sphere of their duty, and cannot be held civilly responsible."

In *Smith v. Parman*, 101 Kan. 115, 165 P. 663, L. R. A. 1917F, 698, it was held that a public prosecutor could not be sued for malicious prosecution. It was there held that a prosecutor, in deciding whether a particular prosecution should be instituted or followed up, performs much the same functions as a grand jury, and it was said: "We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law."

Also in *Griffith v. Slinkard*, 146 Ind. 117, 44 N. E. 1001, 1002, it was said that a prosecuting attorney is "an officer intrusted with the administration of justice. * * * 'Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.' * * * There is, therefore, no more liability against the prosecuting attorney than there is against the grand jury for the return of an indictment maliciously and without probable cause."

In *Yaselli v. Goff*, 12 F.(2d) 396, 404, 56 A. L. R. 1239 (affirmed in 275 U. S. 503, 48 S. Ct. 155, 72 L. Ed. 395), the question of liability of an assistant United States attorney for malicious prosecution was presented to the United States Circuit Court of Appeals of

the Second Circuit. The cases we have referred to, and many others, were considered by that court, and it was held: "A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him. * * * In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case." In applying the doctrine thus announced, the court held that a case was not stated against the defendant, although it was alleged, not only that he prosecuted the criminal action maliciously and without probable cause, but that he also maliciously procured his appointment as assistant United States attorney in order to enable him so to do. These facts, the court held, did not relax or avoid the doctrine of immunity.

The Supreme Court of Oregon, in *Watts v. Gerking*, 111 Or. 641, 222 P. 318, 228 P. 135, 141, 34 A. L. R. 1489, upheld a judgment sustaining a demurrer and dismissing an action for malicious prosecution against a district attorney charged with instituting and prosecuting a criminal charge without probable cause and with malice. The decision quoted was upon rehearing, and the court recalled and set aside its former decision which had held the other way. The question was very carefully considered, and, like the other authorities we have cited, is quite persuasive. A statement in the opinion which is appropriate reads: "In reaching a decision we are confronted with a determination that concerns public policy. We are face to face with a law-enforcing problem. Criminal law does not enforce itself. It demands the assistance

of valid evidence and fearless officials to put it in execution."

As will be seen from reading the foregoing cases, there are many authorities which support the general principles of public policy that are involved in actions of this nature against public officials. But we think further citation is unnecessary. The duties of a prosecuting officer are such as to clearly bring him within the class of public servants who by their official acts incur no civil liability.

In the case of *Leong Yau v. Carden*, 23 Haw. 362, the court reached a different conclusion. It was there held that a public prosecuting officer, in determining whether the prosecution should be instituted, acts in a quasi judicial capacity; that he is not to be held liable in damages for an honest mistake or error in judgment, but is to be held liable if he prosecutes without probable cause and with malice. This case and the authorities therein relied upon were discussed in *Yaselli v. Goff and Watts v. Gerking*, supra, and found to be unsupportable in a case where a prosecuting officer is accused on account of acts done in his official capacity.

In *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77, 15 Ann. Cas. 484, the court upheld the sufficiency of a complaint charging the district attorney, his assistant, and the sheriff with malicious prosecution. The same case was before the District Court of Appeal in 15 Cal. App. 589, 119 P. 391, where a judgment in favor of the defendants was affirmed. The question of immunity of the defendants was not raised or decided in either case, and they are therefore not authority on the point. It is conceivable that the defendants may have chosen to go to trial on the merits without relying upon the special defense.

While cases involving prosecuting officers have rarely been before the courts, they have been sufficient in number and have received such thoughtful consideration as to firmly establish a rule of public policy which bars such actions as the present one. The appellant Johnson at no time acted in any private capacity. Charges were laid before his deputy in a regular manner; a complaint was issued; and the action was prosecuted as any other case would be. No step was taken by the defendant in excess of his authority. Whatever may have been his actuating motive, his acts were those of a public official and not a private citizen.

[2] A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by

the person accused—exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited, and the matter rests in his own discretion. He is a quasi judicial officer, and he is also an executive officer. It was decided in *Singh v. Superior Court*, 44 Cal. App. 64, 185 P. 985, that a district attorney is an executive, as distinguished from a judicial officer within the meaning of section 67, Pen. Code, which declares it to be a felony to offer a bribe to an executive officer of the state. The court did not have before it the question we are discussing, and decided nothing with which we are not in accord. It is the nature of the duty performed that determines whether it is a judicial act—not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers. In *Smith v. Strother*, 68 Cal. 194, 8 P. 852, 854, quoting from *Central P. R. Co. v. Gallatin*, 99 U. S. 727, 761, 25 L. Ed. 504, 516, it was said: "Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is, to that extent, a judicial one, and not the proper exercise of legislative functions." Another definition is found in *Rigdon v. Common Council*, 30 Cal. App. 107, 157 P. 513, 515, reading: "Primarily, of course, a city council, board of supervisors, or like body, exercises ministerial and legislative functions. Quite generally and almost invariably added to these duties is the requirement that judicial or quasi judicial functions shall be called into exercise, and generally it may be said that wherever discretionary judgment depends for its guidance upon evidence to be heard that judgment will be judicial in its nature." They are quasi judicial officers and bodies, and their acts may be either judicial or they may be something else; it all depends upon the duties concerning which the question arises.

The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit

thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement. We are well aware of the fact that in thus shielding the public prosecutor against actions of this sort the rule may work hardship and injustice in individual cases. But there is no middle ground to be occupied in the matter; either all such suits are to be tolerated or none. We are confronted with the not unusual situation that calls for the subordination of the rights of the few to the interests of the whole body of the public. The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is only that they may be enabled to render a better public service.

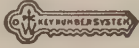
Under the conclusions which we have reached, and which we are satisfied are in accord with the best considered cases and with sound public policy, the defendant and appellant Johnson, upon the facts shown in the record which are most favorable to the respondents, cannot be held to be under any civil liability to plaintiffs and respondents, and the several judgments against him in favor of the respondents should be reversed. Inasmuch as the action cannot be maintained under the allegations of the several causes of action of the complaint, the case should be dismissed.

Other points are urged by the appellant, who earnestly insists that the evidence was insufficient to support the findings that he acted maliciously, and alleged errors in the admission of evidence are also relied upon. As the case will not be retried, it is unnecessary to decide these points.

The judgments in favor of the several plaintiffs, Genevieve Pearson, Cora Skeen,

and J. L. Skeen, against Charles P. Johnson, are reversed, and the lower court is directed to dismiss the action as to said defendant.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 136

PAYNE v. PATHE STUDIOS, Inc., et al.
Civ. 9280.

District Court of Appeal, Second District,
Division 2, California.
April 12, 1935.

1. Contracts ⇨169

Where terms of contract are uncertain, or not clear as to its purpose and effect, or when ambiguous, whether transaction which contract purports to evidence is a contract of one kind or of another must be determined from all the circumstances giving rise to it.

2. Appeal and error ⇨1008(3)

Trial court's construction placed on uncertain, confused, or ambiguous contract in view of surrounding circumstances will not be disturbed on appeal where question was presented by appropriate pleadings and trial court's construction is reasonable and sustained by the language of the instrument and appears to be consistent with true intent of the parties, though contrary construction would be equally tenable.

3. Appeal and error ⇨1008(1)

Whether contract was option on services of plaintiff's assignor or was an agreement to engage services of plaintiff's assignor for at least four weeks with a guarantee of \$5,000 as minimum compensation *held* for trial court.

4. Master and servant ⇨70(1), 80(1)

Where film company agreed to engage actress for at least four weeks' work at \$1,250 per week and actress was at all times ready, able, and willing to perform such work but was not called on to do so, actress *held* entitled to \$5,000, since action for minimum amount provided in contract was not an action for breach of contract or for penalty or liquidated damages, but an action on the contract.

5. Master and servant ⇨80(1)

Where complaining party to contract for hire was prevented from working by defend-

ant, contract need not be treated as broken, but complaining party, though he has performed no service under it, may sue on the contract and recover the agreed compensation.

6. Damages ⇨78(1, 6)

Master and servant ⇨70(1)

Minimum payment clauses in contracts of sale or for services are valid between the parties, and provisions for such minimum payments are not to be deemed provisions for liquidated damages.

7. Damages ⇨76

Provisions for a penalty or for liquidated damages apply only in case of a breach of contract and not to contract providing for minimum payment to employee.

8. Master and servant ⇨80(11)

Where film company agreed to engage actress for at least four weeks' work at \$1,250 per week and actress was at all times ready, able, and willing to perform the work but was not called on to do so, actress *held* entitled to minimum amount specified, though she was employed during a large portion of the period in question.

9. Master and servant ⇨80(11)

Where film company agreed to engage actress for at least four weeks' work at \$1,250 per week and actress was at all times ready, able, and willing to perform such work but was not called on to do so, actress *held* not required to secure other employment since contract of hire did not require actress to give all or the greater part of her time and did not preclude her from undertaking other work.

10. Appeal and error ⇨1010(1)

Trial court's findings are conclusive on appeal where sustained by the evidence.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Joyce Payne against Pathe Studios, Inc., and another. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Ralph H. Blum, of Hollywood, and Alan J. Miller and Sanford I. Carter, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Defendant Pathe Studios, Inc., has appealed from a judgment for the sum of \$5,000 in

favor of plaintiff, as assignee of Zasu Pitts, founded on a contract in writing executed by such defendant and plaintiff's assignor, and the problem on which the controversy herein centers is the nature or character of the contract—whether only an option on personal services or an agreement of employment with a minimum compensation fixed therein.

The contract is in the form of a letter addressed to Miss Zasu Pitts, dated May 7, 1930, and signed by said defendant, with a signed acceptance thereon of Miss Pitts, and is as follows:

"This is to confirm our oral agreement in regard to your services as an actress.

"In consideration of the execution of a Standard Form Artist's Contract covering your services as an actress in a motion picture which is at present entitled 'Beyond Victory' and for the payment of the salary for such services, it is mutually understood and agreed as follows:

"First: You hereby agree to render exclusive services for us as an actress in the production of a motion picture, the photographing of which includes the use and recording of your voice.

"(Supplementing paragraph First): It is understood and agreed that in the event your services are not started on or before December 31, 1930, we hereby agree to pay you the total sum of Five Thousand Dollars (\$5,000), which represents the four weeks guarantee on this agreement.

"Second: In consideration of rendering such services, we agree to pay you a salary at the rate of One Thousand Two Hundred and Fifty (\$1,250.00) Dollars per week for a period of not less than four (4) weeks, and if your services are required in excess of the four week period, we agree to continue to pay you at the same rate for such additional services, six (6) days to be considered a week for the purpose of prorating a fractional part of a week.

"Third: It is understood and agreed that said motion picture for which your services are required will be completed on or before December 31, 1930.

"Fourth: We agree to give you feature billing on the main title and in all paid advertising and publicity under our control in the picture for which you have rendered services in accordance herewith.

"Fifth: It is understood and agreed that this agreement supersedes and cancels all prior agreements, both written and verbal, relating to your services or employment by us.

"If the foregoing is in accordance with your understanding of the agreement, please sign one copy of this letter in the space provided for your signature, thereby indicating your acceptance of the terms and conditions set forth herein, and this letter will constitute a binding agreement between us."

That the foregoing instrument upon its face is not free of defect or ambiguity is patent, and that this is so is confirmed by the opposing contentions of the parties thereto. The instrument was set forth in *haec verba* by attaching a copy thereof to the complaint as an exhibit, and it was incorporated in the pleading by reference and a definite construction was put upon it by plaintiff by averments in the complaint, in compliance with the rule of pleading recognized as governing in such cases, thus eliminating the ambiguity appearing upon the face of the instrument. *Silvers v. Grossman*, 183 Cal. 696, 192 P. 534. In the complaint it is alleged that by the terms of this agreement defendant agreed to employ the services of plaintiff's assignor as an actress in the production of a motion picture guaranteeing the utilization of her services for a period of not less than four weeks at a weekly salary of \$1,250, and that such motion picture would be completed on or before December 31, 1930; that in the event such services were not utilized before December 31, 1930, defendant agreed to pay to plaintiff's assignor the total sum of \$5,000, representing four weeks guarantee provided for by the terms of said agreement. These allegations putting a definite construction on the instrument and by way of interpreting it are each and all denied by defendant. After trial and upon the evidence adduced, the court found in accordance with these averments, and further found that plaintiff's assignor was at all times from May 7, 1930, up to and including December 31, 1930, ready, able, and willing to furnish the services required under said agreement, but that defendant at no time required or permitted her to furnish said services, and has refused to pay the said sum of \$5,000. The court further found that the provisions supplementing the first paragraph of the agreement were not intended by the parties as provisions for payment of liquidated damages in the event of a breach of an obligation to employ plaintiff's assignor under the terms of said agreement.

[1-3] When the terms of a contract are uncertain or not clear as to its purpose and effect or when ambiguous, the question whether the transaction of which it purports to be the evidence is a contract of one kind or

of another kind is to be determined from all the circumstances giving rise to it. *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 566, 161 P. 25. And if the construction placed upon it by the trial court, under appropriate pleadings and as evidenced by its findings, is reasonable and sustainable by the language of the instrument, and appears to be consistent with the true intent of the parties, an appellate court will not substitute another interpretation though it seem equally tenable. *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 300 P. 34. Under the pleadings herein the question whether this contract was an option in favor of defendant on the services of plaintiff's assignor, to be exercised at will, or was an agreement to engage her services for at least four weeks with a guarantee of \$5,000 as a minimum compensation, became a question of fact for the trial court to determine. We have neither been shown nor have we found in the record a substantial reason for declaring the court's construction of the contract erroneous.

[4-7] That the supplemental provision to pay the \$5,000, as representing four weeks' guarantee, was neither in the nature of a penalty nor an effort to provide for liquidated damages, appears clear to us. This action is not one for damages based upon the breach of a contract of hiring, but is an action based upon the contract itself, as construed and interpreted, upon an express promise to pay for at least four weeks' services at \$1,250 per week, or a minimum of \$5,000. It appears from the findings that plaintiff's assignor was at all the times in question ready, able, and willing to work for defendant as an actress, if work had been offered her by defendant, and that no work was offered and that she was not discharged. These findings left the contract, as construed, in full force, with a right of action upon it; and it is no defense upon such a contract to say that plaintiff's assignor has not performed her duties thereunder. *Stone v. Bancroft*, 112 Cal. 652, 44 P. 1069. Where it appears that the complaining party to a contract of hire was prevented from working by the defendant, the contract need not be treated as broken, but the party, though he has performed no service under it, may sue on the contract and recover the agreed compensation. *Stone v. Bancroft*, 139 Cal. 78, 70 P. 1017, 72 P. 717; *Downs v. Atkinson*, 207 Cal. 259, 277 P. 723. Minimum payment clauses in contracts of sale or for services have been held valid in contracts between parties, and such minimum payments are not to be deemed as a provision for liquidated damages. **A.**

B. Field & Co., Inc., v. Haven, 36 Cal. App. 669, 173 P. 108; *San Joaquin L. & P. Corp. v. Costaloupes*, 96 Cal. App. 322, 274 P. 84. Such agreements are upheld and the minimum rate or wage has been sustained as the true measure of recovery, the promise to pay such sum being a part of the direct obligation of the contract and in no sense a covenant for liquidated damages in cases of breach. *San Joaquin L. & P. Corp. v. Costaloupes*, supra. The same reasoning and authorities furnish a negative answer to appellant's question as to whether the promise to pay the \$5,000 was a penalty. Provisions for a penalty as well as for liquidated damages apply only in case of a breach of a contract. The construction placed upon the contract herein eliminates both penalty and liquidated damages from further consideration. Herein plaintiff's assignor had obligated herself to perform four weeks' services as an actress whenever called upon during the period in question, and her readiness, willingness, and ability at all those times to render such services was at once the consideration for the agreement, and the measure of her compensation should defendant refuse to accept her services. The very nature of the agreement negatives any idea of intention of the parties to prescribe a penalty.

[8-10] Appellant also contends that plaintiff's assignor was under duty to mitigate damages by securing other employment, and that the judgment herein is excessive because she was employed and received compensation during a large portion of the period in question. The latter contention is entirely without merit; and as to the former, it may be stated that the rule as to mitigation of damages in cases of contracts of hire does not apply to contracts not requiring all or the greater portion of the time of the party employed, or which do not preclude the party from undertaking and being engaged in the performance contemporaneously of other contracts. 17 Cor. Jur., *Damages*, § 100, p. 775. Here again we must bear in mind that this is not an action for damages for breach of the contract of employment, but an action on the contract itself for the agreed compensation. The doctrine of mitigation of damages has no place in such an action. Assuming, however, that it has, as claimed by appellant, the affirmative defenses based on that doctrine set forth in defendant's answer were negatived by the trial court's findings, which must be deemed conclusive on this appeal.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

**WALTERS v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.***
Civ. 8897.District Court of Appeal, Second District,
Division 1, California.

April 12, 1935.

Rehearing Denied May 9, 1935.

Hearing Granted by Supreme Court
June 10, 1935.**1. Evidence** ⇨83(7)

Where attachment was served on assistant cashier and sheriff's return did not show that such person was officer of bank, it was presumed that assistant cashier was officer, in view of presumption that official duty has been regularly performed (Code Civ. Proc. §§ 542, 1963).

2. Attachment ⇨325

Where sheriff's return showed that service of attachment was made on bank by delivering copy to assistant cashier personally, parol evidence was admissible to show duties of assistant cashier, as basis for showing that he was officer (Code Civ. Proc. § 542).

Code Civ. Proc. § 542, provides that debt owing to a defendant by a banking corporation or credits under its control must be attached by leaving copy of the written notice "with the manager or any other officer of such banking corporation or association."

3. Banks and banking ⇨224

Purpose of amendment in 1927 to statutory provision relating to service of attachment on banking corporation was to do away with disadvantages resulting from designation of specific officers as only ones to receive process (Code Civ. Proc. § 542, as amended by St. 1927, p. 852).

4. Banks and banking ⇨224

Assistant cashier of bank, invested with powers and duties in matter of accepting service of writs and other process, the process to be turned over by him in regular course to legal department of bank, *held*, "officer of bank" upon whom service of attachment process could be made (Code Civ. Proc. § 542).

[Ed. Note.—For other definitions of "Officer (of Corporation)," see Words & Phrases.]

5. Banks and banking ⇨134(1)

Bank indebted to defendant, on which attachment was served by plaintiff, *held*, under facts shown, to have waived right, if any, to set off indebtedness from defendant to bank as successor to another bank.

When attachment was levied on the bank, the defendant was indebted to the

bank as successor to another bank on a demand note for which the bank held certain security. The checking account of the defendant was charged with the entire balance of the account, and such balance was applied on the note after the levy of the attachment. An officer of the bank agreed that the bank would take care of certain checks outstanding and that the amount credited on the note would be immediately recredited to the checking account. Thereafter the checking account was kept open and checks of the defendant were paid by the bank in an amount greatly exceeding the amount of the deposits by the defendant during the same time.

6. Garnishment ⇨115

Where plaintiff was entitled to receive principal amount of judgment on date judgment was rendered, interest was properly allowed on claim as against garnishee (Code Civ. Proc. § 544).

7. Garnishment ⇨115

Allowance of interest in verdict and judgment from May 10, 1930, where prior complaint was for interest only from July 14, 1930, the date of the judgment, was excessive as against garnishee defendant (Code Civ. Proc. § 544).

8. Jury ⇨26

It is within discretion of court to relieve plaintiff from any default suffered in failing to pay jury fees on time.

9. Appeal and error ⇨1035

Where jury had no part in determining issues of fact tried, and judgment was based upon directed verdict and was in reality judgment of court, objection that jury was waived by plaintiff's failure to timely pay jury fees *held* unavailable.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Esther A. Walters against the Republic Securities Corporation, wherein an attachment was issued and served upon the Bank of America National Trust & Savings Association. From a judgment in favor of the plaintiff, the defendant Bank of America National Trust & Savings Association appeals.

Judgment modified, and, as modified, affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Archie A. Smith, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Action against defendant bank, as garnishee. The case was tried by a jury, which rendered a directed verdict in favor of plaintiff. Defendant appeals from the judgment entered thereon.

The complaint alleged that, in an action brought by plaintiff against Republic Securities Corporation, an attachment was issued and was duly and regularly served by the sheriff upon defendant bank, attaching all moneys due and owing, belonging to said Republic Securities Corporation; that plaintiff duly recovered judgment against said Republic Securities Corporation; that at the time of the levy the bank was indebted to or had in its possession and under its control moneys or credits of the judgment debtor in an amount in excess of plaintiff's judgment; that an execution was issued and returned unsatisfied; that no moneys were ever paid over by the defendant to the sheriff or to plaintiff; and that plaintiff had been damaged thereby in the sum of \$9,442.22, together with interest thereon. The defendant by its amended answer set up numerous defenses; one of these being that there was no valid service of the attachment.

[1] The sheriff's return on the writ certified that he had "duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of the Bank of America of California, 7th and Spring St. by delivering to and leaving with R. C. Elliott, Assistant Cashier of said bank, personally, in the County of Los Angeles on the 10th day of May, A. D. 1930, a copy of said writ of attachment," etc. Under section 542 of the Code of Civil Procedure, debts owing to a defendant by a banking corporation or credits under its control must be attached by leaving a copy of the writ and notice "with the manager or any other officer of such banking corporation or association," etc. The return of the sheriff did not show that R. C. Elliott was an officer of defendant corporation; neither did it show that he was not. This situation is one in which it is proper to presume that official duty has been regularly performed (section 1963, Code Civ. Proc.), and under this rule it should be presumed that Elliott, the assistant cashier, was an officer of the bank. *Porter v. Pico*, 55 Cal. 165, 172; *Griffin v. American Gold Mining Co. (C. C. A.)* 136 F. 69. The presumption, of

course, may be overcome, but in weighing the evidence on the subject it cannot be denied consideration.

[2] There is no contradiction of the return as made in presuming that Elliott was an officer of the bank. Parol evidence was properly introduced to show the duties of Elliott in the bank. *Brusie v. Gates*, 80 Cal. 462, 22 P. 284; *Porter v. Pico*, supra. Elliott himself testified that he was an assistant cashier, and that he was a junior officer; that he had been designated by the other officers and higher officers of the bank to accept service of writs and other process and was the one to whom the papers would automatically go, regardless of who first received them; that they came to his desk in any case, and it was his duty to take the proper steps to search the records and give notice to all departments and branches of the bank. Marco Hellman, who was vice president and chairman of the executive committee of the bank at the time of the attachment, testified that Elliott was chief clerk and assistant cashier; that his appointment as such had been confirmed by the board of directors; that the usual practice in the bank was to send those desiring to serve process to Elliott to have the papers served; and that he in regular course turned them over to the legal department. After receiving a copy of the writ, the bank made a return thereon to the sheriff in which it was not stated whether the bank was indebted to defendant Republic Securities Corporation, but which did state, "Defendant indebted to bank." On the day of the levy a Mr. Brown, one of the vice presidents of the bank, had a conversation with James L. Wright, president of the Republic Securities Corporation, in which Brown informed Wright that an attachment had been levied against the account of the corporation, and that he (Brown) had a document there relating to the attachment in the sum of \$9,500. Within its own organization the bank recognized the service as a valid one. An entry was made on the ledger sheet of the checking account "hold all a/c attached 5-10-30," and the bank made answer to the garnishment to the sheriff without indicating any claimed insufficiency of the service.

Certain other actions of the bank, taken in connection with the account of Republic Securities Corporation, which will be referred to later, also tended directly to show that the bank recognized the service on Elliott as service on the bank.

Appellant, although now urgently contending that the evidence was insufficient to prove that Elliott was an officer upon whom

service could be made, was content at the trial to submit the question without offering evidence on its own behalf. If the testimony of Elliott and Hellman were not true, if Elliott were not one of its officers, and if the bank had some other practice than the one testified to and it was customary to direct process servers to some other person in the bank, evidence of such facts was available to the defendant, and its failure to introduce the same gives added weight to the testimony of the witnesses who did testify on the subject.

Appellant cites *Liberty Bank v. Superior Court*, 195 Cal. 766, 235 P. 995, 998, as authority for the proposition that an assistant cashier is not an officer of a banking corporation. In that case an order had been made requiring Charles F. Partridge, the assistant cashier of the Liberty Bank of San Francisco, Cal., to personally appear in the superior court of Los Angeles to show cause why an order should not be made directing him as assistant cashier of the bank to turn over to the plaintiff, in the action in which the order was made, all sums of money owing to or deposited to the credit of the judgment debtor. It was said by the court, in holding the order insufficient, that the recital did not show that Partridge was either an officer or member of the corporation, and that "ordinarily an assistant cashier of a corporation is neither an officer nor a member thereof in the sense that he exercises any such control over the disposition of the property or money in the custody of such corporation as would render him the proper subject of an order requiring him in that capacity to turn over the said money or property in the custody or keeping of such corporation to a stranger to it and in an action to which it is a stranger." We find nothing in this language contrary to the conclusion we have reached.

[3] When the Code section prescribing how service must be made on a banking institution was amended in 1927 (page 852), (section 542, Code Civ. Proc.) so as to allow service on a manager or any other officer, the purpose no doubt was to do away with disadvantages resulting from the designation of specific officers as the only ones to receive process. The tendency of this amendment is toward the rule stated in *Roehl v. Texas Co.*, 107 Cal. App. 691 at page 704, 291 P. 255, and approved in *Milbank v. Standard Motor Co.*, 132 Cal. App. 67 at page 71, 22 P.(2d) 271, 272, where it was said, in connection with service of summons on an agent of the defendant corporation: "We hold the true

rule to be * * * that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.' " We would be at a loss for reasons justifying a holding that the service was invalid in the instant case. It seems unlikely that the bank would follow a practice of allowing process to be served on one not authorized to receive it on behalf of the bank. Where the assistant cashier served was the one, above all others, designated to see that the bank's interests were protected, in so far as they were affected by the service, certainly the bank regarded him as an officer.

[4] We therefore hold that an assistant cashier of a bank, invested with the powers and duties with which Elliott was shown to have been clothed, is an officer of the bank upon whom service of process may be made.

[5] On the date of the levy of the attachment, Republic Securities Corporation was indebted to defendant bank, as successor to Merchants' National Trust & Savings Bank, in the sum of \$50,489.16, on a demand note for which the bank held certain security. In the conversation between Brown, the vice president of the bank, and Wright, president of the Republic Securities Corporation, in which Wright was informed that an attachment had been levied, Brown told Wright that it would be necessary to debit the corporation's checking account with the entire balance of the account, amounting to \$8,086.16, and to apply the same on the note. Wright informed him that there were checks outstanding, and Brown stated that the bank would take care of the checks, and that the amount credited on the note would be immediately recredited to the checking account. Accordingly, on May 10, the account was debited, and the note credited in the amount of the said balance. Between May 10 and May 27 the account was kept open, the corporation's checks were paid by the bank in the total sum of \$1,568.21; the deposits in the meantime amounted to only \$508.57, and between the two dates the corporation had at all times a debit balance which, on May 23, amounted to \$1,419.31. On May 27 the account was credited with \$8,086.16, and the note was debited in the same amount. Thereafter the corporation checked out this sum over a period of time; the bank received no part of it as payment on the note.

The foregoing facts are relied upon by defendant in support of its defense that it had a right of set-off which it exercised by apply-

ing the balance of the account on the note. The briefs in the case treat extensively of the right of set-off under the circumstances we have stated, one of the questions discussed being whether the bank held real estate security, and whether the right of set-off existed without foreclosure thereon. It is unnecessary to discuss these questions, for the reason that we have reached the conclusion that the bank did not avail itself of any right of set-off that may have existed. The process followed was but a shallow pretense of an application of the balance of the account as a payment on the note. Before any action was taken, the bank had agreed to recredit the account, and in the meantime to pay the checks of the corporation as apparent overdrafts. The bank, after recrediting the account, allowed it to be withdrawn by the corporation in the usual course of business. Whatever right of set-off the bank had it waived, and, if the waiver was effective as to the corporation, it was effective as to the attaching creditor, who, from the time of her attachment, stood in the place of the debtor corporation.

[6, 7] All of the foregoing facts are uncontroverted and the evidence thereof is free from doubt. It therefore follows that plaintiff by her attachment became entitled to receive the sum of \$8,086.16, except in the event the bank exercised its prior right to apply the same on the indebtedness to the bank, and as that was not done and the right to do so was waived, plaintiff's right became absolute. Levy of execution on the bank would have accomplished no purpose, would have added nothing to plaintiff's right under the attachment, and was therefore unnecessary. The directed verdict in her favor was proper. We think interest was properly allowed on the claim, since plaintiff became entitled to receive the principal amount on the date of the judgment. Section 544, Code Civ. Proc. By the verdict and judgment, plaintiff was allowed interest from May 10, 1930; the prayer of the complaint was for interest only from July 14, 1930, the date of the judgment, and to that extent the judgment is excessive.

[8, 9] Defendant objected to the trial of the case before a jury, and made the point in the lower court, and urges it here, that a jury was waived by plaintiff's failure to pay the jury fees ten days prior to the date set for trial. A sufficient answer to this point would seem to be that the jury had no part in determining the issues of fact tried. It was within the discretion of the court to relieve

plaintiff from any default she may have suffered in failing to pay the jury fees on time; but, regardless of the regularity of the procedure which was followed, as to which no expression of opinion is necessary, no prejudice has resulted to appellant from the ruling made, since the judgment based upon a directed verdict is in reality the judgment of the court.

The judgment is modified by striking from the provision awarding plaintiff interest on the judgment the words "May 10, 1930," and by substituting the date "July 14, 1930," and, as modified, is affirmed, respondent to recover costs on appeal.

We concur: **HOUSER, Acting P. J.; YORK, J.**



6 Cal.App.2d 299

**CARRILLO et al. v. HELMS BAKERIES,
Limited, et al.
Civ. 9776.**

District Court of Appeal, Second District,
Division 2, California.
April 19, 1935.

1. Trial ⇨253(4)

Instruction that contributory negligence of parents of five year old child could not be imputed to child held not a "formula" instruction, and not erroneous by reason of omission of reference to child's contributory negligence in authorizing recovery for plaintiffs, where instruction immediately preceding covered subject of child's contributory negligence.

2. Trial ⇨295(1)

Single instruction may not be singled out for criticism because of omission of essential element where tone of instructions as a whole indicates that no single instruction was intended to be a complete statement.

3. Negligence ⇨136(29)

Capacity of child at particular age to exercise care to avoid danger is question of fact for jury.

4. Automobiles ⇨246(35)

Instruction, in action for injuries to five year old child struck by truck, that contributory negligence was not generally "imputed as a matter of law to child of plaintiff's tender years" held erroneous as misleading, where court elsewhere gave instructions au-

thorizing recovery without mentioning contributory negligence, and expressly forbade imputation to child of contributory negligence of parents.

5. Trial $\Rightarrow$ 228(1)

Single continuous instruction commingling doctrine of last clear chance and question of concurrent and contemporaneous negligence of injured plaintiff held erroneous, since application of last clear chance doctrine would render plaintiff's negligence remote.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Actions by Charles Carrillo, by Eladio Carrillo, his father and guardian ad litem, and by Eladio Carrillo, individually, against the Helms Bakeries, Limited, and another. Judgments for plaintiffs, and defendants appeal.

Reversed.

George H. Moore and Gerald O'Connor Egan, both of Los Angeles, for appellants.

F. H. Bowers, of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal by defendants from judgments for damages arising out of a collision between an automobile bread delivery truck and a boy of the age of five years. The cause was tried before a jury which rendered a verdict in favor of the boy for \$5,000 for personal injuries, and in favor of the boy's father for \$200 for expense in caring for the injured son, on which judgments were entered, that in favor of the father being reduced to the sum of \$102.20 at the time motion for new trial was denied. The evidence presents sharp conflicts both as to the place and the manner of the collision. There is evidence tending to show that the defendant driver negligently struck the boy when he was crossing at a regular crosswalk with proper care. There was evidence also tending to show that the boy was struck while negligently running out into the street some distance beyond the crosswalk, without negligence on the part of the driver, and there was evidence which warranted the application of the doctrine of the last clear chance. Instructions were given covering all these theories of the accident. The jury resolved all conflicts by its verdicts in favor of plaintiffs, and its findings are binding on this court and present a bar to the granting of any relief to appellants, unless it is made to appear that such determination was arrived at upon the basis or as the result of prejudicial

errors in law occurring at the trial. Such errors are assigned and urged by appellants in respect to certain instructions given by the court, which, in view of the sharp conflict in the evidence, are claimed to be therefore highly prejudicial.

At the trial, the question of contributory negligence of the boy (plaintiff Charles Carrillo) was raised by the answer and was recognized by the court and all parties as being an issue to be submitted to the jury, and the jury was given the usual and approved instructions on that subject. Appellants, however, contend that by the giving of two certain instructions, requested by plaintiffs and characterized by appellants as "formula" instructions, which, it is claimed, failed to contain all the elements essential to a recovery by the minor plaintiff, a conflict was created in the instructions, which was bound to result in prejudice to defendants.

[1, 2] The instructions given are not numbered, but if given numbers in the order of their sequence in the transcript there would be 30, and the first in order of giving, complained of by appellants, would be numbered 15, reading as follows: "You are further instructed that where an infant of the age of 5 years is suing in his own right, the contributory negligence, if any, of his parents may not be imputed to him, and if you find from the evidence in this case that the defendants' negligence was the proximate cause of the injuries to said minor, you will find for the plaintiff and against the defendants." Appellants contend that this instruction is a "formula" instruction and omits the essential element of contributory negligence of the minor plaintiff and therefore falls within the condemnation of the general rule of law that a formula instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. *Ebrite v. Crawford*, 215 Cal. 724, 12 P.(2d) 937. In *Saltzen v. Associated Oil Co.*, 198 Cal. 157, 244 P. 338, 339, in a similar case, it is said: "This court ought not to adopt or give application to a rule that the positive effect of an express instruction upon a specific subject which is admittedly correct will be overcome by a general though erroneous instruction not expressly dealing with that subject in the absence of a very clear showing that the jury have been misled thereby." In addition to the usual general instructions covering contributory negligence

given by the court herein, there was given immediately preceding the one above quoted a specific and positive instruction concerning the subject of contributory negligence in the case of an infant of tender years. In view of that status of the instructions we are of the opinion that the one complained of was neither given to nor accepted by the jury as a so-called "formula" instruction. It serves merely to inform the jury that the contributory negligence of a parent is not imputable to a minor child when suing in his own right for injuries based on negligence of a defendant. It related to another and different feature of the law of contributory negligence, namely that of imputable negligence as distinguished from direct and personal negligence, the latter feature having been fully covered by a preceding correct instruction, and between this and the preceding instructions there appears no conflict whatever. "When the tone of the instructions as a whole denotes that no single instruction was intended to be a complete statement in itself but that all the instructions are to be taken together and, when these instructions fully and correctly state the law without conflict, then no one instruction may be singled out for criticism because it does not completely state all the elements necessary for recovery." *Abbott v. Goodyear Tire Co.*, 116 Cal. App. 665, 3 P.(2d) 56, 57. To the same effect are the cases of *Harvey v. Aceves*, 115 Cal. App. 333, 1 P.(2d) 1043, and *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237, 239. In the latter case the court aptly stated: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it." We conclude, therefore, that instruction numbered 15, though deficient and erroneous, does not fall within the rule affecting formula instructions, and that it neither contributed to nor controlled the verdict in favor of the minor plaintiff.

[3, 4] Immediately following this instruction numbered 15, however, was the following instruction which we have numbered 16: "You are further instructed that contributory negligence is not, as a rule, imputed as a matter of law to a child of plaintiff's tender years." This was later followed by an instruction which we number 22, reading as follows: "You are instructed that if you find from the evidence in this case that the defendants were guilty of negligence in the op-

eration of their truck at the time and place of the collision, and that such negligence of the defendants was the proximate cause of the collision, and the proximate cause of the injuries to this minor plaintiff, then you will find for the plaintiff and against the defendants." Of both these instructions, appellants complain; as to the first, on the ground that its clear effect is to mislead the jury, and as to the second, on the ground that it falls under the condemnation of the rule above stated in respect to formula instructions. With both of these contentions we must agree. The instruction numbered 16 entirely fails to state whose or what contributory negligence is "imputable" to the minor plaintiff. The court had just stated in positive terms that the contributory negligence of a parent might not be imputed to the minor plaintiff, and then followed that by stating that contributory negligence is not as a rule "imputed as a matter of law to a child of plaintiff's tender years." The clear effect of such an instruction would be to lead the jury to understand that a child of plaintiff's tender years could not as a matter of law be chargeable with contributory negligence. It was long ago announced and is still maintained by our appellate courts that there is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age, and that the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 139, 138 P. 712; *Barrett v. Harman*, 115 Cal. App. 283, 1 P.(2d) 458. It is true that the language used in the instruction is taken from a statement of the court in the case of *Gonzales v. Davis*, 197 Cal. 256, at page 260, 240 P. 16, but the statement there made is predicated on the case of *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401, cited as its authority. Upon consulting that case, we find that therein the court was dealing with the rule affecting the imputability of contributory negligence of a parent to a child of tender years, suing in his own right, and wherein the court announced, although tardily, as it stated, that the rule of imputed negligence of parents, as applied to actions by children in their own right, no longer prevails, if it ever did prevail, in this jurisdiction, and that the true rule was to the effect that the negligent exercise of a parent's care and control of a child is not imputed to the child as a defense to an action by the child itself for personal injuries. The danger of error in the extraction of a statement of an appellate court from its con-

text in an opinion and giving it as a statement of abstract law is manifested by the above-quoted instruction No. 16. It was entirely unnecessary to a correct statement of the law, as the court had already correctly told the jury that the negligence of the parent might not be imputed at all to a minor child suing in his own right. To follow that by stating that "contributory negligence is not, as a rule, imputed as a matter of law to a child of plaintiff's tender years," when considered in connection with the instruction, numbered 22 and above quoted, and with the latter part of instruction No. 15, above discussed, was almost certain to produce the understanding on the part of the jury that contributory negligence of the minor plaintiff was eliminated from the case, and that such plaintiff would be entitled to recover if the jury found that defendants' negligence was the proximate cause of the collision, and without regard to any negligence of the minor plaintiff contributing thereto. Nor are we able to reconcile instruction No. 22 with the theory of nonprejudicial error under the reasoning and application of rules above given in respect to instruction No. 15, for it falls squarely under the ban of the rule relating to the so-called "formula" instruction, with no redeeming or exculpatory features. Therein we find the fatal condition of clear conflict with preceding instructions relating to the question of contributory negligence of the minor plaintiff, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of the minor plaintiff. *Beyerle v. Clift*, 59 Cal. App. 7, 209 P. 1015.

[5] As the judgments herein must be reversed on account of this error, and in view of a probable retrial, we deem it proper to comment on the error claimed by appellant in respect to an instruction applying the doctrine of the last clear chance, to the end that the error claimed will not be repeated at another trial. The vice of the instruction, which is No. 20 in its sequence, is charged to arise out of coupling a statement of the law governing the action of the defendant as well as of the plaintiff in an emergency where great peril of doing injury or of being injured suddenly confronts the respective parties, with a charge embodying the doctrine of the "last clear chance." The "emergency" clause was evidently given to cover the conduct of the plaintiff and give an avenue of escape from the effect of the rule of continuous and contributory negligence on his part up to the moment of injury, which would bar recovery on his part. "If all the elements of the last clear

chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery." *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.(2d) 915, 917. In this case last cited, the court clearly and succinctly states what comprise the necessary elements to warrant the application of this doctrine of the last clear chance, and further states: "The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. To hold otherwise would be to dispute its existence." "The 'last clear chance' must be solely upon the part of the person inflicting the injury. If both parties have that chance it cannot be said that there is any 'last clear chance' at all." *Rasmussen v. Fresno Traction Co.*, 138 Cal. App. 540, 550, 32 P.(2d) 1091, 1095. It thus appears that if the doctrine of last clear chance is applicable to this case, then the question of concurrent and contemporaneous negligence on the part of the injured plaintiff is excluded from the case, and it would be error to commingle the two subjects in a single continuous instruction.

As we do not apprehend any repetition of errors claimed to exist in other instructions on a retrial, it becomes unnecessary to review and determine such assignments of error in this decision.

The judgments are, and each of them is, reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

6 Cal.App.2d 57

LOS ANGELES COUNTY v. MARGULIS

et al.

Civ. 9476.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1935.

Hearing Denied by Supreme Court

June 6, 1935.

1. Highways ⇨113(5)

In action on contractor's bond for making street improvements, evidence as to actual cost of completing contract on contractor's default *held* sufficient to establish reasonable cost thereof.

2. Highways ⇨113(5)

Where county accepted highways offered for dedication and contractor breached contract to construct storm drain and other improvements, county *held* entitled to recover on contractor's bond a sum equal to cost of uncompleted portion of work and was not required to complete work before being entitled to damages.

3. Highways ⇨113(5)

In county's action on bond for failure of contractor to construct storm drain and street improvements, surety *held* liable on contractor's default for penal sum named in bond, since county was entitled to receive work of certain value or, in lieu thereof, damages to value of uncompleted work.

4. Damages ⇨80(1)

Contractor's bond containing specified penalty for failure of contractor to perform *held* not void as agreement to pay penalty as liquidated damages, where amount of bond was but one-half of amount payable under contract, and neither bond nor contract contained sum agreed upon as stipulated damages (Civ. Code, §§ 1670, 1671).

5. Highways ⇨113(2)

County which exercised authority to accept dedication of subdivision highways, thereby becoming liable for injuries from defective condition thereof, *held* authorized to contract for improvement thereof, and to require surety bond for performance of contract.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the County of Los Angeles against J. Margulis, Jack Stulman, and the Metropolitan Casualty Insurance Company of New York. Judgment for plaintiff, and last-named defendant appeals.

Affirmed.

Mills, Hunter & Dunn, of Los Angeles, for appellant.

Everett W. Mattoon and J. F. Moroney, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal by Metropolitan Casualty Insurance Company of New York from a judgment against defendants.

Defendants Margulis and Stulman subdivided a tract of land in unincorporated territory of the county of Los Angeles and prepared a map or plat thereof showing the lots, parcels, streets, and certain avenues and alleys which were to be devoted to public use, which map contained a certificate of dedication of the streets, avenues, and alleys. On July 29, 1926, the county of Los Angeles entered into an agreement with Margulis and Stulman as the other party, and called the "contractor," whereby in consideration of the acceptance by the board of supervisors of the highways offered for dedication the contractor agreed to improve certain named streets and build a storm drain, the work to be at the expense of the contractor and to be under the supervision and to the satisfaction of the road commissioner of said county. It was further agreed that the contractor had filed with the county a bond in a sum not less than one-half the amount payable by the terms of the contract, to secure the claims for labor and material, and a bond in similar amount for the faithful performance of the contract. Neither the contract nor the bond sued on purport to set out the estimated cost of the project, but the complaint alleges such cost to be \$31,293.62. On about July 26, 1926, appellant executed and delivered to Los Angeles county the bond to secure the faithful performance of the contract, in the penal sum of \$15,650. Though extensions of time were granted the contractor, it appears that only a small amount of the improvement work was ever done, and that the work called for by the agreement and which the contractor failed to perform was of the reasonable value of \$28,582.78. While claiming damage in this amount for the breach of the contract, the county was limited in its recovery against the surety to the sum of \$15,650, the amount of the bond. The court, on the evidence of plaintiff, no proof being offered by defendants, gave judgment for plaintiff in the sum of \$15,650.

The same points urged by appellant against the judgment here were raised by its ob-

jection to the introduction of any evidence because the complaint failed to show any cause of action.

[1] As to the point that there was no evidence of the reasonable cost of the uncompleted work, the record discloses evidence that the estimated cost of the entire work amounted to \$31,293.62, and that of the value of \$2,710.84 had been performed, leaving a balance of \$28,582.78 as the cost of the uncompleted work. While the testimony as given referred to the "cost," and the term "reasonable cost" was not used by the witness, in the absence of evidence to the contrary this tended to prove and was some evidence of the reasonable cost and sufficiently established the reasonable cost. *Bacigalupi v. Phoenix, etc., Co.*, 14 Cal. App. 632, 637, 112 P. 892.

[2, 3] Appellant claims that the finding that the county was damaged in any sum is unsupported. The contract provided for the improvement of certain streets, avenues, and alleys and the installation of a storm drain. Upon the acceptance by the county of the highways offered for dedication, the county became liable for any injuries to person or property which might result from their dangerous or defective condition, a condition which would not exist if they were improved in accordance with the contract. Under the contract the county was entitled to have these highways so improved and this right was of a value equal to the cost of the work. The contract having been breached by a failure to perform, the county was entitled to a sum equal to the cost of the uncompleted portion of the work; and the county was not required to complete such work before it was entitled to recover damages. *Taylor v. Northern Pacific Coast R. Co.*, 56 Cal. 317; *Charles City v. Rasmussen*, 210 Iowa, 841, 232 N. W. 137, 72 A. L. R. 638; *Clark v. Barnard*, 108 U. S. 436, 2 S. Ct. 878, 27 L. Ed. 780; *Turner v. Howze*, 28 Cal. App. 167, 151 P. 751; *Ceremony v. Drummond*, 37 Cal. App. 446, 174 P. 696. Under the contract the county was entitled to receive work of a certain value. This work not having been received, the county was entitled to receive in lieu thereof as damages a sum of money equal in value to the uncompleted work which the contract called for, and appellant as surety was liable under its bond up to the penal sum therein specified.

[4] Appellant urges that the bond and contract are void in that they are in violation of sections 1670 and 1671 of the Civil Code because they amount to an agreement to pay a

specified sum as liquidated damages, whereas under the facts here the ascertainment of actual damage is not impracticable or extremely difficult. This contention results from a misinterpretation of the agreement. There was under the contract and bond no stipulated sum or fixed unit of damage. The contractor agreed to do certain work and the bond insured the faithful performance of the work. The amount of this bond agreed to be furnished by the contractor was "not less than one-half of the amount payable by the terms of this contract," and it will be noted that the bond for \$15,650 is practically one-half the sum of \$31,293.62, shown by the evidence as the estimated cost of the entire work. Nowhere in either the contract or the bond was there a sum agreed upon as the stipulated measure of damages. Judgment was up to the full penal sum of the bond because the damage exceeded that amount. A contract to perform certain work secured by a faithful performance bond in a specified penal sum does not amount to an agreement for liquidated damages. *Weinreich E. Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 P. 667; *Davis v. Gillett*, 52 N. H. 126, 129; 17 C. J. 951. The authorities cited by appellant are not in point, for they are cases in which the parties agreed to specific sums as liquidated damages, while here no such agreement exists.

[5] Appellant raises the point that the board of supervisors had no authority to enter into the contract or to require such a bond. Appellant seems to assume that the bond and contract were in consideration of permission to file the map of the subdivision. The actual consideration, set forth in the contract, is "the acceptance by the board of supervisors of the highways offered for dedication" and the assumption of the liability, hereinbefore referred to, which comes with the establishment and maintenance of public highways. This acceptance was one which the board could make or refuse. Having agreed to accept the highways, the board could very properly insist that they be improved, and that such improvement be assured by a surety bond. The offer of the contract and bond by the subdividers and surety company was accepted by the board when the contract and bond were filed with it, and the latter adopted an order accepting the specified highways for public use as public highways.

We find no merit in appellant's contentions, and the judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

6 Cal.App.2d 474

PEOPLE v. POTTER et al.

Cr. 180.

District Court of Appeal, Fourth District,
California.

April 25, 1935.

Infants ⇐20

In prosecution for contributing to delinquency of two minor girls, where defendants corroborated girls' testimony in many particulars, evidence *held* to support conviction of contributing to delinquency of one girl.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Joe Potter, Jr., and another were convicted of contributing to the delinquency of a minor, and they appeal.

Affirmed.

J. A. Chase and J. M. Lopes, both of Visalia, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

Appellants were charged with contributing to the delinquency of two minor girls. The information contained two counts. The first charged acts which were alleged to have contributed to the delinquency of one girl and the second to like acts which were alleged to have contributed to the delinquency of the other. Each girl was of the age of about fifteen years. The jury found both appellants not guilty of the offense charged in the first count, and guilty of the offense charged in the second.

Appellants present three grounds for a reversal of the judgments: (1) That the evidence is not sufficient to support the verdicts and judgments; (2) that the trial judge erred in sustaining an objection of the district attorney to a question propounded to a witness by one of their attorneys; (3) an error in an instruction to the jury.

We have studied the entire record and find ample evidence to support the verdicts and judgments if the evidence of the two girls is accepted as true. The jury evidently believed them, and we can find no reason for disagreeing with the conclusions of that body. It is difficult to see how verdicts of not guilty could have been returned, as the defendants corroborated the testimony of the girls in many particulars. No good purpose could be served

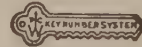
in detailing the evidence as it could only prove of interest to the morbidly inclined.

The correctness of the ruling on the objection is established by the case of *People v. Griffin*, 118 Cal. App. 18, 4 P.(2d) 592. The case of *People v. Pantages*, 212 Cal. 237, 297 P. 890, has no application here. The charge in that case was rape, and not that of contributing to the delinquency of a minor.

We have read the instructions given by the trial judge and can find no prejudicial error in them. The evidence pointing to the guilt of appellants is so convincing that we would find great difficulty in reversing either of the judgments for any technical error in view of the provisions of section 4½ of article 6 of the Constitution.

Judgments affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

**SPIER v. LANG et al. *****SMITH v. LANG-WALL CO. et al.****BUCK & STODDARD, Inc., v. LANG et al.**

Civ. 9015.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1935.

Hearing Granted by Supreme Court
June 20, 1935.**1. Appeal and error ⇐1**

Judgment ⇐336

New trial ⇐½

Judgment regularly entered may be interfered with only by motion for new trial, motion to vacate judgment as not supported by findings and enter different judgment, or appeal (Code Civ. Proc. §§ 662, 663, 663a).

2. Judgment ⇐336

New trial ⇐½

Motions, made in usual form of motions for new trial on statutory grounds therefor pursuant to "notice of intention to move for new trial," referred to as such motions in trial court's minute order denying them and modifying judgments, and not specifying particulars in which court's conclusions of law were inconsistent with his fact findings, *held* not motions to vacate judgments as not supported by findings and to enter different judgment.

ments, but motions for new trial (Code Civ. Proc. §§ 662, 663, 663a).

3. Judgment ☞384

Motion to set aside and vacate judgment as not supported by court's fact findings and enter different judgment must specify particulars in which court's conclusions of law are inconsistent with such findings (Code Civ. Proc. §§ 662, 663, 663a).

4. Judgment ☞394

Trial court cannot make entirely new fact findings pursuant to motion to set aside and vacate judgment as not supported by findings and enter different judgment (Code Civ. Proc. §§ 663, 663a).

5. Judgment ☞360

Judgment rendered without making fact findings in case tried before court without jury may be set aside, unless such findings were waived (Code Civ. Proc. § 632).

6. Trial ☞400(1)

Trial court may change its fact findings at any time before entry of judgment, without ordering new trial.

7. Trial ☞387(1)

Trial is not complete until court renders written decision and files it with clerk (Code Civ. Proc. § 632).

8. Judgment ☞303

Trial court cannot change its fact findings after entry of judgment except on new trial granted by it (Code Civ. Proc. § 662).

9. Trial ☞400(1)

Trial court's fact findings alone do not constitute decision or judgment, and they may be changed at any time before decision or entry of judgment.

10. Trial ☞400(1)

Trial court's fact findings, together with conclusions of law, constitute decision, as distinguished from judgment, of court, and either or both may be changed at any time before entry of judgment.

11. Judgment ☞303

Trial court's conclusions of law and judgment may be changed, modified, and vacated, different conclusions made and different judgment entered on existing fact findings after entry of original judgment (Code Civ. Proc. §§ 663, 663a).

12. Judgment ☞313

Portion of trial court's minute order, modifying judgment against certain defendants so as to be against one of them only after denying the others' motion for new trial, *held* void, if considered as judgment; court's fact findings being inconsistent therewith and

new judgment on such motion unauthorized (Code Civ. Proc. §§ 662, 663, 663a).

13. Trial ☞400(2)

Portion of trial court's minute order, modifying judgment against certain defendants so as to be against one of them only after denying the others' motion for new trial, *held* void, if considered as direction to prepare new findings and judgment in accordance with court's intent; direction to prepare new findings not being made by such order, nor authorized without granting new trial (Code Civ. Proc. § 662).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Actions by Charles S. Spier, N. Smith, and Buck & Stoddard, Inc., respectively, against Major C. D. Lang and others, the Lang-Wall Company, a copartnership, composed of C. D. Lang and others, and C. D. Lang and others, respectively. From portions of judgments, providing for filing thereof and vacation of previous judgments against defendant C. D. Lang and certain codefendants and denying recovery against the latter, and orders denying plaintiffs' motions for new trial and vacation of the second judgments, fact findings, and conclusions of law, plaintiffs appeal.

Orders modifying original judgments and directing new findings and judgments annulled, and new findings and judgments annulled and set aside.

William B. Spivak, J. George Gold, Ivan G. McDaniel, and Jennings & Belcher, all of Los Angeles, for appellants.

Edward A. Adams, Robert L. Collins, Maggart & Miller, and Victor Ford Collins, all of Los Angeles, for respondents.

ROTH, Justice pro tem.

These are three separate actions consolidated for trial and appeal. Each complaint alleges that the defendants, respondents here, were partners in an oil venture, and sets forth causes of action upon common counts for drilling equipment sold to the partnership and its partners. Trial was had and resulted in judgments for the amounts claimed in favor of each plaintiff and against defendant Lang and certain of his codefendants. Findings of fact, conclusions of law, and judgment were signed and filed in each case on June 8, 1932, and judgment in each of the cases was docketed and entered on June 9, 1932. Thereafter written notice of

entry of judgment was served upon each of said defendants by plaintiffs and filed; such service and filing occurring between June 11 and June 18, 1932. Each of the defendants against whom a judgment was rendered filed his notice of intention to move for new trial, which notices were served and filed between the dates of June 7 and June 18, 1932.

Motions for new trial were argued on July 27, 1932, at which time they were submitted, and on August 3, 1932, the following minute order was made: "Motion for a new trial by certain defendants, heretofore submitted on July 27, 1932, is now by the Court denied. Judgments are modified to be against C. D. Lang, only." No order of any kind was made respecting a change in the findings until on September 13, 1932, more than 60 days after the filing of the notices of intention to move for new trial, when a formal order was made which was signed under the caption: "Done in Open Court this 3rd day of August, 1932," requiring, among other things, preparation and entry of new findings of fact and conclusions of law, and a judgment pursuant thereto. In spite of the fact that the order recites that it was "done in Open Court this 3rd day of August, 1932," it is stipulated that the order was in fact signed and filed on September 13, 1932. New findings of fact and conclusions of law and judgments were filed at the same time, to wit, September 13, 1932, which had the effect of reversing the judgments previously rendered in favor of plaintiffs and against the defendants other than C. D. Lang. Plaintiffs made motions for new trials in respect to these second judgments, and also made motions to vacate said purported judgments and said purported findings of fact and conclusions of law, all of which motions were by the court denied. The plaintiffs appeal from the portion of the second judgments providing for the filing of the second judgments and the vacation of the first judgments and denying the recovery against defendants other than Lang, and providing that said defendants have their costs of suit, and also appeal from the orders denying the motions for a new trial made by the plaintiffs, and the orders denying their motions to vacate and strike from the files the second judgments and the second findings of fact and conclusions of law.

The decisive question on this appeal is whether, having denied a motion for a new trial, the trial court could, in an order denying such motion, effectually add another order modifying the judgment as to all defendants except C. D. Lang, the effect of which

additional order is to reverse the first judgment in favor of all defendants except C. D. Lang.

[1] There is no contention and no issue raised, nor would the facts support one, that the original judgment was void on its face or that it was void by reason of extrinsic fraud, or that it should have been set aside under section 473, Code of Civil Procedure, or that it was the result of a clerical error or misprision. Obviously, therefore, there are only three ways of interfering with judgments regularly entered, as stated, which are: By motion for new trial, by motion pursuant to sections 663 and 663a, Code of Civil Procedure, to set aside and vacate the judgment and enter a different judgment because the findings already made will not support the judgment theretofore entered on such findings; and, finally, by appeal.

[2, 3] It is patent that the respondents did not appeal from the original judgments, and an examination of the record discloses that the motions made to effectuate a change in the judgments were motions for a new trial and not motions under sections 663 and 663a, Code of Civil Procedure.

The moving papers in each case are designated "notice of intention to move for new trial." They are in the usual form of such motions made on statutory grounds classified for such motion, and the trial court in its minute order speaks of them as motions for a new trial. Furthermore, an examination of the papers in each case demonstrates that they were, and were intended to be, motions for new trial, and nothing more. In a motion made under sections 663 and 663a, Code of Civil Procedure, a party, in addition to setting out the usual requisites of a motion, must specify the particulars in which the conclusions of law are inconsistent with the findings of fact. *Stanton v. Superior Court*, 202 Cal. 478, 486, 261 P. 1001. The language used in the *Stanton* Case is particularly appropriate and applicable to the facts here. In the *Stanton* Case the court says (202 Cal. 478, at page 486, 261 P. 1001, 1004): "The notices before us set forth no particulars wherein the conclusions of law or judgments do not follow logically from the findings of fact. In fact, the conclusions of law are not attacked and are not even so much as mentioned in the notices. Likewise the notices give no indication of the judgment or judgments sought to be substituted for the original judgment entered. Neither do they contemplate an order contemporaneously given vacating the judgment and establishing a

new one in its stead. Nor do they contemplate an order entering a new judgment as an integral part of the order vacating the old one. None of the proceedings taken and none of the orders in question can properly be identified as procedure authorized by or contemplated by said sections of the Code. The limits set by these sections cannot be transgressed."

[4] Finally, it is demonstrated, if any further evidence were necessary, that the motions cannot be considered as having been made under said Code sections, since the trial court made, signed, and filed an entirely new set of findings, as well as a new judgment, on September 13, 1932. It is thoroughly settled that this cannot be done pursuant to a motion made under these sections, quoting again from the Stanton Case, 202 Cal. 478, pp. 487, 488, 261 P. 1001, 1004: "The sections in no case authorize an attack upon the findings of fact and this is the essence of the attack attempted here. * * * The only mode under our system by which findings of fact may be disturbed by the trial court after they have been filed and judgment has been entered thereon, 'except perhaps in respect of a mere clerical error or misprision,' is by the granting of a new trial. * * * The order of December 16, 1911, purporting to change one of the findings of fact, was therefore ineffectual for any purpose. It, of course, in no way affected the judgment given and entered long prior thereto, and no new findings or judgment could be legally filed or made."

We have been at some pains to determine what the notices were, not so much to decide what they were intended to be, for it is obvious that they were intended to be motions for new trial, but to discover, if possible, a principle of construction or interpretation which would permit a classification of the trial court's additional order modifying the judgment after denying motion for new trial, which would warrant an affirmance thereof. From what has been said, unless the trial court has authority to make an order of the kind in question in acting on the motion for a new trial, it does not have it at all when predicated on facts such as those in the case at bar.

Section 662 of the Code of Civil Procedure, speaking with reference to the court's authority on motion for new trial, uses broad and general language. That section says: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, va-

cate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings," etc.

In order to understand the language of the Code section, it must be read in the light of generally accepted and settled legal principles and limited by them. It may not be amiss, therefore, to collate some of these principles for the purpose of forming an accurate perspective.

[5] Unless they have been waived, findings must be made in a trial before a court without a jury (section 632, Code Civ. Proc.), and there is no question but that a judgment may be set aside when it appears that no findings were made and that findings were not waived. *Van Court v. Winterson*, 61 Cal. 615; *Mace v. O'Reilley*, 70 Cal. 231, 11 P. 721; *Prothero v. Superior Court*, 196 Cal. 439, 238 P. 357; *Hardy v. Frey*, 49 Cal. App. 551, 196 P. 92; *Williams v. Leon T. Shettler Co.*, 98 Cal. App. 282, 276 P. 1065; *Savings & Loan Society v. Thorne*, 67 Cal. 53, 7 P. 36.

[6] It is settled, too, that a court may change its findings any time before entry of judgment without ordering a new trial. *Spaulding v. Howard*, 121 Cal. 194, 198, 53 P. 563; *Smith v. Taylor*, 82 Cal. 533, 23 P. 217.

[7] It is also true that no trial is complete until the court has rendered its decision in writing (section 632, Code Civ. Proc.), and filed the same with the clerk of the court (*Broder v. Conklin*, 98 Cal. 360, 33 P. 211). It should be kept in mind, however, that there are well-defined differences between findings of the court, decision of the court, and judgment of the court, and that the authority of a court is more or less, depending upon at what stage of a lawsuit the court has acted.

In *Broder v. Conklin*, supra, 98 Cal. 360, pages 362, 363, 33 P. 211, 212, the court says: "Section 633, Code of Civil Proc., requires the court, in giving the decision, to state the facts found and the conclusions of law separately, and provides that, after the decision has been given, judgment must be entered 'accordingly.' The judgment which is to be entered 'upon the decision' is the sentence of the court in conformity with the conclusions of law, and must find its basis therein. *Chamberlain v. Dempsey*, 14 Abb. Prac. [N. Y.] 241; [Id.] 15 Abb. Prac. [N. Y.] 1; *Loeschigk v. Addison*, 19 Abb. Prac. [N. Y.] 169; *Belmont v. Ponvert*, 3 Robt. [26 N. Y. Super.

Ct.] 693. The conclusions of law resulting from the facts found form the basis of the judgment, and until they have been made the decision of the case has not been given. The findings of fact are in the nature of a special verdict, and the conclusions of law to be drawn therefrom need not be made at the same time with the findings themselves, but may be reserved by the court for argument or further consideration, as is provided in the case of a special verdict in section 628, Code Civil Proc., and, if made at the same time with the findings of fact, they may be changed by the court at any time prior to the entry of judgment. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. [478] 489, 26 P. 1074 [23 Am. St. Rep. 491]. Inasmuch, therefore, as the judgment is to be entered 'upon the decision,' and must find its basis in the conclusions of law, which are to be a part of the decision, it follows that the trial of the action is not completed until a decision has been given which states the conclusions of law upon which the judgment is to rest."

[8] It has been definitely held that, after entry of judgment, a trial court cannot change its findings "without granting a new trial, and doing it upon new trial." *Smith v. Taylor*, 82 Cal. 533, 544, 23 P. 217, 219. (Italics ours.) In the foregoing case, 82 Cal. 533, at page 544, 23 P. 217, 219, in considering an analogous situation, the court said: "Both sets of findings were filed before judgment. Both are brought up to this court. Either is sufficient to support the judgment, and there is nothing in either that conflicts with the other in any matter material to the issues in the cause, or the judgment entered. While it is true that a court cannot change its findings after the entry of judgment without granting a new trial, and doing it upon new trial, it does not follow that it may not make such modification or correction of its findings before judgment as shall make them conform to the truth, and cover the issues in the cause." (Italics ours.)

While section 662 of the Code of Civil Procedure apparently gives the court power on a motion for new trial to change or add to the findings, modify or vacate the judgment in whole or in part, vacate and set aside the findings, we have been cited to no case in which this has been done unless a new trial has been granted, except *Holland v. Superior Court*, 121 Cal. App. 523, 9 P.(2d) 531, wherein it appears to have been done. However, the question was not raised in the *Holland Case*, and the court, speaking with reference to section 662, expressly withheld its opinion

as to whether or not it correctly stated the law. An abundance of authority indicates that the principle laid down in the early case of *Smith v. Taylor*, supra, that such action can be taken by a trial court only upon granting the motion for a new trial and then only in the new trial, is the law. *Stanton v. Superior Court*, 202 Cal. 478, 487, 261 P. 1001; *Hole v. Takekawa*, 165 Cal. 372, 376, 132 P. 445; *Herz v. Hereford*, 88 Cal. App. 290, 263 P. 382; *Smith v. Sharp*, 70 Cal. App. 336, 233 P. 374; *County of Los Angeles v. Lankershim*, 100 Cal. 525, 532, 35 P. 153, 556; 24 Cal. Jur. p. 1005, § 226, note 11.

[9-11] It follows from the above that findings of fact standing alone do not constitute a decision or a judgment, and may be changed at any time before the decision or entry of judgment; that findings of fact, together with conclusions of law, constitute the decision of the court, as distinguished from a judgment, and that either or both may be changed at any time prior to the entry of judgment. When, however, the judgment has been entered, findings can never be changed except and unless a new trial is ordered, and then only as a result of a new trial. Conclusions of law and the judgment, however, may be changed, modified, and vacated after entry of judgment and different conclusions made, and a different judgment entered on findings as they already exist, pursuant to sections 663 and 663a of the Code of Civil Procedure.

[12, 13] It must be clear, therefore, that, if that portion of the minute order of the trial court made after denying a motion for a new trial is considered as a judgment, it is void, because, first, there not only are no findings to support it, but the only findings extant are inconsistent with it; and, second, the court had no authority to grant a new judgment in that manner on a motion for a new trial. If it be considered a direction to prepare new findings and new judgment appropriate to what the court was trying to do and not what the court said, it is void, because the order does not direct the preparation of new findings, and could not in any event, unless a new trial were granted; if it be considered as an order granting the motion for new trial to the defendants affected, it is immediately torn asunder, first, because the new trial was denied, and, second, because a new trial was never had.

Because of our view of the situation presented, it is unnecessary to express an opinion on the question raised and discussed in the briefs as to whether the new findings and

judgments signed and filed on September 13, 1932, were of any validity because they were not signed and filed within the 60-day period. In our view of the matter, if they had been signed within the 60-day period, they would have no validity.

The orders purporting to modify the original judgments are annulled. The orders directing new findings and new judgments in lieu of the old findings and judgments are annulled. The new findings and new or second judgments are annulled and set aside.

I concur: YORK, J.

I concur in the judgment: HOUSER, Acting P. J.



6 Cal.App.2d 416

SOPRIS v. CONTINENTAL MFG. CORPORATION, Limited, et al.
Civ. 9070.

District Court of Appeal, Second District,
Division 1, California.

April 24, 1935.

1. Guaranty ☞53(1)

Where company's officer personally guaranteed that given number of brushes to be ordered by company should be paid for within 30 days after completion of brushes, and seller's subsequent contract with company for brushes provided that bills were payable within 30 days with 1 per cent. discount or within 60 days net, terms of payment in contract was not an alteration of terms in guaranty so as to relieve guarantor from liability, especially where conduct of parties showed that respective terms were treated as unrelated.

2. Guaranty ☞56

Where company's officer personally guaranteed that brushes ordered by company should be paid for within 30 days after completion of brushes, that company issued and seller accepted trade acceptances payable at future date as payment of certain bills for brushes did not relieve guarantor of liability as against contention that issuance and receipt of trade acceptances extended time of payment, constituted payment, or otherwise affected guaranty.

3. Guaranty ☞36(5)

Where company's officer personally guaranteed payment of "bill" for given number of

brushes, to be ordered by company, within 30 days after completion of brushes, and brushes were furnished under contract between seller and company which required payment within 60 days, guarantor was liable for invoices not paid within 60 days, and interest thereon to be computed commencing 60 days after rendition of each invoice, as against guarantor's contention that he was not liable for interest on past-due invoices.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Suit by I. J. Sopris against the Continental Manufacturing Corporation, Limited, and Lindsay Gillis. From a judgment for plaintiff, second named defendant appeals.

Modified and affirmed.

John De Ferie, of Los Angeles, for appellant.

Birney Donnell, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent's assignor the Faultless Rubber Company, hereinafter referred to as company, sold brushes over a period of time to defendant Continental Manufacturing Corporation, hereinafter referred to as defendant, but, because of the credit standing of the latter, business was done on a c. o. d. basis or on the strength of guaranties executed by defendant and appellant, Lindsay Gillis, who was one of the directors of the defendant.

On April 26, 1930, appellant, Gillis, executed a guaranty in words and figures as follows, to wit:

"Los Angeles, California, April 26th, 1930. Faultless Rubber Co., Ashland, Ohio. Gentlemen: I will personally guaranty payment of bill for fifty thousand brushes to be made by your Company as ordered by Mr. E. Thorlson for Continental Manufacturing Corporation, Ltd. (of Los Angeles, California). Payment therefor is to be made thirty days after completion of said fifty thousand brushes.

"Yours very truly, Lindsay Gillis."

Within approximately three weeks thereafter, company and defendant executed a written contract for 50,000 brushes, which contract set forth the price, terms of payment, time and place of delivery, and other provisions. As to the terms of payment, said contract provided: "The above quotations are based upon terms 1% 30 days net 60, f. o. b. Ashland, Ohio. Until such time as you can

establish credit acceptable to our Credit Department, all orders are to be guaranteed by Mr. Lindsay Gillis, or some other financially responsible party acceptable to us.
* * *

[1] Appellant asserts that the terms of the contract above excerpted constituted a material alteration of his guaranty, and that he is exonerated thereby, citing *Nissen v. Ehrenpfort*, 42 Cal. App. 593, 183 P. 956; *Driscoll v. Winters*, 122 Cal. 65, 54 P. 387. Neither of these cases is applicable here. In the *Nissen* Case a specific promissory note was guaranteed, and in the *Driscoll* Case a specific contract was guaranteed, the terms of which were thereafter altered, without the guarantor's knowledge or consent in either case and to the detriment of the guarantor. In the case at bar, the appellant did not guarantee the specific contract between the company and defendant. Appellant executed a separate blanket guaranty to cover future purchases, wherein he said that he could be looked to for payment of brushes sold to the defendant to the number of 50,000 on three conditions: (1) That they be manufactured by the company; (2) that they be ordered by Thoralsen for the defendant, and (3) that he be not called upon to pay until 30 days after completion of the order for 50,000 brushes. There is no contention that the brushes were not manufactured by the company, or that they were not ordered by Thoralsen, but appellant does insist that the time of payment was changed.

The 30 days referred to in the guaranty are in no way related to the 30 and 60 day provision in the contract. This is the only possible construction, when read with the other provisions of the contract, as such provisions were written, construed, and acted upon by the parties thereto. Thus it was provided, and pursuant thereto the parties did manufacture and take allotted quantities of these brushes from time to time, and at different places. As allotments of brushes were delivered, bills were sent to cover the same. Defendant made some payments on account of these bills by cash, and purported to pay on account by trade acceptances, which were issued to and accepted by the company, but which were not paid when due. It is clear from the writings, therefore, and the conduct of the parties is thoroughly consistent therewith, that they are in no way related to each other. Appellant, as a director of the defendant, in order to expedite its means of doing business, executed a blanket guaranty to cover the purchase of 50,000 brushes, and apparently re-

lied upon his opportunities to keep in touch with the activities of defendant and the single safeguard to protect himself which he set forth in his guaranty, to wit, that the brushes be ordered by Thoralsen. It is undoubtedly for these reasons that he executed a guaranty so general in its terms. It is true that a single contract was executed for the purchase of 50,000 brushes within approximately 3 weeks after the date of the guaranty, but the guaranty would have been just as effective if a dozen different contracts had been executed for that aggregate amount at a dozen different times. Appellant clearly intended that he should not be called upon to pay for each several shipment, as it was made, but should only be required to pay after 50,000 brushes had been manufactured and completed for the account of defendant, if they remained unpaid for for a period of 30 days after such completion. *Tyson v. Reinecke*, 25 Cal. App. 696, 699, 145 P. 153; *Earl Fruit Co. v. Herman*, 90 Cal. App. 640, 266 P. 592.

[2] Appellant's point that the issuance and receipt of trade acceptances either extended the time for payment, constituted payment, or otherwise affected the guaranty, is untenable. *Earl Fruit Co. v. Herman*, supra; *Clark v. Patterson*, 213 Cal. 4, 300 P. 967, 75 A. L. R. 1124; *Hammond Lumber Co. v. Richardson Bldg., etc., Co.*, 209 Cal. 82, 285 P. 851; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 481, 58 P. 164, 73 Am. St. Rep. 64; *Woodhead Lumber Co. v. E. G. Niemann Investments, Inc.*, 132 Cal. App. 115, 22 P.(2d) 252; *National Bank of New Zealand v. Finn*, 81 Cal. App. 317, 343, 253 P. 757; *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 781, 141 P. 375.

[3] Neither do we agree with appellant's contention that he was erroneously charged with interest on bills past due. As already stated, the guaranty is most general in its terms, and was obviously designed to be a blanket guaranty to cover payment for future purchase or purchases of brushes to the amount of 50,000. It provided that the brushes must be ordered by a designated individual, but contained no limitations on his authority to fix the terms of purchase as to price, time of payment, or otherwise. Further, the guaranty itself specifically recites: "I will personally guaranty payment of *bill* for fifty thousand brushes," etc. (Italics ours.) The bill is the invoice rendered by the company to defendant upon delivery of the allotment of brushes, which, according to the contract, was payable within 30 days at a discount of 1 per cent. and due within 60 days

with no discount. Appellant would therefore be responsible for the amount of such invoice, plus the legal rate of interest, if the same remained unpaid for a period of 60 days, such interest to be computed commencing 60 days after the rendition of each several invoice, assuming the merchandise covered by the invoice was delivered contemporaneously therewith. This we do assume, since no question is raised on this point. The fact that the defendant, after the due date of an invoice or before its due date, undertook to make payment by trade acceptances bearing interest at 8 per cent. and due at a future date, could not increase appellant's guaranty to pay the bill. In short, while, because of the general nature of the guaranty in question, defendant had unusual limits in contracting as to the terms upon which the bills were to be rendered, once the status of these bills was fixed, the liability of the guarantor also became fixed.

The judgment must therefore be modified so that the interest will be computed pursuant to our views as above expressed. In all other respects the judgment is affirmed; costs on appeal to respondent.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 346

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. KELSEY.
Civ. 9951.

District Court of Appeal, Second District,
Division 2, California.

April 22, 1935.

Rehearing Denied May 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Guaranty Ⓒ37

Contracts of guaranty are to be construed under same rules employed in construing other contracts, and should receive a fair and liberal interpretation according to true import of their language, and guarantor's liability should not be extended by implication beyond express terms of instrument in which guaranty is contained.

2. Guaranty Ⓒ37

Generally, all guaranties are prospective and not retrospective in operation, unless

contrary appears by express words or by necessary implication.

3. Guaranty Ⓒ37

Guaranty contract, containing no reference to any past or existing indebtedness and employing words clearly looking to future and not to past, *held* not to cover pre-existing indebtedness.

4. Guaranty Ⓒ91

In action on guaranty, evidence *held* not to support finding that debtor manifested intention to creditor that payments should be applied to reduction of debts secured by guaranty (Civ. Code, § 1479).

5. Payment Ⓒ41(2)

At common law, when neither creditor nor debtor makes any application of payment, and there are different debts due, law will make application in such manner, in view of all circumstances, as is most in accordance with justice and equity, and will best protect and maintain both parties' rights.

6. Payment Ⓒ46(1)

Payments by debtor, in absence of debtor's manifestation to creditor as to their application, should have been allocated to payment of pre-existing indebtedness unsecured by guaranty, under statute governing application of payments, which made obligations secured by lien or "collateral undertaking" last in order of application, since guaranty is a "collateral undertaking" in nature of security for debtor's obligations within such statute (Civ. Code, § 1479).

[Ed. Note.—For other definitions of "Collateral Undertaking," see Words & Phrases.]

7. Payment Ⓒ41(1)

Common-law rule respecting application of payments in absence of debtor's manifestation is applicable only when Code rule does not embrace conditions of given case (Civ. Code, § 1479).

8. Payment Ⓒ46(1)

Third persons, such as guarantors, sureties, and indorsers, secondarily liable on one or more of several debts, cannot control application of payment by either debtor or creditor, and, when neither party applies payment to specific debt, court is not required to apply it so as to exonerate such third persons (Civ. Code, § 1479).

9. Guaranty Ⓒ37

Renewal note, which was not given in payment of prior notes, did not discharge any of separate debts which it evidenced, and did not change character of balance of pre-existing debt to that of subsequent debt secured by guaranty.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by the Bank of America National Trust & Savings Association against Tomasa S. Kelsey. From an insufficient judgment, plaintiff appeals.

Modified and, as so modified, affirmed.

Freston & Files, by Ralph E. Lewis, all of Los Angeles, for appellant.

Mott, Vallee & Grant (by Kenneth E. Grant), all of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This action was instituted to secure recovery of money from defendant upon a written guaranty executed by her on January 29, 1930, in favor of plaintiff's predecessor in interest, the pertinent parts of which are in the following language: "You will please give credit to Van R. Kelsey and permit him to become indebted to you on endorsements, overdrafts, acceptances or other liabilities in a sum in United States gold coin not exceeding the total amount of Ten Thousand Five Hundred and no/100 Dollars (\$10,500.00) and as said Van R. Kelsey contemplates a course of future dealings with you, you will please continue said credit, or if it should be reduced or satisfied by payments, renew the same from time to time for said amount, or any less sum, or otherwise keep said credit permanently up to the limit aforesaid or any less sum. And these presents shall be deemed to be, and shall constitute to you a continuing guaranty in reference to, and embrace the original credit hereby authorized and all future liabilities of said Van R. Kelsey to you under such original credit, and under any renewal or renewals thereof, and under any note, endorsement, acceptance, overdraft and/or liability and under such successive transactions with you as shall either continue said liabilities, or from time to time renew them, and this guaranty shall remain and be operative until all present or future credit and credits given by you as aforesaid, not exceeding said limited amount, shall be fully paid, and this guaranty shall remain in full force and effect until written notice of revocation shall have been actually received by you from the undersigned * * *."

The last-amended complaint upon which this action was tried contained two causes of action, the first for reformation of the guaranty agreement on the ground of mutual mistake, so as to cover and include indebtedness previously incurred and existing

at the date of execution of the guaranty as well as indebtedness subsequently incurred by said Van R. Kelsey, and for enforcement thereof and recovery thereon of the unpaid balance of all such prior and subsequent indebtedness alleged to be the sum of \$10,500, and for attorneys' fees as provided in such guaranty. The second cause of action was founded on the guaranty as written and sought recovery of the unpaid balance on all indebtedness incurred subsequent to the execution of the guaranty, alleged to be the sum of \$4,765, with certain interest thereon, and for attorneys' fees.

At the trial the court granted a nonsuit as to the first cause of action for failure of proof of mistake in the making of the guaranty agreement, and no error is claimed in respect to such action. In considering and deciding the second cause of action, the court adopted the construction of such guaranty agreement which limited the liability of the guarantor to indebtedness incurred subsequent to its execution. The court also found that in the making of certain payments on his indebtedness subsequent to the date of the guaranty by Van R. Kelsey "it was his intention" that said payments were to be applied to that portion of his indebtedness which had arisen and accrued subsequent to January 29, 1930, the date of such guaranty. In its conclusions the court also declared that these certain payments so found to have been made must be applied towards the payment of indebtedness which accrued and arose subsequent to the 29th day of January, 1930, for the reason that said Van R. Kelsey "intended" that said sums should be so applied. Under the construction so adopted and the facts as found the court ordered judgment in favor of plaintiff for the sum of \$400 with certain interest as balance on indebtedness incurred on direct loans, evidenced by notes of Van R. Kelsey, made subsequent to January 29, 1930, and for the further sum of \$365 with certain interest, as balance on indebtedness incurred on a loan to a third party, whose note the said Van R. Kelsey had indorsed and guaranteed subsequent to January 29, 1930, and for the sum of \$250 as attorneys' fees.

From this judgment, plaintiff has brought to us this appeal and earnestly urges: (1) That, even without reformation, the guaranty agreement as written ought to be interpreted to include and cover pre-existing as well as subsequent obligations of Van R. Kelsey; and (2) that under the provisions of section 1479 of the Civil Code, correctly construed,

certain payments made by Van R. Kelsey subsequent to January 29, 1930, should have been credited by the court on a pre-existing indebtedness as first in order of precedence under such section, thus increasing the amount to which plaintiff was entitled to recover.

[1-3] Upon consideration of the nature and the language of the guaranty as it was drafted and executed in the light of the rules governing interpretation of such instruments, we are satisfied that the interpretation placed thereon by the trial court was correct. Contracts of guaranty are to be construed under the same rules employed in construing other contracts, and should receive a fair and liberal interpretation according to the true import of their language, and the liability of the guarantor should not be extended by implication beyond the express terms of the instrument in which the guaranty is contained. *First Nat. Bank v. Spalding*, 177 Cal. 217, 170 P. 407. It is a rule of very general application that all guaranties are prospective and not retrospective in operation, unless the contrary appears by express words or by necessary implication. *Brandt on Suretyship and Guaranty* (3d Ed.) § 108; *National Bank of Commerce, etc., v. Rockefeller* (C. C. A.) 174 F. 22. There is nothing in the language of the guaranty before us which discloses any purpose, either express or implied, to give it a retrospective operation. Its whole import is that of promise to guarantee and pay future indebtedness. There is not even a remote reference to any past or existing indebtedness therein. The words employed clearly look to the future and not to the past. An almost exact prototype of this instrument appears in the decision in the case of *London & S. F. Bank v. Parrott*, 125 Cal. 472, 58 P. 164, 73 Am. St. Rep. 64, wherein the facts reveal that it was drawn and executed at a time when the party whose obligations were to be guaranteed owed no existing debts. That instrument was couched in language to fit future debts. This instrument in the case at bar, being in substantially the same language, must logically be deemed to be of the same category, and to exclude from contemplation the existence of any pre-existing debts as coming under the guaranty.

[4-8] In its attack upon the trial court's decision in respect to allocation of credits of the two payments of \$1,600 and \$5,000, hereinafter more fully considered, appellant first makes assault upon the finding of the court that "it was his intention" that said pay-

ments should be applied to indebtedness incurred subsequent to the guaranty when Van R. Kelsey made such payments. This finding and the corresponding conclusion are immaterial and cannot constitute basis of any right or create any duty in respect to application of payments by a debtor who is under several obligations to another. "Intention" is a state of mind and, until communicated or manifested, is known only to its possessor. There was in the evidence herein no evidence of the "intention" of Van R. Kelsey at the time he made the payments in question, as he died before this action was commenced and of course could not reveal his "intention" to the trial court. The essential and material factor in a case of this kind is the "intention or desire of the debtor * * * manifested to the creditor." Section 1479, Civ. Code. No finding was made by the trial court on this factor other than as above stated, and it must be concluded as a matter of law that the fact as found by the court did not necessarily warrant and support its conclusion that the payments in question must be credited on subsequent obligations only. Such finding should, therefore, be considered as surplusage, and the corresponding conclusions be disregarded as unfounded. Upon examination of the evidence relating to the question of manifestation of intention on the part of the debtor, we find nothing therein which would support a finding that the debtor, Van R. Kelsey, manifested any intention or desire to the creditor, appellant herein, that such payments, or either of them, should be applied to the extinction of or reduction of any particular obligation. See *Ray v. Borgfeldt*, 169 Cal. 253, 146 P. 679. But the evidence does show that the creditor, appellant bank, made an application of such payments towards the extinction of a group of four particular obligations due at the time to the exclusion of two other separate obligations, without distinction, however, as between the four different obligations, the details of which transaction will be considered hereinafter.

It has been long ago declared by the Supreme Court that it may now be considered as the settled rule in this country, wherever the common law prevails, that when neither the debtor nor creditor makes any application of a payment on a debt, and there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best

protect and maintain the rights of both parties; but that no specific rule can be laid down that will embrace all the cases that may arise for its application, inasmuch as the infinite variety of human transactions cannot be included within the limits of a formulated rule, and, therefore, courts must be governed by principles rather than by fixed rules in making such application, unless a fixed rule embraces the transaction in question. *Murdock v. Clarke*, 88 Cal. 384, 26 P. 601. In this state the Legislature has attempted to make rules for the guidance of courts in this respect by the provisions of section 1479 of the Civil Code, wherein it is provided that where a debtor, under several obligations to another, makes a payment to his creditor, which is equally applicable to two or more of such obligations, where neither the debtor manifests a desire or intention to the creditor that such payment should be applied on any particular obligation, nor the creditor makes any application of such payment to any particular debt due at the time, then under subdivision 3 of said section the payment must be applied to the extinction of obligations in the following order; and if there be more than one obligation of a particular class, to the extinction of all of that class, ratably: (1) Of interest due at the time of payment; (2) of principal due at that time; (3) of the obligations earliest in date of maturity; (4) of an obligation not secured by a lien or collateral undertaking; and (5) of an obligation secured by a lien or collateral undertaking.

A guaranty, such as is here involved, is a collateral undertaking in the nature of security for the obligations of the debtor, *Van R. Kelsey*, incurred subsequent thereto. *Ohio Electric Car Co. v. Le Sage*, 198 Cal. 705, 247 P. 190. Hence we have at once established at least two classes of obligations as defined by section 1479, for the evidence without question shows that at the date of each of the payments, the debtor was obligated for both pre-existing debts, unsecured by the guaranty and debts incurred subsequent thereto, and thus secured by the guaranty. As these obligations are all evidenced by promissory notes, evidencing loans of money at different times and for different periods, it is quite clear that section 1479 of the Civil Code is applicable and must be recognized as controlling the court in the allocation of the two payments in question to the obligations of the debtor in the order prescribed by the section as above stated, in accordance with their status at the time of such payment,

instead of the common-law rule, which is applicable and controlling only when the Code rule does not embrace the conditions of a given case, as announced in the case of *Murdock v. Clarke*, above cited. And in this connection it should be stated that third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one or more of several debts cannot control the application of a payment by either the debtor or the creditor, and where neither party applies the payment to a specific debt the court is not required to apply it so as to exonerate such third persons. 30 Cyc. p. 1251; *Ohio Electric Car Co. v. Le Sage*, supra; *S. W. Towle Lumber Co. v. Anderson*, 208 Cal. 371, 281 P. 500.

[9] With these rules to guide the court, we ascertain from the record the following undisputed facts: On September 12, 1930, *Van R. Kelsey* made a payment of \$1,600 to the appellant bank. At that time the bank held a note of \$4,000, then due and representing a pre-existing indebtedness, and a note for \$2,000, and two notes of \$2,500 each, all due and representing subsequent indebtedness. These notes amounted in all to the sum of \$11,000. Against this total, without distinction between the two classes of indebtedness, there was credited the payment of \$1,600 on September 12, 1930, and the bank required and the debtor executed a new note for the balance of \$9,400; the total residue of the two kinds of debts thus becoming merged in one instrument. The evidence reveals without dispute that this note was a renewal note only and was not given in payment of the prior notes, and did not therefore discharge any of the separate debts which it evidenced, and therefore did not change the character of the balance of the pre-existing debt to that of a subsequent debt secured by the guaranty. *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 141 P. 375. There being no item of interest involved at the time of this payment, we are led to the second class mentioned in subdivision 3 of section 1479, which embraces "principal due at that time," and under its terms we must apply the payment of \$1,600 to the \$4,000 note as being first in order of the four notes and the only one of its class of unsecured notes. This would result in reducing the \$4,000 pre-existing debt to \$2,400, which, with the total of the other three notes secured by the guaranty, was carried into and made up the amount of the \$9,400 note above mentioned.

On May 5, 1931, a further payment of \$5,000 was made by the debtor and applied by the creditor on the \$9,400 note. At that time the \$9,400 note was due, and under the rule there must be allocated from the \$5,000 payment, first the sum of \$2,400 to extinguish the balance of the pre-existing unsecured debt, and the balance of \$2,600 to the partial extinction of the residue of \$7,000 which was in the secured class. This would leave the sum of \$4,400 unpaid on the debts secured by the guaranty, with which we have been dealing. In addition there was a separate obligation of the debtor secured by the guaranty in the sum of \$365 as separately found by the court. This item has been carried separately by the parties in their briefs as well as by the trial court in its findings. There is no controversy over it nor the correctness of the court's inclusion of that amount as an additional obligation of the guarantor. The total of the guaranteed obligations is, therefore, the sum of \$4,765.

It should be stated that during all these transactions there was in existence another note of the debtor evidencing a pre-existing debt in the sum of \$6,500, which was carried on by renewal notes and still existed at the time each of the payments were made. Appellant concedes that both parties in their dealings with each other in respect to application of the payments, excluded from consideration this \$6,500 note, and that the only debts considered at the time of the first payment were those represented by the four notes above mentioned, and which were merged into one note of \$9,400 upon application thereon of the payment of \$1,600. We note also from the bank loan liability ledger, received in evidence, and as found by the trial court, that the last payment of \$5,000 was in fact credited on the \$9,400 note, and a new or renewal note of \$4,400 representing the balance thereof was executed by the debtor on July 7, 1931. It is proper therefore, to exclude the \$6,500 note from benefit of any credit by reason of either of these payments.

It appears clear to us that a new trial of this action is not required by the interests of justice, but that upon the undisputed evidence findings of facts may be made by this court contrary and in addition to those made by the trial court, and a judgment given as required under such findings. Finding numbered IX of the trial court is therefore stricken, and in lieu thereof this court makes the following finding: "That at the time the said Van R. Kelsey paid the said sum of \$1600.00 as found in paragraph VII

of these findings, he did not manifest any desire or intention to said Bank of America to have the said sum applied on any particular indebtedness other than that evidenced by the four notes described and found in paragraph VII of these findings, nor as to any particular indebtedness evidenced by said four notes; that said Bank of America applied said sum to the whole of said indebtedness of \$11,000.00 without distinction as to any one or more of said four notes evidencing the same, and required of and accepted from said Van R. Kelsey the execution and delivery of a renewal note for the balance thereof in the sum of \$9400.00, as found in paragraph VII hereof; that at the time said Van R. Kelsey paid the said sum of \$5000.00, as found in paragraph VIII of these findings, he did not manifest any desire or intention to said Bank of America to have the said sum applied on any particular indebtedness other than the indebtedness then evidenced by the said \$9400.00 promissory note described in paragraphs VII and VIII of these findings, nor as to any particular indebtedness evidenced by said note of \$9400.00; that said Bank of America applied said sum to the partial extinction of said \$9400.00 note without distinction as to any one or more of the four items of indebtedness evidenced thereby; that by the application of said payment of \$1600.00 to said indebtedness of \$11,000.00, as found herein, there became and was credited on said \$4000.00 note, described in paragraph VII of these findings, the whole of said sum of \$1600.00, leaving the sum of \$2400.00 unpaid thereon; that by the application of said payment of \$5000.00, as found herein, there became and was credited on said \$9400.00 note, the sum of \$2400.00 to the extinction of said \$4000.00 note, and the sum of \$2600.00, being the balance of said payment, to the partial extinction of said \$2000.00 note and of each of said two \$2500.00 notes, aggregating \$7000.00, as described in paragraph VII of the findings herein, leaving a balance of \$4400.00 unpaid on said last mentioned notes."

Upon the findings as thus changed and added to, and in accordance with the views hereinabove expressed, we conclude that the plaintiff, appellant herein, is entitled to a judgment against defendant, respondent herein, in the sum of \$4,400 with interest thereon at the rate of 7 per cent. per annum from July 7, 1931, and in the further sum of \$365 with interest thereon at the rate of 7 per cent. per annum from May 4, 1931, together with the further and additional sum of \$250

as attorneys' fees. Let judgment be entered herein as above stated, and it is further ordered that the judgment appealed from herein, as so modified, be, and the same is hereby, affirmed as modified; appellant to recover its costs on appeal.

We concur: STEPHENS, P. J.; ORAIL, J. J.



6 Cal.App.2d 750

ADAMS v. BYRAM, Tax Collector.

Civ. 1707.

District Court of Appeal, Fourth District,
California.

April 17, 1935.

Municipal corporations Ⓒ407(1)

Acquisition and Improvement Act of 1925, permitting pyramiding of delinquent assessments on property within assessment district, upon which assessments have been paid, held valid (St. 1925, p. 849).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Omar T. Adams against H. L. Byram, Tax Collector for the County of Los Angeles and Acquisition and Improvement District No. 70 of the County of Los Angeles. From the judgment rendered, the plaintiff appeals.

Affirmed.

Lloyd S. Nix and G. W. Nix, both of Los Angeles, and Joe Raycraft, of San Pedro, for appellant.

Everett W. Mattoon and J. H. O'Connor, both of Los Angeles, for respondent.

MARKS, Justice.

Since this appeal was perfected, H. L. Byram has become the tax collector of Los Angeles county. He has been substituted as defendant in the place and stead of W. O. Welch, the original defendant.

This case is before us on the merits and on a motion to dismiss the appeal or affirm the judgment.

The sole question presented here is the constitutionality of the Acquisition and Im-

provement Act of 1925 (St. 1925, p. 849), commonly known as the "Mattoon Act," which permits the pyramiding of delinquent assessments on property within an assessment district, upon which assessments have been paid.

Since this case was tried the precise question here involved has been presented and the constitutionality of this act upheld in two cases. *American Securities Co. v. Forward*, 220 Cal. 566, 32 P.(2d) 343; *Thatcher v. County of San Diego*, 138 Cal. App. 503, 32 P.(2d) 979. The Supreme Court of the United States has refused to review these decisions of the California courts. *Irones v. American Securities Co.*, 55 S. Ct. 403, 79 L. Ed. —; *Thatcher v. County of San Diego*, 55 S. Ct. 403, 79 L. Ed. —.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



6 Cal.App.2d 441

BRISBIN v. WISE CO. et al.

Civ. 9550.

District Court of Appeal, Second District,
Division 2, California.

April 25, 1935.

Hearing Denied by Supreme Court
June 24, 1935.

1. Negligence Ⓒ67

It was duty of store patron, using aisle in store, to use her sense of sight, see what was plainly visible, and keep lookout for clerks or others also using aisle.

2. Negligence Ⓒ67

It is as much negligence for store patron, using aisle in store, to look in careless manner for clerks or others also using aisle as not to look at all.

3. Negligence Ⓒ65

It was as much duty of store patron to exercise care of ordinarily prudent person for her own safety while using aisle in store as it was duty of store proprietor and clerk, with whom patron collided, to exercise such care.

4. Trial Ⓒ251(8)

Instructions as to storekeeper's duty to keep premises and passageways in safe condition and use ordinary care to avoid injuring patrons and invitees held properly refused as foreign to issues in action against store

proprietor and clerk for injuries to patron colliding with clerk as result of latter's alleged negligence in passing along aisle of store in course of her employment.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Clarah I. Brisbin against the Wise Company, a corporation, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Joe Crider, Jr., E. H. Tilson, and S. J. Grogan, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal by plaintiff from a judgment entered upon an adverse verdict by a jury in an action for damages for personal injuries. In her complaint plaintiff charged negligence on the part of defendant Wise Company, proprietor of a department store in Long Beach, through its servant and clerk, defendant Ida Bryant, in that said Ida Bryant negligently collided with plaintiff in an aisle in such store while the latter was using the aisle as a patron and invitee of defendant company. Defendants answered separately, each denying the charge of negligence and each pleading contributory negligence on the part of plaintiff, and that the accident was unavoidable.

[1-3] Appellant complains of six instructions given at defendants' request, and of the action of the court in refusing four instructions requested by plaintiff. The first four of those given and complained of related to the duty of one in plaintiff's situation to use her sense of sight, to see what is plainly visible, to keep a lookout for clerks or other persons using the aiseways, and that it was just as much negligence to look in a negligent and careless manner as it was not to look at all. The last two stated that it was just as much the duty of plaintiff to exercise the care of an ordinarily prudent person for her own safety as it was the duty of defendants to exercise such care, that the rights of clerks in a store and customers are reciprocal, and that each owes the same degree of care to avoid injury to one another.

In the light of the evidence in the case we can find no wrong in these instructions. There was some conflict in the evidence as to the precise manner in which the collision of the two women occurred, but it is made quite clear that it consisted in the ordinary, everyday colliding of two pedestrians, neither of whom is at the moment on the lookout for the other and both unknowingly attempting to occupy the same space at the same time. None of these instructions departs from the usual and correct statement of the duties of pedestrians inter sese, whether in store aisles, on sidewalks, or in any other place where persons gather and move about.

[4] The four instructions refused by the court all relate to the duties of a storekeeper or proprietor of a place to which the public is invited; and, while correct as statements of the law relating to such subject, are foreign to the issues in this case. No claim of negligence appears in plaintiff's complaint as founded on the liability of the defendant company as a proprietor or storekeeper, but the negligence alleged is that of an employee of the store in passing along one of the aisles of the store in the course of her employment and on her master's business. It is through the doctrine of respondeat superior that plaintiff sought to attach liability on the defendant company by alleging that one of its employees negligently collided with her. The question of duty of the storekeeper to keep his premises and passageways in a safe condition and to use ordinary care to avoid injuring his patrons and invitees was entirely beside the issues in this case, and the court very properly declined to instruct on that subject. The real and vital issue centered on the personal conduct of defendant's employee, and presented the simple and well-known case of personal negligence in the movements and action of an individual resulting in injuries to another through bodily collision. In such cases as the one at bar an apology is usually accepted as full compensation; but in this case, by reason of the serious injury resulting to plaintiff, a monetary compensation is sought. The jury decided on the evidence in defendants' favor after a fair trial and upon a very full statement of the law by the court in its instructions, wherein we can find no error.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

6 Cal.App.2d 432

CALIFORNIA TRUST CO. v. SMEAD INV.

CO.

Civ. 9937.

District Court of Appeal, Second District,
Division 2, California.

April 25, 1935.

1. Mortgages ⇨330

Statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness to beneficiary and fair market value of property at time of sale *held* inapplicable to action, commenced after it became law, to recover deficiency in proceeds of sale on foreclosure of trust deed executed before enactment thereof (Code Civ. Proc. § 580a).

2. Mortgages ⇨375

Rendition of judgment for deficiency after sale on foreclosure of trust deed *held* not abuse of trial court's discretion, even if sale price was inadequate, especially in absence of any claim of mistake, misapprehension, or inadvertence, unfairness attending sale, or making thereof under inequitable or oppressive conditions (Code Civ. Proc. § 580a).

3. Mortgages ⇨346

Trust deed, requiring beneficiary to deliver it and note secured thereby to trustee when written declaration of default and demand for sale was made, *held* not to require manual delivery thereof; symbolic delivery being sufficient.

4. Mortgages ⇨369(2)

Irregularity is insufficient to invalidate trustee's sale on foreclosure of trust deed, in absence of claim that it operated to injury of owner of realty sold.

5. Mortgages ⇨24

There is no impropriety in payee of note being also trustee in trust deed securing it.

6. Mortgages ⇨209

Trustee under trust deed, providing for payment of trustee's fee to him in case of foreclosure sale, *held* entitled to customary, reasonable trustee's fee for conducting sale, though he owned note secured by trust deed.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by the California Trust Company against the Smead Investment Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Philip C. Farman, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudft and Donald O. Welton, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in an action for a deficiency upon a promissory note which was secured by a deed of trust and after foreclosure thereof. The note and deed of trust were executed on June 12, 1929, in favor of the California Bank. The plaintiff herein was named as trustee in the deed of trust. On October 23, 1929, the note was assigned to the plaintiff and the plaintiff continued to be the owner thereof until it was surrendered to the court for cancellation upon entry of final judgment herein. On February 14, 1933, at a time when the note had become due and certain installments of interest were unpaid, and while the note was in the possession of the state treasurer of California, as plaintiff's pledgee, as a part of the \$200,000 worth of security deposited by the plaintiff with said treasurer under the provisions of section 96 of the Bank Act (St. 1909, p. 106, as amended by St. 1925, p. 524), plaintiff caused notice of default and election to sell to be recorded in the office of the county recorder. More than a month prior to the foreclosure sale the plaintiff withdrew the note from the office of the state treasurer, substituting other collateral with him. The foreclosure sale was held on June 13, 1933, the property being purchased by the plaintiff for \$27,000, leaving a deficiency unpaid, and the present action was commenced on November 16, 1933, for the purpose of obtaining a judgment for the deficiency and resulted in a judgment for the plaintiff as prayed in its complaint.

[1] The principal contention of the defendant is that section 580a, Code of Civil Procedure, applies to all such actions commenced subsequent to its becoming law even though, as in this case, the trust deeds were executed prior to its enactment. There is no merit in the defendant's contention. This court has succinctly stated its reasons for its position with regard thereto in the case of *Bennett v. Superior Court* (Cal. App.) 42 P.(2d) 80, Mr. Presiding Justice Albert Lee Stephens writing the opinion of the court.

[2] The defendant next contends that the court has inherent equitable power to refuse to allow a deficiency judgment based on the

forced sale price when the sale is attended with any unfairness or is made under conditions which would be inequitable or oppressive. The defendant cites no California cases in this behalf. He cites cases of other jurisdictions in which the courts have refused to approve sales under foreclosure judgments and executions because of inadequacy of sale price, where the inadequacy resulted from mistake, misapprehension, or inadvertence on the part of the interested parties, or of intending bidders. It is obvious, however, the refusal to approve a sale and thus requiring a new or resale is quite another matter from refusing a judgment after the sale has been completed. Furthermore, in the instant case no claim of mistake, misapprehension, or inadvertence is made by the defendant, nor is any claim made that the sale was attended with any unfairness, or that it was made under conditions which would be inequitable or oppressive. We see nothing in the record which would amount to an abuse of discretion on the part of the trial court.

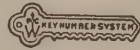
[3-6] The defendant contends that the sale was accompanied with certain irregularities. In this regard he claims that paragraph G.1. of the trust deed required that when written declaration of default and demand for sale was made to the trustee, the beneficiary should at the same time deliver to the trustee the trust deed and the note. A second irregularity claimed by the defendant was that the plaintiff, being the trustee as well as the owner, was unauthorized to charge and collect, as it did, a trustee's fee for conducting the sale. As to the first alleged irregularity, it is our conclusion that manual delivery of the note and deed of trust was not necessary—symbolic delivery was sufficient. There is no claim by the defendant that harm or prejudice resulted to him from the symbolic delivery. An irregularity, even if one has occurred, is not sufficient to invalidate a trustee's sale in the absence of a claim that the irregularity operated to the injury of the owner. 25 Cal. Jur. 91, and cases cited. With regard to the fees of the trustee, the courts of this state have repeatedly held that there is no impropriety in the payee of the note being also the trustee in the deed of trust. 25 Cal. Jur. 19, and cases cited. No claim is made by the defendant that the fee charged was other than the customary fee in the community for like services, and the court found that the charge was a reasonable one. The defendant's conten-

tion is that the plaintiff could not collect a fee for itself because it had become the owner of the note, but the plaintiff was the trustee from the beginning of the transaction, and it was one of the agreements of the trust deed that in case of foreclosure sale the plaintiff would be entitled to a trustee's fee.

Finally, the defendant contends that certain findings of the trial court were unsupported by the evidence. We have examined into these conditions, and find that in each case the findings were supported by substantial evidence.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



6 Cal.App.2d 444

WELFARE INV. CO. v. STOWELL. *

Civ. 9464.

District Court of Appeal, Second District,
California.

April 25, 1935.

As Amended on Denial of Rehearing
May 23, 1935.

Hearing Denied by Supreme Court
June 24, 1935.

1. Appeal and error ☞110

Order denying motion for new trial is nonappealable.

2. Corporations ☞506

Where one of four comakers of note was president of family corporation of which his sons were directors, corporation could maintain action thereon against any one or all of comakers if corporation purchased note as an entity and not as president's agent or alter ego, but, if transaction whereby corporation acquired note constituted payment thereof, such action could not be maintained (Civ. Code, §§ 1473, 3200).

3. Corporations ☞521

Where comaker of note was president of family corporation of which his sons, who had invested their own funds, were directors, evidence that transaction whereby corporation acquired note from payee bank constituted payment of note, held insufficient for jury on theory that corporation was president's agent or alter ego, and hence corporation could recover on note in action against one of comakers.

4. Bills and notes 313

Payee's assignment of note to family corporation of which comaker was president and his sons were directors *held* not fraudulent as to another comaker against whom corporation brought action on note, since each comaker remained jointly and severally liable; fact that president may have been thereby relieved from immediate pressure for payment being of no moment to defendant comaker.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by the Welfare Investment Company against N. W. Stowell. From a judgment on a directed verdict for plaintiff and from an order denying a motion for a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

See, also, 132 Cal. App. 275, 22 P.(2d) 529.

Davis & Thorne, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

[1] This is an action on a promissory note for the sum of \$130,000 interest, attorney fees, and costs. The trial was before a jury, and, after introduction of the note and evidence given as to the value of attorney fees, the plaintiff rested. The defendant thereupon introduced testimony upon the issue of payment and upon the issue of fraud in the assignment of the note to plaintiff and respondent. The court thereafter granted plaintiff's motion for a directed verdict in its favor. This appeal is from the judgment made and entered upon such verdict. There is also an attempted appeal from the motion for new trial, but, as this right no longer exists, this part of the appeal is dismissed.

Appellant contends that the evidence shows that the note was paid, or at least that the evidence upon that issue was such as to entitle the cause to be submitted to the jury. Although there is very little conflict of evidence in the case, there is sharp conflict between counsel as to the factual and legal conclusions to be drawn from the evidence.

On May 12, 1931, N. W. Stowell, appellant and sole defendant in the trial court, together with William Lacy, F. V. Gordon, and F. B. Chapin signed a promissory note as makers in favor of Security-First National Bank as

payee. It appears that after a time the bank experienced difficulty in collecting the interest and, according to the deposition of Wm. Lacy (he had died before the trial), Mr. Jack Kerr, vice president of the bank, had discussed this with him and had said, "Well, Bill (Mr. Lacy) we look to you for the payment of that note." Mr. Lacy replied, "Well, I guess if you sue me you could collect it."

Mr. Stowell (defendant-appellant) testified that he had a conversation with Mr. Wm. Lacy about the note, and that he gave Lacy a check for his proportion of interest (one-quarter thereof) and offered to pay one-fourth of the principal but Mr. Lacy wanted him to pay one-half and Lacy would pay one-half (his and his brother-in-law's portion). This Stowell declined to do.

It will be well at this juncture to examine into the relation of the plaintiff and respondent and its connection with this action. Welfare Investment Company was a family corporation of which Mr. Wm. Lacy was a director and president, and his sons Wm. G. Lacy, Walter P. Lacy, Roy Lacy, and Gordon Lacy were directors. It is contended by appellant that the evidence introduced and hereinafter alluded to tend to prove that this company was not only the agent of, but was in fact the alter ego of, Wm. Lacy. This is disputed by respondent, who refers to the undenied testimony that the other directors had invested their own funds in the corporation; that Mr. Roy Lacy was its general manager and Mr. Wm. Lacy was a minority stockholder.

At the trial Mr. Roy Lacy testified that he was secretary and treasurer of the Welfare Investment Company; that the first time the matter of the note sued upon was discussed in a directors' meeting was in July, 1931, but that he had previously talked with his father concerning the acquisition of the note by the Welfare Company—that his father had explained the circumstances relating to the note. "Possibly" his father had mentioned that he (the father) might have to pay the note and the witness later said: "I made the suggestion that the Welfare Investment Company buy it and he made no suggestion in that regard." Thereafter the father discussed the matter with Mr. Meserve, who testified at the trial that he had been consulted professionally by Mr. Lacy about the note.

At the "Welfare" directors' meeting the matter of the note was discussed as was also its purchase by the company, but nothing was said about getting the money for such purchase. The relevant portions of the com-

pany's minutes are as follows: "The meeting was called to order by the president, William Lacy, and minutes of the previous meeting were read and approved. The president reported the situation of a note jointly signed by himself and N. W. Stowell, F. B. Chapin and F. V. Gordon, stating the situation as to the position of the note and suggesting certain conditions under which the note may be collected. The secretary, upon motion, seconded by W. P. Lacy, offered the following resolution: 'Resolved that the Welfare Investment Company purchase from the Security-First National Bank, Fifth and Spring Street Branch, a note held by them in the name of Lacy, Stowell, Chapin and Gordon, and that the Welfare Investment Company inaugurate proceedings to collect said note.'"

The Security-First National Bank carried separate ledger sheets upon which this note was charged against the makers, and upon such sheets under the date of the Welfare acquisition of the note these accounts were credited in the payment column. The bank representative testified that the bank committee discussed the matter as a "sale" of the note. It should here be stated that the note itself was indorsed on its back as follows: "Los Angeles, Calif. July 28, 1931. For value received the undersigned, Security-First National Bank of Los Angeles, hereby sells, assigns and transfers (without recourse) to the Welfare Investment Company, a corporation, the within note and all indebtedness owing thereon and/or represented thereby, including the principal of the original indebtedness, extended and renewed by this note. This assignment is made without representation, guaranty or warranty. Security-First National Bank of Los Angeles By C. L. Dawson, Jr. Vice-President." In exchange for the surrender of this note, a note for a like sum was executed to the bank by the Welfare Company and indorsed by Wm. Lacy.

[2] Of course, if, in point of fact, the transaction on the part of Welfare Company actually discharged the obligation at the bank by payment thereof, the note was paid and became thereby functus officio, and the instant cause cannot be successfully maintained. Section 1473, Civ. Code, or section 3200, Civ. Code; *Bailes v. Keck*, 200 Cal. 697, at page 701, 254 P. 573, 51 A. L. R. 930; *Harris v. King*, 113 Cal. App. 357, 298 P. 100. It may be noted that this latter case is quite different from the instant one, in that the note was paid directly by one primarily liable and was delivered to him indorsed "without recourse." If there is evidence in the instant case that Welfare Company was the agent or alter ego

of Wm. Lacy, it is authority for appellant's position. On the other hand, if, in point of fact, the Welfare Company, as an entity, purchased the note, it became the owner with full right to maintain an action against any one or all of the makers. *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Chappell v. McKeough*, 21 Colo. 275, 40 P. 769.

The trial court directed that the jury bring in its verdict in favor of a judgment running from defendant to plaintiff, and it did so.

[3] If we find that the court was wrong in so directing the jury, and that there was some substantial evidence supporting appellant's contention, we must reverse the judgment. We find no such evidence. No evidence is called to our attention which tends to dispute the idea that the Welfare Company was a legitimate business entity in which the directors and stockholders had invested their own funds. There is nothing stronger than suspicion that it was ever the alter ego or the agent of Mr. Wm. Lacy in the matter of this note or in any other matter.

That the sons took a lively interest in the fact that their father would in all probability be called upon to meet this large obligation is nothing to their discredit, although their interest could as well be ascribed to the fact that their affairs were linked with those of their father's in the corporation and that his necessity might well have seriously affected the welfare of all.

[4] And wherein, may we ask, is the fraud? Each and every one of the makers was jointly and severally liable for the whole of the note and continued to be after the transfer. The original holder could have maintained the same suit as the instant one or could have sold to another bank, and their successor could have done the same. No question arises here as to the right of appellant to require contribution. Appellant has been placed in no better or no worse position by the suit of respondent than he might have been by any other plaintiff. The fact that the course taken relieved Mr. Wm. Lacy from immediate pressure for payment, if it did, is of no moment to appellant.

In our opinion, no evidence is here presented that tends to take the transaction complained of outside of strict business procedure. If there were moral considerations, such as were hinted at in appellant's conversation with Mr. Wm. Lacy about the payment of the note, they are beyond the consideration of either the trial court or this court. Since neither party on appeal mentions the matter

of attorney fee as involved in the appeal, we, too, pay no attention to it.

The judgment is affirmed.

We concur: **CRAIL, J.; WILLIS, Justice pro tem.**



6 Cal.App.2d 407

ANDREWS v. FIRST REALTY CORPORATION et al.

Civ. 9418.

District Court of Appeal, Second District,
Division 2, California.

April 23, 1935.

Rehearing Denied May 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Fixtures ☞35(3)

Whether refrigerating equipment installed in apartment house became a fixture, or remained personal property, *held* question of fact.

2. Appeal and error ☞931(1)

On appeal, appellate court must view evidence in light most favorable to respondent and sustain trial court's findings of fact if supported by any substantial evidence.

3. Fixtures ☞35(3)

Evidence, that three years after installation two compressors of refrigerating unit of one kind had been removed from building and had been replaced by one of another make, that building could be and had been operated without electrical refrigeration, that electrical apparatus could be removed without damage, and that coil was attached to refrigeration box by four removable bolts, supported finding that equipment removed was not a "fixture" but personalty, and hence action for money damages for conversion of refrigerating equipment would lie.

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

4. Appeal and error ☞204(1)

Objection to admission of evidence may not be made for first time on appeal.

Appeal from Superior Court, Los Angeles County; Carl B. Sturzenacker, Judge.

Action by Harry H. Andrews against First Realty Corporation and others. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Schweitzer & Hutton, of Los Angeles (Edward H. Gaylord, of Los Angeles, of counsel), for appellant.

L. H. Phillips, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by the First Realty Corporation from a judgment for the respondent in an action for money damages for the conversion of certain refrigerating equipment in a 28-unit apartment house. The appellant says: "The only question involved in this appeal is whether the property in dispute became a fixture or remained personal property."

[1-3] The question whether the property involved in this case became a fixture or remained personal property is a question of fact to be determined by the fact finder upon all the facts and circumstances in evidence bearing upon the question. It is the duty of this court on appeal to view the evidence in the light most favorable to the respondent; and if we find any substantial evidence to sustain the findings of the trial court it is our duty not to disturb such findings. Three years after installation two compressors of one kind had been removed from the building and they had been replaced by one of another make. There was evidence that the house could be and had been operated without electrical refrigeration and was properly equipped for ice refrigeration. The electrical apparatus could be removed without damage and the coil was attached to the refrigeration box by four removable bolts. This is sufficient to support the finding that the equipment removed was not a fixture.

Under the circumstances of this case we conclude that there is nothing in the rule set out in *Dauch v. Ginsburg*, 214 Cal. 540, 6 P. (2d) 952; *Hammel Radiator Corp. v. Mortgage Guarantee Co.*, 129 Cal. App. 468, 18 P. (2d) 993; *Hammel Radiator Corp. v. California Security Loan Corp.*, 140 Cal. App. 407, 35 P. (2d) 353; nor in *Broadway Imp. & Inv. Co. v. Tumansky* (Cal. Sup.) 41 P. (2d) 553, which would warrant a reversal of the instant case.

[4] It is the final contention of appellant that the trial court erred in receiving in evidence the copy of a certain federal decree between others than the parties to this action. The decree was admitted in evidence by the stipulation of the parties, or at least it was so claimed in open court by the attorneys for the respondent without protest from the appellant; furthermore, when the exhibit was offered and admitted there was no objection from the appellant. The objection to the exhibit may not be first made on appeal.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



6 Cal.App.2d 436

CAPRON v. PACIFIC SOUTHWEST DISCOUNT CORPORATION et al.
Civ. 9896.

District Court of Appeal, Second District,
Division 2, California.
April 25, 1935.

1. Pleading ⇨114

Denial by answer of existence of necessary element to plaintiff's cause of action raises issue of fact.

2. Mandamus ⇨164(2)

In stockholder's petition for mandamus to examine corporate records, answer alleging that board of directors decided to purchase certain outstanding stock and that petitioner knew of such plan but intended through examination of records to secure options and thus interfere with plan held not demurrable as alleging conclusion (Civ. Code, § 355).

3. Mandamus ⇨164(2)

In stockholder's petition for mandamus to examine corporate records, answer alleging that petitioner intended through examination to secure options on outstanding shares and to interfere with plan of board of directors in purchasing outstanding shares held not demurrable, because not alleging that petitioner would in fact carry out his plan (Civ. Code, § 355).

4. Corporations ⇨181(1)

"Purpose" within statute limiting stockholder's right to examine corporate records

to cases wherein examination is for "purpose" reasonably related to his interests as a shareholder is purpose existing in mind of shareholder at time of inspection of records, and hence right to inspect does not depend upon whether he will succeed in accomplishing purpose for which he demands right (Civ. Code, § 355).

[Ed. Note.—For other definitions of "Purpose," see Words & Phrases.]

5. Mandamus ⇨164(2)

In stockholder's petition for mandamus to examine corporate records, answer alleging that petitioner intended through examination to secure options on outstanding shares which corporation desired to purchase, and to interfere with plan of board of directors held not demurrable on ground that petitioner, prior to ruling on demurrer, withdrew demand to examine share registers, where there still remained his demand to examine other records from which he could have secured desired information (Civ. Code, § 355).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for mandamus by Ralph E. Capron against the Pacific Southwest Discount Corporation and another. From a judgment granting a peremptory writ of mandate after sustaining an oral demurrer to respondents' answer, respondents appeal.

Reversed and remanded.

See, also, 36 P.(2d) 664.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellants.

Kenyon F. Lee, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal from judgment granting a peremptory writ of mandate.

Respondent herein filed in the superior court a petition for writ of mandate to compel appellant corporation, in which he was a stockholder, to permit him to examine its corporate records. The petition, in addition to other and formal averments, alleged on information and belief that S. A. Scherer, the president of the corporation, had loaned to one Christie Bauer some \$200,000 of the corporate funds for the purpose of purchasing all of the outstanding shares of the stock of the corporation, except the shares held by said Bauer and Scherer, for the personal use of said S. A. Scherer; that corporate funds had been used and were being used for such

purpose with the ultimate object of vesting in Scherer all of the shares of stock of the corporation; that as a result of this operation the value of respondent's shares of stock became depreciated, and that he desired to inspect said records to determine the present value of his shares to ascertain whether he should sell or hold the same. The answer admitted by failure to make denial the existence of the corporation, the shares of stock issued and outstanding, and that respondent was a shareholder and had demanded the opportunity of inspecting the corporate records. It denied all other allegations contained in the petition, and affirmatively pleaded that the board of directors had determined that it was to the best interests of the corporation to purchase certain of the outstanding shares of its capital stock and that appellants were advised and believed that the petitioner for the writ knew of said intention of said board; that it was petitioner's plan to procure options to purchase such shares of stock and to sell them to the corporation at a price in excess of that for which the corporation could purchase the same from the shareholders; and that the purpose of petitioner was not to secure an examination of the corporate records for a purpose reasonably related to his interests as a stockholder, but for the purpose of procuring the names of the shareholders and other information concerning the corporation to carry out his said plan, to the detriment of the corporation.

When the petition came on for hearing, petitioner withdrew his demand for inspection of the share registers of the corporation, thereby limiting the subject of his demand to an inspection of the books of account and minutes of the proceedings of the shareholders and board of directors, and orally demurred to the answer on the ground that it did not state a defense. The appeal herein is from the judgment and order granting the writ of mandate following the sustaining of the demurrer.

The right of a shareholder in a corporation to inspect its records is codified and granted by section 355 of the Civil Code. This provision of law does not confer upon a shareholder the right to examine corporate records whenever he desires to do so, but limits this right to cases wherein the examination is "for a purpose reasonably related to his interests as a shareholder." Respondent herein, as a necessary element to his cause of action, alleged in his petition in the superior court, in the language of the sec-

tion, that he had such purpose, and made the further allegations as to the use of corporation funds by its president and the effect of such operations on the financial status of the corporation and the value of its shares as above mentioned. We believe that such allegations sufficiently set forth facts which if established would show that the inspection of records sought by respondent was "for a purpose reasonably related to his interests as a shareholder." These latter allegations as to the reason and purpose of the petitioner, as well as those relating to the conduct of the president of the corporation, are denied by the answer of all the respondents named in the petition. This raised an issue both as to the alleged and declared purpose of the inspection of the records in question and as to the specific allegations to the effect that the affairs of the corporation were being so conducted as to impair the value of its shares.

[1] The case of *Gertridge v. State Capital Co.*, 129 Cal. App. 86, 18 P.(2d) 375, 376, relied upon by respondent, is not in point. While in that case, as here, the petitioner sought an inspection of corporate records to determine the value of his stock and whether to sell or hold the same, the answer of the respondents in the case cited merely set up as a defense that the demand for inspection was made with intent to use the books "to the injury of such corporation upon receipt of the information sought to be acquired thereby" and "was influenced by and made with bad motive and purpose." These defensory allegations were properly held to be mere conclusions of law and justified the sustaining of the demurrer. Respondent here assumes that in the case cited respondents denied the allegations as to petitioner's purpose in demanding access to the corporate records. Such an assumption is wholly unwarranted. The opinion particularly mentions that the answer "stated no facts showing that plaintiff was not acting in good faith or for any purpose other than that provided by the statute and alleged in his petition." This rather clearly indicates that the court was of the opinion that had such facts been stated the answer would not have been vulnerable to demurrer. Here the basic allegations for the desired relief, the existence of the purpose for the inspection provided by the statute, is denied by the answer, and an improper purpose is affirmatively pleaded. We believe no authority is necessary for the proposition that the denial by answer of the existence of a necessary ele-

ment to a plaintiff's cause of action raises an issue of fact.

Respondent also urges in support of the judgment granting the writ herein that affirmative allegations of the answer are merely conclusions. These allegations set forth the determination by the board of directors that it was in the best interests of the corporation to purchase in its behalf certain of its outstanding shares and of their intention to make such purchases; that appellants (respondents under the petition) were advised and believed that the petitioner knew of such plan and himself intended to procure options on outstanding shares with a view of reselling them to the corporation at an increased price; that petitioner's purpose in demanding an inspection of the records was not the purpose alleged but that of securing the names of other stockholders and other information so that he might secure options to purchase stock of such individuals and then offer to resell to the corporation at an advance in price, and that it was the purpose of petitioner to make a profit for himself, to the detriment of the corporation. Respondent's statement that the trial court held these allegations to state mere conclusions of law fails to find support in the record, which shows the sustaining of the demurrer but not the reasons for such ruling.

[2-4] The allegations as to the determination of the board of directors while declaring their decision and conclusion was not the pleading of a conclusion of law but a statement of fact that such determination had been made and the intent and plan of purchasing outstanding shares which that board had decided upon. The further allegations to the effect that petitioner knew of this plan and intended through the examination of the records to secure options on outstanding shares, thus interfering with the plan of the board of directors, is not an allegation of a conclusion of law but a statement of the alleged intent and purpose of petitioner in seeking an examination of the records. Respondent urges that the answer does not allege that the petitioner will in fact carry out his plan to secure options. Such an allegation is not necessary. The right of a shareholder under section 355 to examine corporate records depends not upon whether he will succeed in accomplishing the purpose for which he demands the right, but whether such right is "for a purpose reasonably related to his interests as a share-

holder." The "purpose" referred to in the statute is the purpose existing in the mind of the shareholder at the time of inspection of the records.

[5] The fact that the petitioner had, prior to the ruling on demurrer, withdrawn his demand to examine the share registers does not affect the question before us, as there still remained his demand to examine other records from which he could have secured the names of other shareholders and information which would have assisted him in carrying out a plan to secure options on outstanding shares of stock.

The answer raised the issue as to whether the actual purpose of the demanded inspection of records was such as to warrant a denial of that right by the corporation, and the demurrer to the answer should have been overruled.

The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

We concur: STEPHENS, P. J.; CRAIL, J.



6 Cal.App.2d 482

SANFORD v. McCOOK et al.

Civ. 10222.

District Court of Appeal, Second District,
Divison 2, California.

April 26, 1935.

1. Automobiles ☞244(14)

Finding that defendant motorist who drove into rear of automobile making boulevard stop was negligent *held* sustained by evidence.

2. Damages ☞160

Where complaint for injuries sustained in automobile collision alleged that plaintiff had been under constant medical care and had incurred heavy bills for medical care, examination, and supplies, and defendant did not demur to complaint, evidence as to money expended for medical care *held* properly received.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Margaret Sanford against George A. McCook and others. From a judgment for plaintiff, defendants George A. McCook and Marie C. McCook appeal. On respondent's motion to dismiss appeal or affirm judgment.

Judgment affirmed.

O'Melveny, Tuller & Myers and Albert Parker, all of Los Angeles, for appellants.

J. Russell Morton, of Pasadena, for respondent.

STEPHENS, Presiding Justice.

This is an appeal after judgment had by plaintiff upon an action for damages caused by an automobile collision. Appellant has filed his opening brief, and respondent has presented his motion for dismissal of the appeal or affirmance of the judgment as provided for in rule V, section 3, of the Supreme and Appellate Court rules, and we think the motion should be granted for affirmance of the judgment.

[1] Appellant contends that the evidence does not support the findings of negligence. But this cannot be sustained, for the automobile of plaintiff making a boulevard stop was run into from the rear by defendant's automobile projecting it clear across the street. The driver of the rear car, answering a question about how it occurred, replied: "Lady, I was just driving too fast." The driver of the front car testified: "Well, the other car ran into the back end of it and pushed it clear across the street; was terribly hit." And question: "So that you cannot state, then that if the car moved forward it was because the clutch came into gear and went forward?" Answer: "Well, I, I could tell by the jolt I got." There was other testimony, but this is sufficient to show that there was supporting testimony to the negligence finding and upon appeal we must take it to be true.

[2] The only other point raised is that damages for medical care was improper because not specially pleaded. There was no demurrer but there was objection to questions eliciting such proof at the trial. The complaint alleges: "That she (plaintiff) has been under constant medical care because of said injuries and has incurred heavy bills for medical care, examination and supplies." The answer to this point is clear in the following quotation from *Abelas v. Consolidated Construc-*

tion Co., 32 Cal.App. 732, 164 P. 19, 20: "Had the defendant demurred specially to the complaint, plaintiff would have been required to particularize the amount expended for nursing; but in the absence of such a demurrer * * * the complaint undoubtedly was sufficient to entitle plaintiff to introduce evidence to prove the amount expended or incurred on the several accounts."

The judgment is affirmed.

I concur: CRAIL, J.



6 Cal.App.2d 343

**CRAIN v. SECURITY TITLE INS. &
GUARANTEE CO.**

Civ. 9479.

District Court of Appeal, Second District,
Division 2, California.

April 22, 1935.

Rehearing Denied May 22, 1935.

1. Trial ☞396(7)

Court's findings should not deviate from facts admitted by pleadings, and findings contrary to such admissions are outside issues.

2. Insurance ☞666

Proper damages for breach of policy of title insurance are amount which would compensate for all detriment proximately caused thereby (Civ. Code, § 3300).

3. Appeal and error ☞1010(1)

In action on policy of title insurance, where judgment limited insured's loss to value of \$2,500 note and trust deed rendered valueless because of prior interest not shown on policy; and insured's allegation that interest which he would have acquired on foreclosure of trust deed was worth \$5,500 was admitted, judgment would not be reversed on insurer's appeal based on absence of evidence from which court could determine proper damages, especially where insurer's contention regarding measure of damages and lack of evidence thereof was not adequately presented to trial court (Civ. Code, § 3300).

4. Appeal and error ☞1012(1)

Appellate court will not concern itself with where preponderance of evidence lies.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Gordon Crain against the Security Title Insurance & Guarantee Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

William H. B. Haymond and Kibbey & Cooper (by W. Fenmore Cooper), all of Los Angeles, for appellant.

Walter M. Campbell and Walter M. Campbell, Jr., both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiff for damages for the breach of a policy of title insurance whereby the plaintiff was insured against loss or damage not exceeding \$18,000 which insured shall sustain by reason of title to the land being vested otherwise than as therein stated. The defendant says, "We have no hesitancy in stating that our principal contention on this appeal, in view of the record, is the absolute failure to introduce evidence upon which the court could determine the proper amount of damages. * * *

The plaintiff was the owner of a note for \$2,500 secured by a second trust deed against the property which was covered by the policy. He foreclosed the trust deed, but found that there was a leasehold interest in the hands of a third party which was prior to his trust deed, and which was not shown on the policy of insurance. The complaint alleged in paragraph 10 of count I and the answer admitted by failure to deny the same that "if the title thereto had been as shown by said policy, the interest therein acquired under said foreclosure sale, over and above the lien of the first trust deed thereon would have been the sum of \$5,500; that by reason of the superiority of the lease to the lien, the plaintiff's interest in said property was wholly destroyed, and was of no value whatever."

[1-3] Early in the introduction of testimony at the trial, the attorney for the plaintiff said, "Many of the allegations are admitted. I am not purposing to go over that ground if I can avoid it, if the Court please." This plan was adhered to by plaintiff and no evidence was offered as to damages. However, by inadvertence, or for some other reason, the court made a finding that paragraph X of the complaint, in which paragraph said facts were set forth, was not true. Never-

theless, the rule is that "A court in its findings should not deviate from facts which are admitted by the pleadings. * * * Findings contrary to such admissions are outside the issues." 24 Cal. Jur. 932, and numerous cases cited in notes 12 and 14. Any contention on appeal that evidence is necessary as to the above-admitted facts is without merit.

The judgment of the trial court limited the loss sustained by the plaintiff to the value of the note and trust deed which were rendered valueless by reason of the prior encumbrance. The proper measure of damages, a breach of duty under the contract being shown, is the amount which would compensate for all detriment proximately caused thereby. Section 3300, Civ. Code; *Mitchell v. California-Pacific Title Ins. Co.*, 79 Cal. App. 45, 248 P. 1035. The defendant asserts that the damage suffered by plaintiff was the loss of possession of the premises "between the date of the delivery of the deed to him * * * and that presently unknown date of the delivery of a deed to another arising out of the sale under the first trust," and that the proper measure of damages would be the value of such possession. This contention ignores the admitted fact that by reason of the plaintiff's inability to obtain such possession his interest in the property was valueless, whereas his interest including such possession would have been \$5,500, or more than double the amount of the note. The damages which were allowed by the trial court were less than and included within the measure of damages contended for by the defendant. This question as to the measure of damages and as to lack of evidence thereof was not adequately presented by the defendant to the trial court, and we do not feel that the judgment of that court should be reversed on this contention.

[4] Appellant's second contention is as follows: " * * * we are also very serious in our contention that so great a preponderance of evidence indicates facts entirely contrary to the ones found by the trial court that it may be said there is no conflict of evidence and that proper findings in this connection would completely absolve the appellant from liability." It is the duty of this court upon appeal, however, not to concern itself with where the preponderance of evidence lies, and we find no merit in this contention.

Judgment affirmed.

I concur: STEPHENS, P. J.

5 Cal.App.2d 679

MEYER & HOLLER v. RAMONA VILLAGE

et al.

Civ. 8788.

District Court of Appeal, Second District,
Division 1, California.

April 27, 1935.

Appeal from Superior Court, Los Angeles
County; Minor Moore, Judge.

On rehearing.

For prior opinion, see 43 P.(2d) 823.

Scott McReynolds, of Los Angeles, for ap-
pellants.Loeb, Walker & Loeb, of Los Angeles, for
respondent.**PER CURIAM.**

On consideration of the petition presented to this court by the appellants for a rehearing of their appeal, it is ordered that the words "and severally" that occur in the fifth and sixth lines of the fifth paragraph, and the words "and several" that occur in the third line of the ninth paragraph, of the opinion of this court heretofore filed herein, and as the said words appear in the advance sheets of 43 P.(2d) 823 at pages 825 and 826, respectively, be and they are eliminated from said opinion.

It is further ordered that the said petition for rehearing herein be and it is denied.



6 Cal.App.2d 504

COHN v. CLARE et al.

Civ. 9813.

District Court of Appeal, First District,
Division 2, California.

April 29, 1935.

Rehearing Denied May 29, 1935.**Trusts — 101**

Employee who obtained lease on employer's place of business after employee was discharged and upon information which was neither secret nor confidential, and which was not obtained by reason of or in course of employment, did not hold lease in trust for benefit of employer.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Suit by Paul S. Cohn, executor of the estate of Helen A. Cohn, deceased, against Reuben Clare and others. From the judgment, the plaintiff appeals.

Affirmed.

Walter E. Dorn, of San Francisco, for appellant.

Charles H. Patterson, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to have it determined that a lease secured by defendant Clare from his codefendants was held in trust for the benefit of plaintiff. The trial court made findings favorable to defendants and denied relief to plaintiff.

Plaintiff and his predecessors conducted a cigar store in the city of Oakland for about twelve years prior to this controversy. Defendant Clare was employed for several years as manager of that store and was discharged when the business became unprofitable. Plaintiff had rented the premises from the other defendants under a written lease which expired about two years before the controversy. After his discharge, Clare procured a lease covering the same premises, and his codefendants ousted plaintiff through proceedings in ejectment. The trial court found that the lease was obtained by Clare after the relation of employee had been terminated, and that it was not procured through any secret or confidential information obtained by said defendant in the course of his employment.

There is substantial evidence to support these findings. The fact that plaintiff and his predecessors had been operating on a month to month tenancy was generally known and discussed. It was not a "secret of the trade." Any one in or out of the business could have ascertained whether a term lease were recorded and, upon inquiry, could have learned the terms of the tenancy under which the premises were occupied. This information is not like a confidential list of customers such as is involved in the "laundry" and similar cases. There the list is confidential information acquired by reason of the employment only. Here the information is neither confidential nor secret, and it could be learned by any one outside of the employment. The distinction is found in *Avocado Sales Co. v. Wyse*, 122 Cal. App. 627, 10 P.(2d) 485, and

In those cases in which the business was of such a character that it depended upon keeping its lists of customers and other information secret.

In view of the court's finding here that the lease was obtained after the employee's discharge and upon information which was neither secret nor confidential, and which was not obtained by reason of, or in the course of, the employment, the case of *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242, and similar authorities have no application.

The judgment is affirmed.

We concur: STURTEVANT, J.:
SPENCE, J.



6 Cal.App.2d 340

ROGERS v. TRANSAMERICA CORPORATION et al.
Civ. 9683.

District Court of Appeal, Second District,
Division 2, California.
April 22, 1935.

1. Dismissal and nonsuit ⇨40

Effect of plaintiff's filing of dismissal of action as to certain defendants with clerk of court before hearing of such defendants' motions for change of venue was ipso facto to dismiss case as to them, and clerk's filing of request with papers of case was merely ministerial act (Code Civ. Proc. § 581).

2. Dismissal and nonsuit ⇨18

Defendant cannot, by demanding change of venue, deprive plaintiff of right to dismiss action by filing dismissal with clerk of court, and rule that no judicial action can be taken pending such demand is inapplicable (Code Civ. Proc. § 581).

3. Venue ⇨52½

Order on certain defendants' motions for change of venue after plaintiff filed dismissal of action as to such defendants with clerk of court was invalid as to them for want of jurisdiction (Code Civ. Proc. § 581).

4. Appeal and error ⇨151(2)

Defendants, as to whom plaintiff filed dismissal of action with clerk of court, were not aggrieved by court's subsequent order denying their motions for change of venue,

and their appeal therefrom must be dismissed (Code Civ. Proc. § 581).

5. Appeal and error ⇨151(2)

Defendants, as to whom plaintiff filed dismissal of action with clerk of court before hearing of their motions for change of venue, held not entitled to appeal from subsequent order denying such motions on ground that they might be subsequently aggrieved thereby because they would not be entitled to granting of second motion for such relief if brought back into case by amendment to complaint (Code Civ. Proc. § 581).

6. Judgment ⇨243

Party dismissed from action becomes stranger thereto, and no judgment or order can be rendered against him therein until dismissal is vacated.

7. Venue ⇨43

Effect of plaintiff's dismissal of action as to defendants moving for change of venue by filing dismissal with clerk of court was same as if they had never been made parties, and they may again make such motion, if required again to appear in action by amendment to complaint (Code Civ. Proc. § 581).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by R. I. Rogers against the Transamerica Corporation, Louis Ferrari, and others. From an order denying motions by defendants Ferrari and others for a change of venue, they appeal.

Appeal dismissed.

Cushing & Cushing and Cullinan, Hickey & Sweigert, all of San Francisco, Clarke & Bowker, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, for appellants.

Oliver O. Clark, Henry Brown, and David D. Sallee, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from an order of the superior court denying motions for a change of venue made by the defendants Louis Ferrari, L. M. Giannini, and A. J. Mount, who are residents of other counties than the county of Los Angeles. Said defendants served upon the plaintiff their notice of intention to move for a change of place of trial, but before the motions were heard and before the order thereon was made, the plaintiff filed with the clerk of the court a dismissal as to each of said defendants. It is the contention of the

said defendants that at the time their motions were made they were entitled to a change of venue, and therefore it was the duty of the court to grant the motions regardless of the dismissal. While there were many original parties defendant in the action, only the three defendants against whom the action was dismissed have appealed.

[1-4] The dismissal was made by the plaintiff under section 581 of the Code of Civil Procedure, and it was accomplished without any intervention or action by the court, and by simply filing with the clerk of the court a dismissal of the action as to those three defendants as is expressly authorized by that section. The effect was, ipso facto, to dismiss the case as to said defendants. *Huntington Park Imp. Co. v. Superior Court*, 17 Cal. App. 692, 121 P. 701. Under the situation which existed, the plaintiff had an absolute right under said section to dismiss his action as to these defendants, and the act of the clerk in filing the request with the papers of the case was merely a ministerial act. A defendant cannot, by making a demand for a change of venue, deprive the plaintiff of such right to dismiss, and the rule that no judicial action can be taken pending such a demand has no application. *McDonald v. California Timber Co.*, 2 Cal. App. 165, 83 P. 172; *Prendergast v. Mitchell-Silliman Co.*, 65 Cal. App. 456, 224 P. 243. Upon the filing of the dismissal, the action immediately ceased as to said defendants, and they were not and could not be aggrieved by anything done thereafter in the action for the reason that as to such defendants the action did not exist. It is elementary, of course, that after such an ending of the action as to said defendants, any order on the motions for a change of venue was without jurisdiction and invalid as to them; however, for the reason that the defendants at the time of the order were not parties to the action and are not now, and that only aggrieved parties may appeal, this appeal must be dismissed.

[5-7] This case is similar to the case of *Page v. Hale* (Cal. App.) 36 P.(2d) 818, with the exception that in that case the respondents filed a stipulation that at any time they sought to rejoin the appellants as parties defendant, the entire action might be ordered dismissed without prejudice, and thereupon the appeal was dismissed. No such stipulation has been filed in this case, and the appellants contend herein that they might be subsequently aggrieved in this action, because the plaintiff is "free to bring them back into

the case by an amendment to his complaint * * * and the defendants would not then be entitled to have a second motion for a change of venue granted." There is no merit in this contention. When a party is dismissed from an action he becomes a stranger thereto, and no judgment or order can be rendered against him therein until the dismissal is vacated. *Sere v. McGovern*, 65 Cal. 241, 3 P. 859; *Fisch & Co. v. Superior Court* (Cal. App.) 43 P.(2d) 855. If by any procedure the said defendants are brought back into the case, they will find their original motions for a change of place of trial still on file, still undisposed of as to them. Again, the effect of a dismissal, such as was made in this case, is the same as if the said defendants had never been made parties. *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 97 P. 516; *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 P. 278. Under this rule the defendants might again make their motions if and when they are required to again appear in the action. The trial court will protect the defendants in their right to move for a change of venue.

The appeal is dismissed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



6 Cal.App.2d 334

**DECKER v. BOARD OF HEALTH COM'RS
OF CITY OF LOS ANGELES.**

Civ. 9660.

District Court of Appeal, Second District,
Division 2, California.

April 20, 1935.

1. Officers ⇨66, 72(1)

Appointments during good behavior cannot be terminated except for cause and after notice and opportunity for officer to be heard, but appointments to hold office during pleasure of appointing power may be terminated at any time and without notice.

2. Municipal corporations ⇨191

City health officer who held office at pleasure of board of health commissioners held subject to removal by board without notice or hearing, notwithstanding charter provision for removal on ground of failure to comply with instructions of board of health

commissioners, or incompetency, dishonesty, discourtesy, or neglect of duty, after written notice and opportunity to be heard by board, since such provision did not limit power of removal for other reasons without notice or hearing (Const. art. 20, § 16).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Dr. Charles W. Decker for a writ of review of proceedings of the Board of Health Commissioners of the City of Los Angeles. From a judgment denying petitioner relief after a general demurrer to the petition was sustained, petitioner appeals.

Affirmed.

Rex Hardy and Vernon W. Hunt, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment of the superior court in an action for a writ of review of proceedings of the board of health commissioners of the city of Los Angeles (respondent) as the result of which the respondent removed the petitioner from his office as city health officer. Petitioner contends the removal was without due notice and hearing. A general demurrer to the petition was presented by the respondent. The demurrer was sustained without leave to amend and judgment was thereafter entered denying the petitioner relief.

[1] Petitioner contends it is settled law in this country that an officer can be removed only upon notice and after a hearing where the tenure of his office is during good behavior, citing *Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732, and petitioner further contends that "the tenure of health officer under the foregoing charter provisions [Freeholders' Charter of City of Los Angeles] is without definite term and, hence, may be deemed to be comparable with an appointment 'during good behavior.'" The respondent contends, on the contrary, that the tenure of office of petitioner was at the pleasure of the appointing power. This difference between the parties raises the vital question in this case, for the reason that whereas appointments during good behavior cannot be terminated except for cause and in such cases the officer is entitled to notice and an op-

portunity to be heard; yet, on the contrary, where appointments are made to hold during the pleasure of the appointing power they may be terminated at any time and without notice. *Boyd v. Pendegast*, 57 Cal. App. 504, 207 P. 713.

The Constitution of our state provides that, when the term of any officer is not declared by law, said officer shall hold his position during the pleasure of the authority making the appointment; with the provision that, as to any officer of any municipality governed under a legally adopted charter, the provisions of such charter with regard to the tenure of office or the dismissal from office of such officer or employee shall control. Const. art. 20, § 16. In the case of *Sponogle v. Curnow*, 136 Cal. 580, 69 P. 255, 256, our Supreme Court used the following language: "When, therefore, the time of holding is not fixed, the tenure of the office is at the pleasure of the appointing power. This power of removal cannot be divested or taken away except by limiting the term. A law which provides that an officer may be removed in a certain way, or for a certain cause, does not restrain or limit the power of removal to the cause or manner so indicated. The power to remove is an incident to the power to appoint, as a general proposition, and is made so expressly by the constitution. The only way in which this power of removal can be limited is by first fixing the duration of time of office, and then providing the mode, if deemed necessary, by which the officer may be removed during the term."

[2] The charter of the city of Los Angeles has no provision relative to the tenure of office of the health officer, hence the petitioner held office at the pleasure of the respondent, subject only to the charter limitations as to his removal, if any. If there is any limit upon the power of respondent to remove the petitioner, it is contained in the following language of section 79 of the city charter: "The board [Board of Health Commissioners] may issue instructions to the general manager of its department concerning his exercise of any of the powers conferred upon him by this charter. Failure on his part to comply with such instructions, or incompetency, dishonesty, discourtesy, or neglect of duty on his part, as determined by the board of his department, shall constitute adequate grounds for his removal by said board, provided that the person affected shall be given previous written notice of the grounds of the proposed removal and opportunity to be heard by the board." We un-

derstand this section to mean that if the officer be removed for any of the grounds specifically designated therein, then and in that event, he must first be served with a notice setting forth the reasons for his removal and be given an opportunity to be heard. In no place in this section is there any language which indicates that the freeholders intended to take from the appointing power the right to remove the general manager for other reasons without notice or hearing. The charter section merely provides that an officer may be removed in a certain way for certain causes, but as said in the case of *Sponogle v. Curnow*, supra, such law in cases where the tenure of the office is at the pleasure of the appointing power "does not restrain or limit the power of removal to the cause or manner so indicated." Other grounds as well as those set forth in said section 79 were assigned for the removal of petitioner. As to those, he was not entitled to notice of hearing.

Judgment affirmed.

I concur: STEPHENS, P. J.



COLLYER v. S. H. KRESS CO. et al. *
Civ. 9253.

District Court of Appeal, First District,
Division 1, California.
April 27, 1935.

Hearing Granted by Supreme Court
June 25, 1935.

1. False Imprisonment ☞7(3)

Cause of action for false imprisonment may grow out of an unlawful arrest made by an officer or private citizen without a warrant, or an unlawful arrest made by an officer with an illegal warrant, or with warrant illegally executed (Pen. Code, § 236).

2. False Imprisonment ☞6

Cause of action for false imprisonment may grow out of unlawful detention of a person, such as restraining him of his liberty, even temporarily, by means of force, or threats, express or implied, in place where he does not want to go or remain; and such threats may be conveyed by conduct or words, including threats of arrest (Pen. Code, § 236).

3. False Imprisonment ☞3

Causes of action for false imprisonment and for malicious prosecution are distinct from each other, and both cannot exist on same state of facts (Pen. Code, § 236).

4. Appeal and error ☞989

In action for false imprisonment and malicious prosecution wherein damages were awarded for false imprisonment only, appellate court, reviewing sufficiency of evidence to sustain award, could disregard what occurred after plaintiff was taken into custody by police, since at that time detention of plaintiff by defendants ended (Pen. Code, § 236).

5. False Imprisonment ☞10

Owner of property, in exercise of right to protect it, may, under certain conditions, restrain any person who seeks to interfere with his property, without being liable for a false imprisonment (Pen. Code, § 236).

6. False Imprisonment ☞13

If there is proof of theft, legally sufficient to amount to probable cause, property owner may detain person suspected of stealing for a reasonable length of time to investigate matter in a reasonable manner, but neither mere suspicion of wrongdoing, nor actual belief not based on reasonable grounds, will justify detention, and detention, if for unreasonable time, or if investigation is conducted in unreasonable manner, may amount to false imprisonment (Pen. Code, § 236).

7. False imprisonment ☞13

Whether there was legal justification for detention of person suspected of stealing by property owner must be determined from circumstances as they existed at time of detention, and does not depend upon actual guilt or innocence of person detained, hence, even though accused be subsequently prosecuted and exonerated, detention may not have been a false imprisonment.

8. False imprisonment ☞31

In action against store owner and others for damages for false imprisonment, consisting in the intercepting and detention of plaintiff for investigation on charge that he had pilfered articles from store counters, evidence held to establish legal justification for interception and detention of plaintiff (Pen. Code, § 236).

9. False imprisonment ☞13

In action against store owner and others for damages for false imprisonment, consisting in alleged unlawful detention of plaintiff for investigation on charge that he had pilfered articles from store counters, justification for detention held properly interposed as defense where store authorities had not attempted to arrest plaintiff (Pen. Code, § 236).

10. False imprisonment ☞31

In action against store owner and others for damages for false imprisonment, consisting in alleged unlawful detention of plaintiff for investigation on charge that he had pilfered articles from store counters, evidence showing that an attempt was made by store employees forcibly to search plaintiff and to coerce him, under threats of arrest, into signing confession of guilt *held* to sustain finding that defendants had exceeded legitimate bounds of investigation, entitling plaintiff to reasonable damages (Pen. Code, § 236).

11. False imprisonment ☞36

\$1,500 as damages for false imprisonment, consisting of unreasonable investigation during 20-minute period of detention of 70 year old man of previous good character accused of pilfering articles from store counters *held* excessive by \$1,000, where no punitive damages were asked, nor special damages pleaded (Pen. Code, § 236).

12. False imprisonment ☞31

In action against store owner and others for damages for false imprisonment, consisting in alleged unlawful detention of plaintiff for investigation on charge that he had pilfered articles from store counters, evidence showing that store detective, upon plaintiff refusing to follow detective to room of store for investigation, had threatened to call police, and that plaintiff had thereupon followed her, *held* sufficient to show an "imprisonment" (Pen. Code, § 236).

[Ed. Note.—For other definitions of "Imprison; Imprisonment," see Words & Phrases.]

13. Malicious prosecution ☞58(1)

In action for damages for false imprisonment and malicious prosecution, evidence showing that upon entering city prison plaintiff was searched, photographed, and fingerprinted, *held* properly admitted in support of cause of action charging malicious prosecution (Pen. Code, § 236).

14. Appeal and error ☞170(3)

Where allegations of cause of action were perhaps defective, but defendant had had no difficulty in answering allegations, defects *held* not to require reversal of judgment (Const. art. 6, § 4½).

15. Appeal and error ☞140(2)

In action for false imprisonment, where damages were excessive, court could order judgment to be reversed and cause remanded, unless plaintiff filed a remittitur (Pen. Code, § 236).

Action by D. M. Collyer against S. H. Kress Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed on condition of remittitur.

Sylvester J. McAtee, of San Francisco, for appellants.

D. W. Brobst, Jesse E. Nichols, and John M. Cartwright, all of Oakland, for respondent.

KNIGHT, Justice.

Defendants appeal from an adverse judgment in an action for damages growing out of accusations of shoplifting. The sixth amended complaint upon which the case was tried was in two counts, one charging malicious prosecution, and the other false imprisonment. The jury found in favor of defendants on the former, and in favor of plaintiff on the latter, assessing his damages in the sum of \$3,500. On motion for new trial the court made a conditional order reducing the amount of damages to \$1,500, and plaintiff accepted the lesser amount. Among the grounds urged for reversal are insufficiency of the evidence and excessive damages.

The alleged shoplifting took place between 4:30 and 5 o'clock on Christmas eve in the basement of a department store in Oakland, operated by the defendant S. H. Kress Company. The store was crowded with customers at the time, and according to defendants' evidence, three persons, to wit, a customer, the store detective, Mrs. E. G. Crowell, and her assistant, Sidney Schwartz, saw plaintiff pilfer certain articles from the open counters on which they were displayed and put the articles in his overcoat pockets. He was intercepted at the main exit of the store, just as he was leaving, by Mrs. Crowell and Schwartz, and escorted back into the store to a room on the second floor for the purpose of investigating the matter. The testimony is conflicting as to what actually transpired after they entered the room. However, it appears without dispute that plaintiff was there accused of pilfering, and he denied the accusation, stating he had paid for all the articles in his possession. After considerable difficulty, lasting some twenty minutes, during which an attempt was made by Mrs. Crowell forcibly to search him, it was revealed he had in his possession the articles he was accused of having stolen, and he was asked to sign a statement to the effect that he had taken the articles without paying for them. Still insisting he had paid for the articles, he refused to sign the statement. Meanwhile the police

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

had been summoned, and soon after their arrival, at the request of the store management, the police placed plaintiff under arrest and he was taken to the city prison, where he was searched, photographed twice, and fingerprinted; and about 8 o'clock that night he was released through arrangements made by his nephew with the store management. The day after Christmas, Mrs. Crosswell swore to a criminal complaint charging plaintiff with petty theft; but a few weeks later a jury found him not guilty. At the time this happened plaintiff was seventy years of age, and until about a year prior thereto he had been for approximately six years a deputy constable and process server in Oakland. There is some evidence tending to show that he had been drinking when he entered the store, but he denied that such was the fact.

[1, 2] False imprisonment, as defined by section 236 of the Penal Code, "is the unlawful violation of the personal liberty of another"; and as appears from the decisions, a cause of action therefor may arise in a number of ways. It may grow out of an unlawful arrest made by an officer or private citizen without a warrant, or an unlawful arrest made by an officer with an illegal warrant or with a warrant illegally executed. *Donati v. Righetti*, 9 Cal. App. 45, 97 P. 1128. Or, aside entirely from an attempted arrest, such a cause of action may grow out of the unlawful detention of a person, such as restraining him of his liberty, even temporarily, by means of force or threats, express or implied, in a place where he does not want to go or remain; and such threats may be conveyed by conduct or words, including threats of arrest. *Vandiveer v. Charters*, 110 Cal. App. 347, 349, 294 P. 440.

[3, 4] The present case is one of alleged unlawful detention. In this regard the evidence shows without dispute that defendants themselves made no attempt at any time to place plaintiff under arrest as they might have done under the authority of subdivision one of section 837 of the Penal Code, which provides that a private person may arrest another "for a public offense committed or attempted in his presence." Nor is the complaint based on any claim of an illegal arrest by defendants. As stated, the arrest was made by the police when they took plaintiff into custody at the end of the investigation in the room. Furthermore, it is well settled that the two causes of action, false imprisonment and malicious prosecution, are entirely separate and distinct from each other. *Donati v. Righetti*, *supra*.

Both cannot exist on the same state of facts; or to put it more clearly, if one lies upon the facts, the other does not. *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312, 57 P. 764, 59 P. 698; *Warfield v. Krueger*, 96 Cal. App. 671, 274 P. 764. And it follows that since the jury in the present case found defendants liable only on the false imprisonment charge and exonerated them on the malicious prosecution charge, we are not here concerned with anything that occurred after plaintiff was taken into custody by the police (*Mackie v. Ambassador Hotel, etc., Corporation*, 123 Cal. App. 215, 11 P.(2d) 3), because at that time the detention of plaintiff by defendants ended.

The first question presented for determination is, therefore, whether under the circumstances the detention of plaintiff for the twenty-minute period during which he was detained by defendants for investigation was unlawful; and necessarily in determining that question, due consideration must be given also to the legal rights of the defendants.

[5-7] In this regard, it is well settled that an owner of property, in the exercise of his inherent right to protect the same, may, under certain conditions, restrain any person who seeks to interfere with his property (11 R. C. L. 805); and in applying this fundamental doctrine, it has been held universally that if there be proof of theft legally sufficient to amount to probable cause, the property owner is justified in detaining the person suspected of stealing for a reasonable length of time in order to investigate the matter in a reasonable manner. Neither mere suspicion of wrongdoing, nor actual belief not based on reasonable grounds, however, will justify such detention; nor may the accused person be detained for an unreasonable time, or the investigation conducted in an unreasonable manner; and if these limitations are exceeded, the detention may amount to false imprisonment. See notes, 26 A. L. R. 1333, and 31 A. L. R. 314; also 25 Cor. Jur. 471; *Jacques v. Childs Dining Hall Co.*, 244 Mass. 438, 138 N. E. 843, 26 A. L. R. 1329; *Fenn v. Kroger Grocery & Baking Co.* (Mo. Sup.) 209 S. W. 885. It is also held generally that the question of whether there was legal justification for the detention must be determined from the circumstances as they existed at the time of the detention. It does not depend upon the actual guilt or innocence of the person detained; and therefore, even though the person accused be subsequently prosecuted and exonerated, it does not follow that the detention amounts to false imprisonment. *Davis*

v. Pacific Telephone & Telegraph Co., supra; Mackie v. Ambassador Hotel, etc., Corporation, supra; 25 Cor. Jur. 471.

[8] The evidence here shows without contradiction that, in detaining plaintiff for investigation, defendants did not act on suspicion or groundless belief. As stated, they acted upon the positive statements of three persons that they had actually seen plaintiff pilfering. The evidence so introduced by defendants was, in substance, as follows: First, plaintiff was pointed out to the floorman of the store by a customer, who stated he had seen plaintiff take two neckties and a pair of suspenders and put them in his pocket without paying for them. Mrs. Croswell, who for fifteen years had been employed at the store as detective, was notified, and she went to the basement at once, where plaintiff was pointed out to her. Stepping up along side of him, close enough to touch his arm, she followed him about and saw him pilfer certain Christmas tree ornaments from the open counters and put the articles in his overcoat pockets. He first picked up an extension electric light cord strung with eight small sockets, and right afterwards took four small colored bulbs. Meanwhile he purchased a toy wagon and some additional bulbs, which, in conformity with a strict rule of the store, enforceable by summary dismissal of any employee violating the same, were wrapped by the sales girl and sales tags placed in the packages before they were delivered to plaintiff. Schwartz was standing nearby while Mrs. Croswell followed plaintiff about, and he too saw plaintiff reach for and take some of the bulbs. In so testifying, he stated that he was close enough to plaintiff at the time to observe that the tips of plaintiff's fingers on his right hand, with which he took the bulbs, were gone. Thereafter Mrs. Croswell and Schwartz kept plaintiff under surveillance while he made his way upstairs and to the exit door, and just as he stepped outside they stopped him and asked him to return into the store.

In our opinion the evidence above narrated is sufficient under the authorities above cited to establish legal justification for intercepting plaintiff as he was leaving the store and detaining him for investigation.

[9] Plaintiff contends that probable cause is not available to defendants as a defense herein, and that consequently all evidence introduced by defendants for the purpose of showing justification for the detention must be disregarded. We find no merit in the point. The two cases mainly relied upon by plaintiff (Nelson v. Kellogg, 162 Cal. 621, 123 P. 1115,

Ann. Cas. 1913D, 759; Neves v. Costa, 5 Cal. App. 111, 89 P. 860) grew out of unlawful arrests made under the authority of illegal process issued in civil actions. In later cases growing out of a certain class of unlawful arrests made without warrants, probable cause is recognized as a defense. Michel v. Smith, 188 Cal. 199, 205 P. 113; Mackie v. Ambassador Hotel, etc., Corporation, supra; Van Fleet v. West American Insurance Co. (Cal. App.) 42 P.(2d) 378; Allen v. McCoy, 135 Cal. App. 500, 27 P.(2d) 423; 28 P.(2d) 56. Here, however, we are not dealing with a case growing out of an unlawful arrest with or without a warrant. As above stated, defendants did not pretend to place plaintiff under arrest; and clearly under the authorities hereinabove cited, in cases such as this of alleged unlawful detention by private persons without an attempted arrest, justification for the detention may be interposed as a defense.

[10] The next question arising is whether in making such investigation defendants detained plaintiff for an unreasonable length of time, or the investigation was conducted in an unreasonable manner. There is no substantial conflict in the evidence as to what was said and done on the way to the room to which plaintiff was escorted. Apparently plaintiff made no objection to returning other than to inquire why they wanted him, and in reply Mrs. Croswell told him he knew as well as they. Plaintiff declared, however, he did not know, and just as they were about to ascend the stairway leading to the room he stopped and demanded to know "what it was all about." Mrs. Croswell replied, "Come on, you will learn later," but plaintiff was not inclined to go further, until Mrs. Croswell threatened to call the police. He then stated she need not do so, that he would go along; and he did without further hesitation. There is a sharp conflict, however, as to what happened after they entered the room. According to the evidence introduced on behalf of defendants, the following occurred: Mrs. Croswell asked plaintiff to remove all of the merchandise from his pockets, and he refused to do so. She then asked him to produce the string of electric light sockets, which he refused also to do; whereupon she advanced toward him, saying, "Well, then I will take them out of your pocket"; but when she attempted to do so plaintiff resisted, and during the scuffle which followed, plaintiff grabbed her arm and twisted it, and then advanced toward her with his arm raised and fist clenched as if he were going to strike her. She called for help, and two or three other

store employees responded. About the same time, unknown to plaintiff, Mrs. Croswell summoned the police; but before they arrived plaintiff reached in his overcoat pocket, took therefrom the disputed four electric light bulbs and string of sockets, which were not wrapped, and for which he had no sales tags, and throwing them on a couch in the room, said, "Here they are. If you think I didn't pay for them I'll pay for them again." Mrs. Croswell then asked him to sign a document prepared and used by the Kress Company in such cases, to the effect that he had taken the articles described therein without paying for them; but plaintiff refused to sign the paper, or to give his name or address, telling her it was none of her business. It was about then that police inspectors Jewell and Trowbridge arrived; whereupon Mrs. Croswell told them in plaintiff's presence she had seen him pilfering, and how, after entering the room, he removed from his pockets the articles they had seen him pilfer and threw them on the couch; she also related to them the conversation which had taken place up to that time. The officers then asked plaintiff if he had any other articles in his pockets, and he replied he had not, whereupon they searched him and found the neckties and suspenders. They too were not wrapped, nor did plaintiff have any sales tags therefor. When plaintiff was asked to explain why the disputed articles were not wrapped and he had no sales tags for them, he replied merely that it was strange he could not purchase goods without having them wrapped and accepting sales tags therefor. Plaintiff's name and address were revealed when he was searched by the police, and Mrs. Croswell again sought to have him sign said document, but he refused to do so; whereupon the store manager, C. F. Clifford, who had entered the room while the investigation was going on, told Mrs. Croswell, in plaintiff's presence, that under the circumstances the only thing they could do was to cause his arrest; and accordingly, at Mrs. Croswell's request, the officers placed him under arrest, and he was taken to the city prison. The officers took with them also as evidence the string of light sockets and the four bulbs plaintiff was accused of having stolen.

Plaintiff's version as to what transpired after they entered the room was quite different. He stated that as soon as the door was closed Mrs. Croswell began calling him a "robber," "thief," and "skunk," and said she wanted the things he had stolen downstairs; that she fairly screamed the words at him; that he replied he had purchased and paid for everything he had in his possession; that she

then attempted forcibly to search him and he pushed her away with his hands, whereupon she screamed for help and ran out of the room; that she returned immediately, accompanied by other store employees and the manager; that she told the manager she had caught him, plaintiff, stealing, and that he refused to give up the stolen articles. Continuing, he stated he denied having stolen anything, and asked them to take him downstairs to the girl who waited upon him "and prove he had not paid for the articles," but that they refused to do so; that Mrs. Croswell then produced the document he was asked to sign, but after reading it he refused to do so; whereupon the manager, after hesitating a moment, said to Mrs. Croswell: "If he don't give up those things we will have to make an example of him." About this time, so he testified, the police inspectors arrived, and Mrs. Croswell told them he had taken some articles without paying for them and would not allow her to search him; whereupon they searched him and took from his pockets all of the articles in his possession; and shortly afterwards, acting under the manager's instructions, they took him to jail. Plaintiff denied he had placed the sockets and four bulbs on the couch before the inspectors arrived, or that he said he would again pay for them; but in apparent contradiction thereof Inspector Jewell and Clifford both testified that said articles were on the couch when they entered the room, and that the inspectors took from his pockets only the remaining ones. At the trial, in explanation of the possession of the unwrapped articles and the absence of sales tags, plaintiff stated that the neckties and suspenders were wrapped when he purchased them, but that on account of the crowd in the store it was inconvenient for him to carry so many packages, so he slipped the articles out of their wrappings into his pocket, and threw the wrappings away; and that upon purchasing the string of light sockets and additional bulbs he told the salesgirl she need not wrap them, that he would put them in his pocket, which he did; and that he had no recollection of having been given sales tags for either.

As will be seen from the testimony introduced by both plaintiff and defendants, despite plaintiff's persistent denials that he had stolen any of the goods he had in his possession, and his repeated assertions that he had purchased and paid for all of them, an attempt was made by the store employees forcibly to search him and coerce him, under threats of arrest, into signing a confession of guilt. It would appear, therefore, that the jury was warranted in concluding therefrom

that defendants went beyond the legitimate bounds of an investigation and committed acts which amounted to an unlawful violation of the personal liberties of plaintiff, for which he was entitled to reasonable damages.

[11] We are convinced, however, that the amount of damages awarded plaintiff, even as reduced by the trial court, is grossly disproportionate to any injury he may have suffered as the result of such excessive acts. No punitive damages were asked, nor did plaintiff plead any special damages; and as already pointed out, the cause of action of false imprisonment pursuant to which the award was made ended and the cause of action for malicious prosecution began at the close of the investigation in the room, and when plaintiff was taken into custody by the police. Such, apparently, was the position taken by plaintiff during the trial. But despite the adverse finding of the jury on the malicious prosecution charge, it would appear that, in assessing plaintiff's damages under the cause of action for false imprisonment, it took into consideration also and included in the amount awarded the elements of damage flowing from the malicious prosecution charge, and in doing so was influenced by a feeling of prejudice and passion generated by the thought, which counsel for plaintiff has stressed to a considerable extent on the appeal, that plaintiff was an old man of previous good character who had been jailed, photographed, and fingerprinted, prosecuted criminally, and eventually acquitted on a charge of having stolen 90 cents' worth of Christmas tree ornaments, on Christmas eve, from a chain store. And on this appeal counsel for plaintiff earnestly contends in support of the amount finally awarded that the matter of the incarceration, photographing, and fingerprinting of plaintiff, all of which occurred subsequent to the detention of plaintiff by defendants, are proper elements of damage under the false imprisonment charge. We are unable to sustain such contention. In view of the amounts awarded in like cases, as shown by the decisions, and especially in *Vandiveer v. Charters*, *supra*, wherein the circumstances were far more aggravated than those of the present case, it is our opinion that an award of \$500 will fully and fairly compensate plain-

tiff for whatever damages he may have suffered as the result of the illegal acts committed by defendants during the twenty-minute period he was detained by them.

[12] Defendants further contend that in any event the evidence fails to show that plaintiff was involuntarily "confined or imprisoned," and that consequently there was no false imprisonment. There is no merit in the point. As above stated, the "imprisonment" may consist in restraining a person of his liberty even temporarily, by means of force or threats, express or implied, in any place where such person does not wish to go or remain; and that such threats may be conveyed by conduct or words, including threats of arrest. *Vandiveer v. Charters*, *supra*.

[13] Nor do we find any error in the trial court's ruling admitting the testimony showing that upon entering the city prison plaintiff was searched, photographed, and fingerprinted. Such testimony was properly admitted in support of the cause of action charging malicious prosecution, which the jury decided in defendant's favor.

[14] There is much force in defendants' contention that the allegations of the second cause of action were defective. But it appears that they had no difficulty in answering the same; consequently, it cannot be said they were misled or prejudiced thereby; and under such circumstances, the defects do not call for a reversal of the judgment. Section 4½, art. 6, Constitution.

[15] Therefore, in accordance with the conclusions above stated, and in conformity with the procedure followed in *Shaffer v. Arnaelsteen*, 54 Cal. App. 719, 202 P. 946, and the cases therein cited, it is ordered that the judgment herein be reversed, and the cause remanded, unless within thirty days from the filing of the remittitur in the trial court plaintiff shall remit from the judgment all except the sum of \$500 and the costs already taxed; and if such remission be so made, then the judgment shall stand affirmed. Plaintiff will recover his costs of appeal.

I concur: TYLER, P. J.

6 Cal.App.2d 400

WOOD v. LOS ANGELES CITY SCHOOL**DIST. et al.****Civ. 9585.**

District Court of Appeal, Second District,
Division 2, California.

April 23, 1935.

Hearing Denied by Supreme Court

June 21, 1935.

1. Schools and school districts ⇨133

Under school laws, employment of school teachers is classified either as permanent, probationary, or substitute (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

2. Schools and school districts ⇨133

Teacher's right to classification as a probationary and substitute employee depends on her contract of employment, and classification as a permanent employee depends on contract of employment and compliance with provisions of the statute (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

3. Schools and school districts ⇨133

Position of teacher in public school is created by contract (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

4. Schools and school districts ⇨133

"Probationary teacher" is one employed for the full year, and "substitute teacher" is one employed from day to day to serve at the option of the school district in the absence of the regular teacher (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

5. Schools and school districts ⇨133

"Employed" as used in school laws implies and requires services rendered or to be rendered for compensation on a written contract and to be "employed for a year" a teacher must have a written contract employing her services for a year and not from day to day (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

[Ed. Note.—For other definitions of "Employed," see Words & Phrases.]

6. Schools and school districts ⇨136

Under contract employing substitute teacher in district school for service from day to day only during such portions of school year as she might be assigned to fill position of absent teacher, school teacher *held* not entitled to permanent classification as "employed for a year," but to have given school board an option on her services from day to day (Pol. Code, § 1609 (e), as amended

by St. 1927, p. 1913; School Code, § 5.520 as amended by St. 1931, p. 1398).

7. Schools and school districts ⇨133

Teacher who served district school for a year as probationary teacher and voluntarily changed her classification during middle of next year from that of a probationer to that of a substitute teacher and during the next year acted partly in one capacity and partly in the other *held* not entitled to a permanent rating (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

8. Schools and school districts ⇨133

Where 195 days' teaching during a year entitled teacher to credit for "complete" school year under rules of board of education, teacher, who following a complete year taught only 191 days during second year and then became entitled to credit for complete year for third year *held* not entitled to a permanent rating under statute requiring two or three "complete" consecutive school years in positions requiring certification qualifications (Pol. Code, § 1609 (e), as amended by St. 1927, p. 1913; School Code, § 5.520, as amended by St. 1931, p. 1398).

"Complete" is defined as free from deficiency, entire, absolutely finished, filled up, with no part, item, or element lacking; perfect, consummate.

[Ed. Note.—For other definitions of "Complete; Completion," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Gola M. Wood against Los Angeles City School District and others for a writ of mandate compelling defendants to classify petitioner as a permanent teacher of the defendant school district and directing payment of compensation as such from July 1, 1932. From an order denying the writ, petitioner appeals.

Affirmed.

Aaron Turner and John Felton Turner, both of Oakland, and Lawler & Degnan and M. Philip Davis, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal by petitioner from an order of the superior court denying her a writ of mandate. The petitioner contends

that she was entitled to a judgment classifying her as a permanent teacher of the respondent school district and to a writ directing respondents to classify her as such and to pay her compensation as such from July 1, 1932, on the ground that she had been successfully employed by the district for two complete consecutive school years in positions requiring certification qualifications during the three years commencing July 1, 1928. Respondents contend that she had not been so employed.

[1-3] There are three classifications of such employment under the school laws of California—permanent employment, probationary employment, and substitute employment. *Saxton v. Board of Education*, 206 Cal. 758, at page 761, 276 P. 998; *Grigsby v. King*, 202 Cal. 299, 260 P. 789. Subdivision (e) of section 1609 of the Political Code (as amended by St. 1927, p. 1913), during the period involved, read as follows: "Boards of school trustees, and city * * * boards of education shall have power and it shall be their duty: * * * to classify as permanent employees all persons * * * who shall have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications." (Respondent district had adopted the two-year probationary period.) This section marks clearly the distinction between permanent employees and probationary employees. Section 5.520 School Code, as amended by St. 1931, p. 1398, defines substitute employees as "those persons employed * * * from day to day for less than one school year, to fill positions of regularly employed persons absent from service," etc. The right of a teacher to classification both as a probationary and substitute employee depends upon her contract of employment; and her right to classification as a permanent employee depends upon her contract and her compliance with the provisions of subdivision (e) of section 1609. Our courts have frequently held that a position of teacher in the public school is created by contract. *Gould v. Santa Ana High School District*, 131 Cal. App. 345, 21 P.(2d) 623; *Leymel v. Johnson*, 105 Cal. App. 694, 288 P. 858.

[4-6] The distinctions between the probationary classification and the substitute classification are obvious. The probationary teacher is employed for the full year. The substitute teacher is employed from day to day to serve at the option of the school district in the absence of the regular teacher. The probationary plan was provided so that

the school board would have an opportunity to determine, before a teacher should be given a lifetime position in teaching children of the district, whether or not that teacher would be thoroughly satisfactory. Her ability to impart instruction, her power to hold the attention of the pupils and to maintain order, her power to inculcate principles of righteousness and loyalty, and to fill the children with a sense of their obligations to society and to country, all these and other qualifications must be carefully investigated and determined, before the district is obliged to decide and to take the important step of employing her permanently. For such purpose, the probationary classification is created. When a regular teacher is absent and a substitute is called in, the continuity of instruction and the orderly program of the pupils is interfered with. The substitute teacher has no satisfactory opportunity to carry out either her own plans or the plans of the regular teacher. A teacher who comes into a classroom for a short period of time and as a mere substitute for the regular teacher does not have presented to her the same problems as those presented to a probationary teacher, nor the same test of her capabilities. For a short time the substitute may be able to maintain order and carry on the assignments of the work along the lines of the regular teacher, but the question whether or not she could do this work with success continuously is one which the district cannot well determine under the circumstances and with which it therefore does not concern itself. It is for these reasons and possibly others that, in order to qualify under subdivision (e) of section 1609 of the Political Code, a teacher must have been employed for two complete consecutive years. The term "employed" as used in the California school laws implies and requires services rendered or to be rendered for compensation upon a written contract (*Gould v. Santa Ana High School District*, supra), and to be employed for a year a teacher must have a written contract employing her services for a year and not from day to day. Petitioner's contract during the periods in which she was employed as a substitute teacher read as follows: "You are to be employed as substitute teacher in said School District for service from day to day only, during such portions of the school year * * * as you may be assigned or transferred by said Board to fill the position of a regularly employed teacher absent from service. It is expressly understood that your employment is not for the full school year but only for such portions thereof as may be

required of you, as aforesaid, and shall be a day to day employment." Under the terms of said contract petitioner was not employed for a year. The school board obtained an option thereunder whereby it might employ her from day to day "as you may be assigned."

The petitioner does not recognize these distinctions. In our opinion they are distinctions which materially affect her rights. It is our opinion that a teacher in the substitute class, through her teaching as a substitute merely, does not become entitled to permanent classification.

[7] The facts in this case are stipulated to. The petitioner served the year 1928-29 as a probationary teacher and served a complete school year. During the middle of the next year she voluntarily changed her classification from that of a probationer to that of a substitute teacher. The next year she served partly in one capacity and partly in the other. Under this situation she is not entitled to a permanent rating.

[8] Furthermore, respondents assert with apparent justification that regardless of the distinctions between substitute and probationary employment, petitioner did not serve two complete consecutive years as teacher. "Complete" is defined in Webster's Dictionary as "free from deficiency, entire, absolutely finished." In Webster's New International Dictionary the definition appears as, "filled up, with no part, item, or element lacking; free from deficiency, entire, perfect, consummate." It appears that a complete school year of the district consists of approximately 200 teaching days, although it was stipulated that under the rules of the board of education applicable at that time, a teacher who is credited by the board with 195 days during a school year is entitled to credit for a complete school year. Following this rule, the year 1928-29 of petitioner was a complete school year. The year 1929-30 petitioner was credited with and was paid for only 191 days. That was not a complete school year. The year 1930-31 was again a complete year, but not having served a complete year the year before, she was starting all over again. Using service only as the test, petitioner's contention is not sustained by the facts. For the reasons stated, the petitioner is not entitled to permanent classification.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.

WEBSTER v. MOUNTAIN MONARCH GOLD MINING CO., LIMITED.

Civ. 9866.

District Court of Appeal, Second District,
Division 2, California.

April 25, 1935.

1. Appeal and error ⇨173(9)

In action to recover possession of personalty, defense of estoppel was unavailable on appeal, where defendant had opportunity to plead estoppel and failed to do so.

2. Sales ⇨480(1)

Where defendant was withholding possession of mining equipment and machinery from plaintiff, after notice and knowledge that plaintiff was owner and entitled to possession as seller under conditional sales contract which was in default, plaintiff *held* entitled to recover possession of property.

3. Appeal and error ⇨1010(1)

Court's findings which were supported by competent evidence were binding on appellate court.

4. Replevin ⇨93

Finding that plaintiff was owner of and entitled to possession of "personal" property described constituted finding on issue whether property described in complaint was real or personal.

5. Appeal and error ⇨996

On appeal, reviewing court is entitled to draw necessary inferences from findings to support judgment.

6. Appeal and error ⇨1071(6)

Where findings are made on determinative issues, other issues become immaterial, and failure to find thereon does not constitute prejudicial error.

7. Limitation of actions ⇨201

Finding, in action to recover personal property, that defendant was entitled to take nothing by reason of its answer, constituted finding on issue of limitation (Code Civ. Proc. § 338, subd. 3).

8. Appeal and error ⇨1071(6)

Failure to find on issue of limitation in action to recover personal property, where there was no evidence of demand having been made at any time prior to three years before date of filing suit, *held* not prejudicial error, since limitation began to run from time of demand and refusal to return, and finding must of necessity be adverse to defendant (Code Civ. Proc. § 338, subd. 3).

9. Replevin ⇨107

In action to recover possession of personal property, judgment for value of property

in alternative was unwarranted where plaintiff had secured possession by claim and delivery before trial (Code Civ. Proc. §§ 627, 667).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. E. Webster receiver for the Southwestern Engineering Corporation, against the Mountain Monarch Gold Mining Company, Limited. From a judgment for plaintiff, defendant appeals.

Modified, and, as so modified, affirmed.

Hy Schwartz, of Los Angeles, for appellant.

Claude I. Parker, Ralph W. Smith, and J. Everett Blum, all of Los Angeles, for respondent.

WILLIS, Justice.

Plaintiff, as receiver of Southwestern Engineering Corporation, commenced this action to recover possession of certain mining machinery and equipment or its value, alleged to be the sum of \$5,000, from defendant. The record discloses the fact that before trial plaintiff had obtained possession of all the property claimed by process of claim and delivery, and that such possession still continued at the date of decision and judgment herein. The complaint is in the usual form in such actions, and the only issues created by the answer consisted of the right of possession, the status of the property described in respect to being personal or real, the value thereof, and whether the action was barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure. After trial, the court found that plaintiff was the owner of and entitled to the possession of "that certain personal property" described in the complaint, with the exception of two items which had previously been returned; that the value thereof was the sum of \$4,220; that defendant, without right, had held and retained possession "of the hereinabove described personal property"; that demand for the possession thereof had been made by plaintiff and refused by defendant. From its findings, the court concluded that plaintiff was entitled to judgment against defendant for the possession of the property or the sum of \$4,220, found to be the value of such property, and that "defendant is entitled to take nothing by his answer." Judgment was accordingly entered in the alternative form for recovery of possession or, in event said personal property cannot be delivered by the

defendant to the plaintiff, that plaintiff recover from defendant the sum of \$4,220. From this judgment and from the whole thereof, this appeal is prosecuted.

Appellant contends (1) that the evidence is insufficient to justify the decision; (2) that the findings are not supported by the evidence; (3) that there is a failure to find on material issues; and (4) that plaintiff is estopped by long delay in asserting any rights to the property in question.

[1] The defendant had opportunity to plead estoppel and failed to do so. Such failure renders that defense unavailable now. 10 Cal. Jur. 654; Mahana v. Echo Publishing Co., 181 Cal. 233, 183 P. 800.

[2, 3] We have at great pains examined the typewritten record, notwithstanding it was not our duty to do so, in order to ascertain what merit, if any, lay in appellant's claims of insufficiency of the evidence to sustain the decision or support the findings, and such examination shows no merit in such claims. The evidence clearly shows that defendant was withholding possession of the personal property in question from plaintiff, after notice and knowledge that plaintiff was the owner thereof and entitled to its possession under a conditional sales contract with Mt. Whitney Union Mining Company, the buyer, in which contract title was reserved to the seller with right of repossession on failure of the buyer to make payments as provided therein. It is undisputed that the buyer was long in default as to payments, and there is sufficient evidence to support the claim of plaintiff to its possession and that defendant had acquired no rights or title to such property. Indeed, the record fails to show that defendant ever asserted any right to the property, but does show that when it acquired the lease on the mining ground on which this equipment and machinery was located, it had knowledge of plaintiff's claim to the same and of the circumstances of its conditional sale and delivery to the Mt. Whitney Union Mining Company. The findings of the court are supported by competent evidence and are binding on the appellate court.

[4-6] Appellant contends that the court failed to find on the issue whether the property described in the complaint was real or personal, or on the issue of the statute of limitation pleaded in the answer. The answer herein denied that the property described in the complaint was personal property. The court's findings as hereinabove partially quoted negative that denial and in effect are

findings that the property was personal property. There is nothing left undetermined in respect to the status of the property. The court found that plaintiff was the owner of and entitled to possession of the "personal" property described. Necessarily, this conclusion excludes all notion or idea that the property was of any other kind, and it was unnecessary to make a more particular finding upon the denial in the answer. *Saxon v. Buckeye Mfg. Co.*, 34 Cal. App. 200, 167 P. 174. On appeal we are entitled to draw necessary inferences from the findings in order to support the judgment. *Hulen v. Stuart*, 191 Cal. 562, 217 P. 750. Furthermore, where findings are made upon issues which determine a case, as the findings herein do, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. 24 Cal. Jur. 947.

[7, 8] Appellant's claim of prejudicial error based on the apparent failure of the court to find on the issue of the statute of limitations is not well founded. The court in its conclusions found that defendant was "entitled to take nothing by reason of its answer." This may readily be understood to mean that the plea of the bar of the statute of limitations was not supported by the evidence and therefore not the basis of any relief. Furthermore, as the statute pleaded began to run in this case from the time of demand and refusal to return (5 Cal. Jur. 172), and as there is no evidence whatever of any demand having been made at any time prior to three years before June 2, 1933, the date of filing the suit, it is manifest that no prejudicial error could result from failing to find, where the finding must of necessity be adverse to the defendant. 24 Cal. Jur. 944; *Hulen v. Stuart*, supra; *Phillips v. Stark*, 65 Cal. App. 136, 223 P. 443.

[9] In its oral decision at the close of the trial the court found that plaintiff had repossessed and was then in possession of the personal property of which recovery was sought. In its brief herein appellant states that upon filing the complaint plaintiff secured possession of the property described in the complaint by process of claim and delivery executed by the sheriff. Section 627 of the Code of Civil Procedure provides that if the personal property, recovery of possession of which is sought, has not been deliv-

ered to the plaintiff, the value of the property must be found; and section 667 of the same Code provides for entry of judgment in such case for possession or the value thereof. In *Claudius v. Aguirre*, 89 Cal. 501, 26 P. 1077, 1078, it is held that under this section the jury is authorized to find value of the property, if their verdict be in favor of plaintiff, only "if the property has not been delivered to the plaintiff"; and that e converso, if the property has been delivered to the plaintiff, they are not required to find the value, and unless the value has been found there is no basis upon which to render the alternative judgment for its value. Precisely to the same effect is the case of *Caruthers v. Hensley*, 90 Cal. 559, 27 P. 411. In *Erreca v. Meyer*, 142 Cal. 308, 75 P. 826, 827, it is said: "If, for instance, the plaintiff in such an action has already obtained the possession of the property before judgment, there is no occasion, in the event that he finally prevails, for any judgment for its value, 'as the condition is wanting upon which such clause in the judgment is authorized, viz., 'if a delivery cannot be had.'" *Claudius v. Aguirre*, 89 Cal. 501, 504, 26 P. 1077, 1078." From these authorities it is clear that the issue of value in this case became immaterial and the finding thereon is surplusage and the judgment for such value in the sum of \$4,220 as an alternative to recovery of possession was unwarranted by the record. There was no occasion for an alternative judgment. Plaintiff had secured possession by claim and delivery process before trial, and the right to continued possession was adjudged by the court. That was all he was entitled to, other than damages for detention. No such damages were found or adjudged. It follows that the judgment must be modified by eliminating therefrom the alternative portion thereof awarding the sum of \$4,220 to plaintiff.

The judgment herein is modified by striking therefrom the following: "Or in the event said personal property cannot be delivered by the defendant to the plaintiff, the plaintiff do have and recover from the defendant the sum of Four Thousand Two Hundred Twenty Dollars (\$4220.00)," and, as so modified, it is affirmed, appellant to bear costs on appeal.

We concur: CRAIL, J.; STEPHENS, P. J.

6 Cal.App.2d 550

SPELLMIRE v. BUTTRESS & McCLELLAN, Limited, et al.
Civ. 9765.

District Court of Appeal, Second District,
California.

April 30, 1935.

1. Evidence ⇐568(4)

In action for value of services rendered at defendant's request, trial court was not bound to accept opinion of any witness as to value, but could make its own estimate of value of services.

2. Work and labor ⇐28(1)

In action for value of services rendered at defendant's request, testimony *held* to support finding of trial court that value of services was \$2,000.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by T. L. Spellmire against Buttress & McClellan, Ltd., and others. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

John C. Miles and John L. Fleming, both of Los Angeles, for appellant.

John M. Hall, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of plaintiff for \$2,000 in an action for the value of services rendered to defendants at their special instance and request. The contention of the defendants is that the value of the services did not exceed \$750, and that the evidence was insufficient to warrant a recovery or to sustain the finding that this was the value of plaintiff's services.

[1, 2] The sole question before this court on appeal is this: Is there any substantial evidence to support the finding of the trial court that the value of the services was \$2,000? The plaintiff testified that the value of his services was \$14,332. This alone was sufficient to sustain the finding. He presented another witness who testified they were worth over \$4,000. We may not weigh this evidence. Furthermore, the services were fully described in the evidence, the facts placed before the court, and when this is done the court is not bound to accept the opinion of

any witness as to value but may and should make its own estimate of the value of the services under all the facts and circumstances and evidence bearing upon the question. *Kimes v. Davidson Inv. Co.*, 101 Cal. App. 382, 281 P. 639.

Plaintiff contends that the appeal is frivolous and for delay merely, but this court has caught up with its work and there has been little delay. We are not in a frame of mind to assess a penalty for delay.

Judgment affirmed.

I concur: STEPHENS, P. J.



FIRST-TRUST JOINT STOCK LAND BANK OF CHICAGO v. MEREDITH.*
Civ. 8711.

District Court of Appeal, Second District,
Division 1, California.
April 25, 1935.

Rehearing Denied May 25, 1935.

Hearing Granted by Supreme Court
June 24, 1935.

1. Mortgages ⇐218

Statute governing mortgage foreclosure actions *held* applicable only to mortgages on California lands, and hence mortgagee of foreign lands could maintain action on mortgage note and was not limited to foreclosure action in foreign state (Code Civ. Proc. § 726).

2. Husband and wife ⇐156

Where wife, together with husband and another, executed note and mortgage before delivery, wife, though receiving no consideration, *held* liable at least as accommodation maker to holder for value; consideration to one or both of comakers being presumed (Civ. Code, §§ 3105, 3110, 3266).

3. Husband and wife ⇐156

Wife who, together with husband and another, executed note and mortgage on Iowa lands, *held* liable on note, even though wife's purpose was solely to relinquish dower, and though wife received no consideration and mortgagee did not rely on her personal credit.

4. Mortgages ⇐218

Mortgagee of foreign lands *held* entitled to maintain action for balance of mortgage note on nonpayment of installment, even though note contained no acceleration clause,

where mortgage authorized mortgagee on default to declare entire debt due (Code Civ. Proc. § 726).

5. Mortgages ⇨105

Note and mortgage should be construed as single contract, as regards acceleration of maturity.

6. Mortgages ⇨559(1), 561

Under statute, deficiency judgment may be rendered in mortgage foreclosure action, or, if not obtainable therein, may be recovered in independent action (Code Civ. Proc. § 726).

7. Mortgages ⇨218

Action is maintainable on mortgage note if security has become valueless (Code Civ. Proc. § 726).

8. Mortgages ⇨561

Only in cases where parties so contract may mortgagee be precluded from recovering deficiency after foreclosure until such time as mortgage notes mature (Code Civ. Proc. § 726).

9. Mortgages ⇨218

Under mortgage providing that mortgagors should pay attorney's fee and all costs and expenses in case of foreclosure, and that mortgagors should pay specified principal and interest, together with all costs and expenses of collection, and any costs, charges, or attorney's fees incurred in foreclosing or maintaining priority of mortgage, words "expenses of collection" held intended to exclude attorney's fees, and hence attorney's fees were not recoverable in action on mortgage note.

[Ed. Note.—For other definitions of "Expenses of Collection," see Words & Phrases.]

10. Mortgages ⇨218, 581(1)

Attorney's fees are not collectible as between debtor and creditor, in absence of special agreement therefor, as in note or mortgage.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the First-Trust Joint Stock Land Bank of Chicago, a corporation, against Alice R. Meredith. Plaintiff's motion for judgment on the pleadings was granted, and defendant appeals.

Modified and affirmed.

William M. Hiatt and John M. Hiatt, both of Los Angeles, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

This action was brought to recover the balance of some \$36,000 on a promissory note of Robert Meredith, Alice R. Meredith, his wife, and Harlan Meredith, secured by their mortgage upon lands in the state of Iowa. The note and mortgage were executed in California. It is not necessary to decide in what state they were delivered. The note was payable in 68 semiannual installments of \$1,300 each, which payments included interest; the first payment falling due April 29, 1924. Default was made in the payment due November 1, 1931, whereupon plaintiff, without demand for payment, instituted this action. By the terms of the note itself the holder was not given the right to declare the entire debt due upon default in the payment of any installment of principal or interest, but the mortgage contained the following provision: "And the said parties of the first part do further covenant and agree that in case of default in payment of said principal sum of money, or of any amortization installment thereof, or of interest thereon, or in the performance of any of the covenants or agreements herein contained, then, or at any time thereafter during the continuation of such default, the said party of the second part or its successors or assigns, may, without notice, declare the entire debt hereby secured immediately due and payable, and thereupon the said party of the second part, or its successors or assigns, shall be entitled to the immediate possession of said premises and the appointment of a receiver, as above provided, and may proceed to foreclose this mortgage; and in case of foreclosure, such sum as may be lawful shall be allowed by the court for attorney's fee and all costs and expenses incurred by said Bank or its attorneys, and be included in the judgment or decree."

Defendant answered, setting up four separate defenses. Plaintiff made a motion for judgment on the pleadings, which was granted for the full amount of principal and interest and for \$1,100 attorney's fees.

[1] The first of appellant's points which we shall consider is the claim that by the provision of section 726 of the Code of Civil Procedure plaintiff is barred from prosecuting an action on the note and is limited to an action of foreclosure. It may be conceded that this position is well taken if section 726 relates to mortgages upon lands outside of the state, but the decisions are to the effect that the section relates only to mort-

gages upon lands located within this state. *Felton v. West*, 102 Cal. 266, 36 P. 676, 677; *McGue v. Rommel*, 148 Cal. 539, 83 P. 1000. In the first of these cases the plaintiff was allowed to recover a deficiency in California after foreclosure of a mortgage on Oregon land, in which action personal service could not be had and no deficiency judgment was obtained. The Supreme Court considered the question fully and came to the conclusion that the section does not relate to mortgages upon lands outside of the state, stating: "All the provisions of the section entirely negative the idea of any other construction. * * * This section refers to actions brought in the courts of California for the purpose of foreclosing mortgages upon property situated in the state of California."

In *McGue v. Rommel* an action on a note was sustained although it was secured by real property in the republic of Mexico. The question was thus again answered contrary to the contention of the appellant. These authorities are controlling on the point. Plaintiff therefore had a right to bring this action on the note in California; it was not limited to a foreclosure action in Iowa.

[2] Another defense relied upon is alleged want of consideration. The answer alleged that defendant received no money or property or anything of value for the execution of the note and mortgage, and that her signing of the same was wholly without consideration. The briefs cite and discuss the authorities on this point, which are in conflict upon the question whether a mere allegation of no consideration states a sufficient defense. The question does not arise under the defendant's pleading, for the reason that there is no allegation that there was no consideration for the note and mortgage; the allegation being merely that no consideration passed to the defendant Alice R. Meredith. She executed the note and mortgage, with her two comakers, before delivery. If they or either of them received a consideration, and it is presumed that they did, Alice R. Meredith is liable, even though no consideration passed to her. Section 3105, Civil Code, provides that such an instrument is deemed, prima facie, to have been issued for a valuable consideration. An accommodation maker is liable to a holder for value under section 3110, Civil Code, and plaintiff is a holder of the instrument under section 3266, Civil Code. This defense, therefore, was insufficient. If all of the allegations were true, defendant would still be liable as an accommodation maker to a holder for value.

[3] As a further defense, defendant alleged that she executed the note and mortgage, "solely in order that her contingent right of dower would not take precedence over plaintiff's mortgage, and for no other purpose," that she received no consideration, and that plaintiff did not loan any money upon the personal credit of defendant or because of any personal obligation of the defendant to repay the same. In support of her argument upon this point appellant cites *Hinman v. Treinen*, 196 Iowa, 701, 195 N. W. 345; *Le Fleur v. Caldwell*, 196 Iowa, 727, 195 N. W. 234; *Insell v. McDaniels*, 201 Iowa, 533, 207 N. W. 533; *Cooley v. Will*, 212 Iowa, 701, 237 N. W. 315. These cases hold that, where a wife receives no consideration for making a note and mortgage, which she executes for no other purpose than to waive or relinquish her contingent right of dower, and where no credit is extended to her personally, she is under no personal liability for the debt. In all of the cases cited, there was a pre-existing obligation of the husband for which the wife was not liable. The notes and mortgages were given in each of the cases cited to secure the husband's obligation. Neither of the transactions was a new or original one, whereas, in the instant case it is alleged, and not denied, that at the time the note and mortgage in question were given plaintiff loaned thereon the sum of \$40,000. The Iowa decisions have not extended the rule of the cases cited to a case where the wife's note and mortgage are given at the time of the creation of the debt or obligation which they evidence and secure, but, upon the contrary, in *Starry v. Starry & Lynch*, 212 Iowa, 274, 234 N. W. 281, 283, the authorities here cited by appellant were reviewed, and the court said that they follow an exception to the general rule and that the exception "is to be carefully applied within strict lines lest by its expansion it destroy the rule itself." It was held in this case that the rule first announced in *Hinman v. Treinen*, supra, did not apply to a case where the obligation of each signer became effective at the same time and the consideration of the contract became operative on both parties simultaneously.

In *Millard v. Curtis*, 208 Iowa, 682, 223 N. W. 489, the court refused to extend the exception to the rule to relieve from liability a wife who joined her husband in a note given to a bank, upon the ground that consideration did not depend merely upon what she received, or whether she received anything, but might as well depend upon incon-

venience or detriment to or waiver by the bank.

In *American Commercial, etc., Bank v. Kramer*, 206 Iowa, 49, 219 N. W. 931, 932, a wife was held to be liable where she joined her husband in an agreement to pay a mortgage which her husband had theretofore assumed, in consideration for which the bank extended the time for the payment of the debt. The cases here cited by appellant were discussed by the court and held to be not in point, and it was said of the wife's contract in each of those cases: "Her signature was attached by her to a contract already complete. It was not done pursuant to any previous promise or condition. The payee parted with nothing on the faith thereof, nor did the principal maker receive anything." These later cases show quite clearly that the Supreme Court of Iowa has not extended the rule of *Hinman v. Treinen* to cover such facts as we have in the instant case, but, upon the contrary, has refused to do so. We conclude, therefore, that this special defense did not allege facts sufficient to relieve defendant from liability upon the note.

[4-8] Another defense urged is that only one installment of the note was overdue at the time the action was commenced, and that the judgment is erroneous in awarding plaintiff judgment, for the entire unpaid balance of the note.

The note was payable in sixty-eight semi-annual installments of \$1,300 each, applying to principal and interest. There was no acceleration clause in the note, but the mortgage provided that, in event of default, "the said party of the second part, or its successors or assigns, may without notice declare the entire debt hereby secured immediately due and payable and thereupon the said party of the second part, or its successors or assigns, shall be entitled to the immediate possession of said premises and the appointment of a receiver as above provided, and may proceed to foreclose this mortgage," etc.

It is appellant's contention that the provision of the mortgage which gives the mortgagee the right, in event of default, to declare the entire debt due, relates and is limited to the foreclosure of the mortgage; in other words, that, while the debt may be declared due, the remedy available is only the foreclosure of the mortgage, and that no suit can be brought on the note. In support of this argument, cases are cited which announce the rule for which appellant con-

tends, and which has come to be known as the "Minnesota rule," declared in that state in the case of *White v. Miller* (1893) 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673. This rule has been followed in later Minnesota cases, and has been adopted in a number of other jurisdictions, while in others it has been rejected, in favor of the rule that default gives a mortgagee the right to declare the debt due under the acceleration clause of the mortgage, not only for the purpose of foreclosure but for all purposes. The point has not been decided in California. It would unduly extend this opinion to discuss the many learned opinions on the question and the reasoning employed to support them.

The weight of authority, and we believe the better reasoning, is against the Minnesota rule as a general rule. When it was originally adopted, not only in Minnesota in *White v. Miller*, supra, but in *McClelland v. Bishop*, 42 Ohio St. 113, *Baird v. Meyer*, 55 N. D. 930, 215 N. W. 542, 56 A. L. R. 175, *Birken v. Hickey*, 42 S. D. 472, 176 N. W. 137, *Capehart v. Dettrick*, 91 N. C. 344, all of which cases are frequently cited in support of the rule, the courts gave effect to the notes and mortgages as separate instruments so as to preserve the negotiability of the notes unaffected by acceleration clauses in the mortgages. Each case was properly considered with a view to carrying out the contract of the parties. In later cases the doctrine has been extended unduly, we think, to situations which do not come within the reasoning of the earlier cases, in which the rule had its origin. It has been carried to the extent of holding that a deficiency after foreclosure cannot be recovered until the notes themselves mature. *Burnside v. Craig*, 140 Minn. 404, 168 N. W. 175. Where so many forms of notes and mortgages have been construed, the courts have necessarily placed them in two classes, one in which the contract showed an intention that the debt shall not be matured except for foreclosure purposes, and the other where a contrary intention is found in the particular language of the instruments. Changes which have occurred in the Negotiable Instruments Law have eliminated many of the reasons which led the courts to regard the notes as negotiable instruments, unaffected by the terms of mortgages by which they were secured. The courts of Iowa have made no choice between two rules, although in that state recovery of the entire debt in a mortgage foreclosure action is allowed even before the notes mature according to their terms, although, as we have said,

this is not the rule in Minnesota. There is nothing in the Iowa cases which militates against a construction that the note and mortgage in question should be considered as a single contract, maturable under the terms of the mortgage, not only for the purpose of foreclosure, but for all purposes.

The later cases, in jurisdictions where no choice has previously been made between the two rules, hold that a debt matured under a provision of a mortgage is matured for all purposes. *Durham v. Rasco* (1924) 30 N. M. 16, 227 P. 599, 34 A. L. R. 838; *Wilson v. Kirchan* (1927) 143 Wash. 342, 255 P. 368. In both of these cases the authorities are collected, and they may also be found in notes in 34 A. L. R. 850, and 56 A. L. R. 185.

The California cases, such as *Meyer v. Weber*, 133 Cal. 681, 65 P. 1110, hold that a note and mortgage are to be construed as a single contract. While section 726, Code of Civil Procedure, allows but one action to be brought on a mortgage obligation, judgment for deficiency may be rendered in a foreclosure action, under express authority of the statute, or may be recovered in an independent action in cases where it cannot be granted in the foreclosure suit. *Blumberg v. Birch*, 99 Cal. 416, 34 P. 102, 37 Am. St. Rep. 67. There is also the right in California to bring an action on the mortgage note in case the security has become valueless. We could apply the rule in this state, which would defer the bringing of such actions until the notes matured, only to a case where the parties had contracted that way.

The note and mortgage in the instant case should be construed as one instrument. The note recites that it is secured by a conveyance of certain described real estate. The mortgage sets forth the amount of the debt and the terms of payment, and provides that the mortgagors "do hereby covenant and agree to pay or cause to be paid the principal sum and interest above specified, in the manner aforesaid." There is a further provision that upon default the mortgagee has the right to "without notice declare the entire debt hereby secured immediately due and payable." No question of the negotiability of the note is concerned. No rights or liabilities of indorsers are involved, and the action is between original parties to the contract. In such a case we see no reason for holding that a debt, when matured according to the terms of the mortgage, is not collectible by independent suit on the note brought in California without foreclosure of the mortgage in Iowa.

[9, 10] Appellant next contends that the judgment for attorney's fees was erroneous, and with this contention we are disposed to agree. The note contained no provision for the payment of attorney's fees. The mortgage contained a provision which we have already quoted, and also the following provision: "And the said parties of the first part do hereby covenant and agree to pay, or cause to be paid, the principal sum and interest above specified, in manner aforesaid, together with all costs and expenses of collection, if any there shall be, and any costs, charges or attorney's fees incurred and paid by the said party of the second part, or its successors or assigns, in maintaining the priority of this mortgage, or in foreclosing the same." As we interpret these provisions, there was no obligation to pay attorney's fees except in case of foreclosure. The parties had in mind collection either through foreclosure or without foreclosure. Accordingly, the mortgage bound the makers, where there was no foreclosure, to pay the principal and interest, "together with all costs and expenses of collection, if any there shall be." There were two separate provisions for the payment of costs, charges, or attorney's fees paid in foreclosing the mortgage. The theory of the respondent is that "expenses of collection" include attorney's fees, and numerous authorities are cited so holding. We do not question the rulings in the cases cited, but we think the parties to the mortgage have contracted otherwise. If they had understood that "expenses of collection" included attorney's fees, they would not have considered it necessary, by two separate provisions of the mortgage, to provide for attorney's fees in case of foreclosure, and conversely, as they apparently considered it necessary to make a special provision for attorney's fees in the case of foreclosure, and did not provide for attorney's fees in case of collection without foreclosure, we do not doubt that the words "expenses of collection" were understood to exclude liability for attorney's fees. Since attorney's fees are not collectible in the absence of special agreement to pay them, and we believe that such agreement was not intended to be expressed in the language employed in the mortgage, it follows that the judgment for attorney's fees was erroneous.

As no sufficient defense was stated in the answer, the motion for judgment on the pleadings was properly granted, except in so far as it awarded plaintiff attorney's fees in the sum of \$1,100.

The judgment is modified by striking therefrom the award of attorney's fees, and, as modified, is affirmed; appellant to recover costs on appeal.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 590

**MYERS v. HOPLAND UNION ELEMEN-
TARY SCHOOL DIST. OF MENDOCI-
NO COUNTY.**
Civ. 5322.

District Court of Appeal, Third District,
California.
May 4, 1935.

Hearing Denied by Supreme Court
July 1, 1935.

1. Schools and school districts ☞112

Failure to present to board of trustees verified claim for injury sustained by minor school boy in fall from schoolhouse porch in allegedly dangerous condition within ninety days after accident held fatal to school boy's cause of action against school district (St. 1923, p. 675; St. 1931, pp. 2475, 2476, amended by St. 1933, p. 2147; School Code, § 2.801).

2. Schools and school districts ☞112

Statute requiring filing of verified claim for damages for injury resulting from dangerous or defective condition of school district property or negligence of public officer of school district is mandatory, in view of amendment, regardless which of three statutes action against school district is based on (St. 1931, pp. 2475, 2476, amended by St. 1933, p. 2147; School Code, § 2.801; Civ. Code, § 1714½; St. 1923, p. 675).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Ivan D. Myers, Jr., a minor, by Ivan D. Myers, Sr., as guardian ad litem, against the Hopland Union Elementary School District of Mendocino County. Judgment for defendant, and plaintiff appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

Lilburn Gibson, Dist. Atty., of Ukiah, for respondent.

Mr. Justice pro tem. COATS delivered the opinion of the court.

[1] The plaintiff brings this action through his guardian ad litem. He was a pupil in the Hopland Union Elementary School and was of the age of six years when he was injured by a fall from the schoolhouse porch. The action is predicated upon the claim that the school property was in a dangerous and defective condition because there was no railing around the porch, and upon the carelessness and negligence of the trustees in allowing this condition to exist. The court made no findings upon these issues, but did specifically find that no verified claim for damages was presented to the board of trustees of the school district or to any officer, or clerk or secretary thereof within ninety days after the accident, and thereupon rendered judgment for the defendant. The appeal is upon the judgment roll.

The right to maintain an action of this nature is authorized by the provisions of the act of June 13, 1923 (St. 1923, p. 675), and section 2.801 of the School Code.

This right only exists by virtue of statutory enactment, and the Legislature having granted the right may also prescribe the procedure by which it may be enforced. This it has done by the act of June 19, 1931 (St. 1931, pp. 2475, 2476), which provides that whenever it is claimed that a person has been injured as a result of the dangerous or defective condition of a public building, grounds, works, or property of a school district, or of the carelessness or negligence of a public officer of a school district, a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the school district within ninety days after such accident. The provisions of this section are mandatory and a person has no right to maintain such an action unless he complies therewith. *Thompson v. County of Los Angeles*, 140 Cal. App. 73, 35 P.(2d) 185. Plaintiff, although a minor, is bound by its provisions as there is nothing in the act excepting minors from its operation. *Phillips v. County of Los Angeles*, 140 Cal. App. 78, 35 P.(2d) 187.

[2] Plaintiff cites *Bates v. Escondido Union High School District*, 133 Cal. App. 725, 24 P.(2d) 884, and contends that this case establishes as law that the filing of a verified claim is not necessary in cases of this nature. The cause of action in that case arose out of the negligent operation of a school bus by an employee, and not an officer of the district, and came clearly within the provisions of section 1714½ of the Civil Code. The court

held that the act of June 19, 1931, as then existing, did not require the filing of a verified claim before instituting such an action, but recognized and clearly declared that the act did require the filing of such an action when the injury resulted from the dangerous or defective condition of certain publicly owned property described in the act, or where it was caused by the negligence of an officer. Such is the nature of the present action. The accident in the *Bates v. Escondido Union High School District* Case occurred in the year 1931. The Legislature in 1933 (St. 1933, p. 2147) amended the act of June 19, 1931, to provide that the words "public property" include any vehicles and the word "officers" includes employees. The provisions of the act of June 19, 1931, are therefore now applicable to causes of action against school districts, whether they come within the provisions of the act of June 13, 1931, section 1714½ of the Civil Code, or section 2.801 of the School Code.

The failure of plaintiff to present his claim as required by law is fatal to his cause of action. *Bancroft v. City of San Diego*, 120 Cal. 432, 52 P. 712.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.



6 Cal.App.2d 649

BEAUMON v. KITTLE MFG. CO.

Civ. 9275.

District Court of Appeal, Second District,
Division 1, California.

May 8, 1935.

Rehearing Denied June 5, 1935.

Hearing Denied by Supreme Court
July 5, 1935.

Patents 6218(3)

Licensor held not barred from recovering minimum royalty on automobile signaling device by assignment of interest in patent on ground that licensor thereby divested himself of means to insure licensee exclusive right to manufacture and sell device for full term of patent, since assignee took assignment subject to prior rights of licensee.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Leon Beaumon against the Kittle Manufacturing Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Freston & Files, of Los Angeles, for appellant.

Roscoe R. Hess, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Appellant is the licensee of a patent for a signaling device for automobiles, under a contract entered into in 1927 with the respondent, who is the inventor and patentee. Respondent sued in another action for \$2,500 as royalty for the year 1928, and secured judgment for that amount against the appellant. On appeal the judgment was affirmed and the rights of the respective parties under the contract determined. See *Beaumont v. Kittle Mfg. Co.*, 122 Cal. App. 547, 10 P.(2d) 508. In the present action the respondent sued for royalty of \$2,500 per annum alleged to be due for the years 1929 to 1932, inclusive. The appellant pleaded and proved that respondent in January, 1930, entered into a contract with one Davis under which he made certain agreements concerning the patent rights licensed to the appellant. Appellant contends that by entering into the contract with Davis, respondent breached the agreement theretofore made with it. Respondent had judgment for \$10,000 and the only point presented on appeal concerns itself with the operation and effect of the Davis contract upon the one made by the respondent with appellant.

By the license agreement sued upon respondent, as licensor, gave to the appellant, as licensee, the sole and exclusive right to manufacture, use, and sell the patented direction signal for the full term of the patent. It was stipulated that the appellant has never manufactured any of the patented articles, the judgment against it being for the minimum royalty provided for by the license agreement. Appellant contends that plaintiff under his later contract with Davis made an assignment of an interest in the patent, and thereby divested himself of the means to insure the monopoly he granted to the appellant under its license agreement.

Giving the Davis contract all of the effect appellant claims for it, appellant's rights have not been interfered with. "An assignee of a patent takes it subject to all prior licenses given by former owners, even though

such licenses were oral." Amdur, Patent Law and Practice, p. 542. "It is true that in some ways the rule seems anomalous; but it has passed into one of property clearly understood, and should not be interfered with, except, after due consideration, by statute. The present is an instance of how a dishonest inventor can work injury to several innocent parties; but, when defendant took its assignment, it had long passed into the text-books that such an assignee acquired title subject to prior licenses of which the assignee must inform himself as best he can, and at his own risk. Rob. Pat. § 817; Walker (5th Ed.) §§ 303, 304." *Keystone Type Foundry v. Fastpress Co.* (C. C. A.) 272 F. 242, 245.

Any interest in the patent acquired by Davis under his contract was subject to the appellant's license. Appellant's rights under its license were not interfered with by the Davis contract.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



6 Cal.App.2d 721

EMERZIAN v. EMERZIAN et al.

Civ. 1385.

District Court of Appeal, Fourth District,
California.

May 13, 1935.

1. Partnership ⇨108

Rule that one partner cannot sue another upon a demand arising out of a partnership transaction, in absence of an accounting, does not apply where the transaction is not a partnership matter.

2. Partnership ⇨296(1)

Pendency of action for accounting between former partners held not a bar to action by former partner who had been compelled to pay a note given for sole benefit of another former partner against person for whose benefit note had been given and against a third former partner who was also an accommodation maker.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Richard Emerzian against Karl Emerzian and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Barbour, Kellas & Backlund, of Fresno, for appellants.

Conley, Conley & Conley, of Fresno, for respondent.

BARNARD, Presiding Justice.

The plaintiff was compelled to pay a note given to a bank and signed by himself and the two defendants. He brought this action to recover from the defendant Karl Emerzian as the principal debtor and for contribution from the defendant C. Emerzian as one of the accommodation makers. Among other things, the complaint alleged that the note was executed for the sole benefit of Karl Emerzian, and that he received the entire consideration therefor. In his answer, the defendant Karl Emerzian alleged that the proceeds of the note were used for the purposes of a partnership which theretofore existed between himself and the plaintiff, and that another accounting action, with respect to said partnership, was then pending. The defendant C. Emerzian also set up in his answer the existence of the partnership action, and that said partnership was indebted to him.

Apparently the main issue at the trial was as to whether this note arose out of a partnership transaction or whether it was given for the sole use and benefit of the defendant Karl Emerzian. The court found that the money for which the note was given was not obtained or used for partnership purposes, and that the note was executed for the sole use and benefit of Karl Emerzian, who used the proceeds thereof for his own individual purposes. From the judgment entered, the defendants have appealed.

The sole point here raised is that an action at law may not be maintained between partners with respect to a partnership transaction, and that the court was without power to proceed in this case until the other action between the partners had been disposed of.

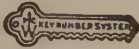
[1, 2] While it is well settled in this state that one partner cannot sue another partner upon a demand arising out of a partnership transaction, in the absence of an accounting, it is equally well settled that this rule does not apply where the transaction is not a partnership matter. *Bull v. Coe*, 77 Cal. 54, 18 P. 808, 11 Am. St. Rep. 235; *Johnson v. Rosen-*

stein, 132 Cal. App. 675, 23 P.(2d) 418; Collins v. Meis, 139 Cal. App. 233, 33 P.(2d) 472.

The court here found that this transaction was an individual one and not one arising out of the partnership relation. That finding is fully sustained by the evidence, and no attempt is made to show anything to the contrary. No reason appears for disturbing the trial court's conclusion that the loan transaction here involved should be treated as one between the parties as individuals, while the partnership relation between two of them was separately dealt with in the accounting suit.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



**FILLMORE UNION HIGH SCHOOL DIST.
OF VENTURA COUNTY et al. v.**

COBB. *
Civ. 5269.

District Court of Appeal, Third District,
California.
May 4, 1935.

Hearing Granted by Supreme Court
June 3, 1935.

Schools and school districts §154

Terms and conditions prescribed by county superintendent of schools for attendance of pupils at high school in district other than those in which pupils reside and apportionment and transfer of funds to the school attended cannot operate retroactively so as to affect pupils in their past attendance on the school, but are applicable only to pupils who attend school after rules and terms are adopted and apportionment made by superintendent.

Appeal from Superior Court, Ventura County; Frank C. Collier, Judge.

On petition for rehearing.
Prior opinion, 43 P.(2d) 863.
Modified, and petition denied.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for appellant.

Charles F. Blackstock, of Oxnard, and Ferguson L. Fairbanks, of Fillmore, for respondents.

PER CURIAM.

On petition for rehearing the opinion is modified by striking out the last two lines thereof as they appear in 43 P.(2d) 863, 867, to-wit, "The judgment is reversed, and the court is directed to render judgment in favor of the defendant," and inserting in lieu thereof the following language:

"What has been previously said is not intended to give the superintendent of schools authority to determine rules or terms or fix tuition retroactively so as to affect pupils in their past attendance upon the school, but upon the contrary these rules and the apportionment of funds are to apply only to pupils who attend the school after the rules and terms are adopted and the apportionment made.

"The judgment is reversed and the court is directed to enter judgment in accordance with the foregoing opinion."

With the above modification, the petition for rehearing is denied.



6 Cal.App.2d 582

PEOPLE v. CLEMENTS.

Cr. 1425.

District Court of Appeal, Third District,
California.
May 3, 1935.

1. Criminal law §736(2)

Trial court has discretion to determine admissibility of confession.

2. Criminal law §1158(4)

Evidence being conflicting on question whether confession was free and voluntary, trial court's finding will not be disturbed on appeal.

3. Burglary §45

In burglary prosecution, question as to who brought stolen articles to defendant's premises held for jury on conflicting evidence.

4. Burglary §41(5)

Evidence held insufficient to justify finding that burglary occurred in nighttime, but was sufficient to show second-degree burglary.

There was evidence that owner, having placed stolen articles in ice box about

noon, was away from home from 1 o'clock until about 4:30 in afternoon; that defendant admitted that he took articles about 4 or 4:30 in afternoon; that defendant was seen with stolen articles in early evening; and that sun set at 4:38 p. m.

Appeal from Superior Court, Sacto County; L. M. Shelley, Judge.

John Clements was convicted of burglary in the first degree, and he appeals.

Modified and affirmed.

Kenneth McGilvray, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was charged with the crime of burglary and was found guilty by a jury of burglary in the first degree. This appeal is from the judgment of conviction based thereon.

Appellant, as grounds for reversal, claims the court erred in admission of certain evidence, particularly in regard to an alleged confession by appellant, and also that the evidence is insufficient to support a verdict of burglary of the first degree.

As to the first point urged, we can find no error of sufficient gravity to justify a reversal. Appellant, with a man named Beedo and two other men, lived in what he termed a shack in the jungles in the outskirts of Sacramento. A police officer testified that in a list of articles taken from certain burglarized premises was a candy container and a toaster which were later found in the shack occupied by appellant. The officer also testified he talked to Beedo, who told him appellant brought the articles to the shack. Upon objection by appellant this testimony was stricken out. The officer then stated Beedo was taken to the cell of appellant in the city jail, where he there said to appellant: "Red," referring to appellant, "you pulled that burglary job, why don't you tell the truth?" Following this incident, so the officer testified, appellant freely and voluntarily admitted he burglarized the house as charged in the information.

Appellant claims he was not given an opportunity to show the confession was not free and voluntary, but the record discloses appellant had ample opportunity and called a

witness in addition to his own testimony in an attempt to discredit the same.

[1, 2] The trial court is vested with a discretion to determine whether or not a confession is admissible, and if there is a conflict in the evidence as to whether this testimony was or was not free and voluntary, the finding of the trial court will not be disturbed. *People v. Lebew*, 209 Cal. 336, 287 P. 337; *People v. Luzovich*, 127 Cal. App. 465, 16 P. (2d) 144; *People v. Castello*, 194 Cal. 595, 229 P. 855; *People v. Eli*, 131 Cal. App. 482, 21 P.(2d) 654.

[3] We have read the entire record, however, relating to the confession and the circumstances preceding it, but we find nothing that would indicate the use of threats or violence or undue influence in obtaining the statement from appellant. It is true he attempted on the witness stand to repudiate it, but his testimony is not convincing. There is some conflict as to who brought the stolen articles to the premises of appellant, but the determination of such matters is for the jury and their finding against appellant is binding upon us.

[4] As to the point that the evidence fails to show the burglary was committed in the nighttime, we must hold with appellant. The articles taken from the burglarized premises consisted of a toaster, a dish or two, some bacon, and a carton of eggs. These articles were placed in the ice box by Mrs. Smith, the owner of the property taken, about noon of December 4th, and were not missed until about 8 o'clock on the morning of December 5th. She was away from the home from 1 o'clock until about 4:30 o'clock on the afternoon of December 4th, but was in the house the remainder of the evening and night. Appellant admits in his confession he took the articles about 4 or 4:30 o'clock in the afternoon. The police officers, on cross-examination, testified that Beedo told them that appellant came in in the early evening with the stolen articles. The sun set upon the evening of December 4th at 4:38 p. m. We find nothing else in the record bearing upon the element of time.

This evidence was insufficient to justify the finding of the jury that the burglary occurred in the nighttime, and no claim is made that appellant was armed at the time of the commission of the crime.

The facts, however, are sufficient to support a verdict of guilty of burglary of the second degree.

The judgment therefore is modified by reducing the degree from burglary of the first degree to burglary of the second degree, and, as so modified, the judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



6 Cal.App.2d 674

MOYNOUGH v. EMPRESS GOLD MINING CO., Limited, et al.
Civ. 9694.

District Court of Appeal, First District,
Division 2, California.
May 10, 1935.

Rehearing Denied June 8, 1935.

Hearing Denied by Supreme Court
July 8, 1935.

1. Appeal and error ⇐931(1)

Reviewing court would consider evidence in light most favorable to respondent, giving him benefit of all presumptions and legitimate inferences tending to support judgment, and, where evidence was conflicting, court would examine record solely to determine whether judgment was supported by substantial evidence.

2. Principal and agent ⇐173(3)

In suit to recover balance due on option to purchase mining property, evidence held sufficient to sustain judgment for plaintiff on ground that defendant was an undisclosed principal to plaintiff in negotiations to secure option, and that defendant ratified and accepted benefits of option.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Suit by John H. Moynough against the Empress Gold Mining Company, Limited, and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Arthur H. Barendt, of San Francisco, and Samuel J. Crawford, of Santa Monica, for appellant.

Joseph E. Reardon, of San Francisco (Enid Childs, of Berkeley, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover the balance due on an option to purchase land. The cause was

tried without a jury, and plaintiff had judgment against the mining company. The defendant has appealed on typewritten transcripts. The single question raised on the appeal is whether the evidence is sufficient to support the finding "that the appellant was, as to respondent, an undisclosed principal."

[1] Since the finding was adverse to the appellant, we must view the evidence in the light most favorable to respondent, giving him the benefit of all presumptions and all legitimate inferences which may be drawn from the evidence in support of the finding. For this reason we will disregard the conflicting testimony upon which appellant so strongly relies, and will examine the record for the purpose of determining whether there is substantial evidence to justify the finding attacked.

Appellant executed a written contract with Smith and Bragg under which the latter agreed to purchase a controlling interest in the mining company, payments therefor to be made from time to time to the escrow holder, a bank in Reno, Nev., and the mining company agreed that the first \$135,000 received under the contract "shall be expended by it in the purchase of new mining properties and/or the development of mining properties owned by it. * * *" Pursuant to this agreement Smith and Bragg, through their agent Klinker, paid to appellant something over \$50,000 for which they received the agreed number of shares of treasury stock. The greater portion of this sum was expended for labor and materials used in the development of defendant's properties; \$17,000 was paid to the respondent on account of the option herein referred to. While this contract was in force, Klinker, acting for Smith and Bragg, conferred with Jacobs, the vice president and active manager of the mining company, relative to the purchase of respondent's property adjoining the property of appellant in Grass Valley, Cal. Both agreed that respondent's property should be acquired by the appellant, though Jacobs objected to an outright purchase and insisted upon an option with leave to prospect and examine. This course was approved by four of the five directors of the mining company and, at the suggestion of Jacobs, Klinker made arrangements to secure the option through a third party so that the respondent should not know that appellant was the real party in interest. Klinker accordingly employed Murphy for this purpose. The latter went to Grass Valley, having first received from Jacobs instructions how to ap-

proach the respondent, and procured from respondent an option to purchase this property upon payment of \$11,000 down and three installments of \$3,000 each. The option gave permission to carry on mining operations on the property for the period of one year if these payments of \$3,000 were made as stipulated. The total purchase price was fixed at \$100,000. Klinker paid through Murphy the first installment of \$11,000 and paid Murphy \$1,000 for his services. Murphy then assigned without any consideration all his interest to the appellant, the latter accepted the assignment, took exclusive possession of the property, conducted mining operations thereon, paid the taxes and a special district assessment, paid one of the installments due under the option, and recorded its assignment and a deed from Murphy. At a special meeting of its board of directors the appellant, by resolution, affirmed the purchase of the option and declared that the sum paid by Klinker therefor on behalf of Smith and Bragg "for all purposes shall be deemed as a cash payment of such sum for shares of treasury stock of first party" (the appellant). An installment of \$3,000 due November 5, 1932, was paid to respondent by Klinker, and Smith and Bragg were reimbursed with treasury stock of the company. The second installment due was paid by the company while it was in possession of the property. Before the final installment was due the appellant endeavored to get a new contract with respondent giving a longer time within which to pay the \$83,000 balance of the purchase price. When this was refused appellant defaulted on the final payment of the option price, and the suit is to recover that amount.

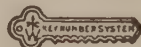
[2] The judgment must be affirmed for two reasons: First, the evidence is ample to support the finding that appellant was an undisclosed principal. All the moneys advanced by Smith and Bragg through Klinker for the purchase of the option were in fact paid by the appellant in accordance with its written contract with Smith and Bragg. They were all paid for appellant's benefit, and with its knowledge and consent. It was the active participant in securing the option, whereas Murphy was but a "dummy" working in its interest. Second, there was a complete ratification by appellant of the entire transaction and a full acceptance of all the benefits resulting from it. The appellant took from Murphy without consideration an assignment and deed transferring all his interest in the option, it entered into possession and conducted

mining operations on the premises, exercising all the rights of the optionee; by resolution of its board of directors it affirmed the entire transaction, and reimbursed Smith and Bragg for all the moneys advanced by them including the fee paid Murphy for his services in procuring the option; and it accepted and enjoyed for its own use all the benefits—the right to work and prospect the land to determine its value for mining purposes—a right which it had long desired to possess, but which it was unable to secure through its own efforts and in its own name.

This is wholly a "fact" case. The principles of law involved are so elementary that we can see no reason for encumbering the record with citation of authorities.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



6 Cal.App.2d 645
HOUTZ v. BEEMAN INV. CORPORATION
 et al.
 Civ. 1702.

District Court of Appeal, Fourth District,
 California.
 May 7, 1935.

1. Mortgages ☞310

Release clause in mortgage covering subdivision runs with the land and inures to benefit of purchasers.

2. Mortgages ☞310

Where mortgagee accepted before default payments less than specified in release clause and retained money after discovery that certain releases covered same lots, mortgage was subsequently extended and before default purchaser of half lot completed payments and was refused release, purchaser held, in mortgage foreclosure action, entitled to have mortgagor's overpayments for which releases had not been issued applied and half lot released as condition of mortgagee's having equitable relief sought.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Aaron E. Houtz against the Beeman Investment Corporation and others. From portion of judgment in favor of defendant Emma Bahn, plaintiff appeals.

Affirmed.

H. E. Allport, of Hollywood, for appellant.

Myra Grether Collins, of Alhambra, and Riggins & Hoffman, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mortgage covering a subdivision known as tract 9215 in Los Angeles county. The mortgage contained a release clause wherein the mortgagor agreed to subdivide the property and the mortgagee agreed to release lots in the tract upon the payment of \$470 as to some of the lots and \$700 as to other larger lots. The release clause further provided that the mortgagee was to join in the execution of a subdivision map and that the mortgagor might make payments at any time in amounts of not less than \$2,000 and "shall be entitled to credit therefor in respect to thereafter releasing any of said lots."

In 1927 the Beeman Investment Corporation, the mortgagor, paid \$940 to the mortgagee and received a release for lots 167 and 168 of the tract in question. Later this mortgagor paid another \$940 and was given another release for the same two lots. In 1929 the defendant Bahn purchased the south half of lot 179 of said tract. On January 8, 1931, the mortgagee gave to the mortgagor a written extension of the mortgage for three and one-half years. On May 19, 1932, the defendant Bahn paid the full purchase price and the Beeman Investment Corporation tendered to the mortgagee the sum of \$350 and requested a release for the south half of lot 179. This request was refused by the mortgagee for the reason that lot 179 was one of the larger lots which was to be released upon the payment of \$700. No default existed at that time, but in July, 1932, the mortgagor defaulted in the payment of interest and this foreclosure action followed.

Judgment was entered in favor of the defendant Bahn releasing the south half of lot 179 from the lien of the mortgage but otherwise in favor of the plaintiff. From that portion of the judgment in favor of the defendant Bahn, the plaintiff has appealed.

The gist of the appellant's contentions is that there was no privity between the respondent and himself; that he had extended the mortgage with a certain amount of land

as security for the remaining indebtedness, that after such extension the mortgagor could not claim any release of lots on account of the former double payment; and that the respondent, claiming under the mortgagor, is in no better position.

[1, 2] The respondent is not a complete "stranger" to him and his mortgage, as the appellant insists. Such a release clause runs with the land and inures to the benefit of such a purchaser. *Sacramento S. F. L. Co. v. Whaley*, 50 Cal. App. 125, 194 P. 1054. By the terms of this mortgage the appellant had required the mortgagor to subdivide the property and sell the same in lots. This was in part for the benefit of the appellant and it may not be said that he owed no duty whatever to a purchaser thus authorized and invited by him. The appellant admits that he knew that a mistake had been made and that a double release had been issued on the same lots within ten days after the same occurred. Knowing this fact, he retained the money paid and from that time on the mortgagor was entitled to additional releases corresponding to that amount. The renewal of the mortgage did not change any of its terms, but merely extended the time of payment. There is nothing in the record to indicate that this renewal was made upon any condition that any right then held by the mortgagor should be waived. Another part of the release clause provided that payments in amounts of not less than \$2,000 could be made at any time and that the mortgagor should be entitled to thereafter have any of the lots released corresponding to such payment. While the payment here in question was less than \$2,000, the appellant could waive that part of the provision. Under either of these theories the mortgagor had paid an amount more than sufficient to release one of the larger lots and had the right to demand such a release. The respondent was equitably entitled to the benefit of this right of the mortgagor. After the respondent paid the full purchase price for the half lot in question, the mortgagor tendered a further payment of \$350 and demanded a release for her benefit. While, strictly speaking, the last tender was not sufficient in itself, the appellant then held money for which he was obligated under the terms of the mortgage to release such a lot. Under these circumstances, we think the respondent was entitled to the protection of a court of equity, and that her equities were superior to any right of the appellant to stand on any strict and technical interpretation of

the contract between himself and the mortgagor.

The appellant chose this forum and in seeking equitable relief must be governed by its rules. One of the first rules of equity is that he who seeks equity must do equity. The respondent as one of the purchasers contemplated by the agreement, between the mortgagor and the appellant, had paid the full purchase price before any default existed under the terms of the mortgage. The mortgagor in turn had paid to the appellant an amount considerably in excess of that required to release the whole of lot 179, for which amount no lots had been released. The court had the power and it was its duty to prevent so unjust and inequitable a result as that now contended for by the appellant, and the relief demanded by the appellant was properly given upon the condition that the equitable rights of the respondent be protected.

The portion of the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



6 Cal.App.2d 379

SCHNEIDER v. BRECHT et al.

Civ. 5319.

District Court of Appeal, Third District,
California.

April 22, 1935.

Hearing Denied by Supreme Court
June 20, 1935.

1. Negligence ☞100

While ordinary negligence on part of plaintiff is not defense upon which defendant may rely when complaint is based upon charge of willful misconduct, where negligence of plaintiff is of such character that it contributes to and becomes part of, and inducing cause of, defendant's willful misconduct, no recovery can be had.

2. Automobiles ☞181(1)

In ascertaining whether liability attaches to driver of automobile for injuries to guest under guest statute, intent of Legislature must be inquired into (St. 1931, p. 1693, § 141¾).

3. Automobiles ☞181(1)

Under statute making motorist liable for injuries to guest proximately resulting from

intoxication or willful misconduct, "willful misconduct" is something different from conduct of motorist whose reckless driving is superinduced by intoxication, and when acts of motorist, which would be classed as willful misconduct if motorist were not under influence of intoxicating liquor, are induced by use of intoxicating liquor, injury is to be regarded solely as result of drunken driving (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

4. Automobiles ☞226(1)

Where willful, intentional, and reckless acts of motorist resulting in injury to guest proximately result from use of intoxicating liquor, and guest is participant in drunken orgy leading up to motorist's intoxicated condition, guest cannot recover for injuries, since motorist and guest are both equally culpable (St. 1931, p. 1693, § 141¾).

5. Automobiles ☞181(1)

Under statute making motorist liable for injury to guest proximately resulting from "intoxication," driver is in state of "intoxication," which term covers wide degree of both physical and mental incapacity, where his ordinary voluntary free will and capacity is lessened to an appreciable degree and ordinary clearness and control of his thinking processes are clouded so as to render him unable to appreciate, as a reasonable person, the caution that should be exercised (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Intoxicated; Intoxication," see Words & Phrases.]

6. Automobiles ☞226(1)

Automobile guest, who knowingly and intentionally participated in drunken orgy leading up to motorist's intoxicated condition, was guilty of "willful misconduct" which precluded guest's recovery for injuries received in collision proximately caused by motorist's reckless driving induced by intoxication (St. 1929, p. 537, § 112; St. 1931, p. 1693, § 141¾).

7. Automobiles ☞226(1)

Intoxication of guest in automobile does not affect guest's rights or relieve guest from any responsibilities as regards right of guest to recover from motorist for injuries sustained in collision (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Julie Schneider against Nettie Brecht and her husband. From the judgment, the plaintiff appeals.

Affirmed.

John M. Welsh and Butler, Van Dyke & Harris, all of Sacramento, for appellant.

Inman & West, of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action was injured while riding as a guest in an automobile driven by the defendant Nettie Brecht. The action was based upon a collision which took place between the automobile driven by the defendant Nettie Brecht, and one driven by F. N. McCuen. The complaint alleges willful misconduct on the part of Nettie Brecht. For convenience, we will refer to Nettie Brecht as the "defendant," and whenever that word is used in this opinion, it refers to Nettie Brecht alone.

The cause is before us upon the judgment roll, but the findings of fact show that the plaintiff and the defendant, prior to the collision mentioned in the complaint and referred to in the findings, had been engaged in a drinking carousal to a considerable extent; had been going from place to place participating in the obtaining drinks of different kinds of liquor, and of different quality also; that the drinking was all in the presence of both the plaintiff and the defendant, and appears to have been with the consent, and for the purpose of having somewhat of a "free and easy" afternoon on the part of both the plaintiff and the defendant.

At the conclusion of the testimony the court, after finding the defendant guilty of misconduct, found the following, to wit:

"V. The court further finds that the following facts are true and that the same appear from the evidence introduced on behalf of plaintiff, and as a part of her case, to-wit: That on the day of the accident, and during a period of some hours prior to the time of the accident, plaintiff and defendant had been drinking alcoholic liquors together; that during said period said defendant had driven her automobile to several places, including a 'boot-leg joint,' at all of which places intoxicating liquor was consumed by plaintiff and defendant, all the drinking of each of them having been done in the presence of the other. That the last stop which was made on said date prior to the accident was at a place referred to in the testimony as the firehouse; that while at said last mentioned place the said parties each had another drink of whiskey; that at said time and place the parties alighted from said automobile and entered said place, and re-

mained there for some time; that as stated, while at said last mentioned place each of said parties finished their drinking by each consuming a glass of whiskey; that defendant was then and there under the influence of intoxicating liquor to such an extent as to prevent her from exercising the care and caution in the operation of her said automobile which she, as a sober and ordinary prudent person would have exercised under the same or similar circumstances, and the alcoholic liquor which she had been drinking had then and there so far affected her nervous system, brain and muscles as to impair, to an appreciable degree, her ability to operate said vehicle in the manner that she, as an ordinary prudent and cautious person in the full possession of her faculties, would have operated and driven the same had she not been so under the influence of intoxicating liquors; that plaintiff was then and there fully aware of said intoxicated condition of defendant, and knew the extent of her said intoxication, as above set forth, and then and there knew that if she entered said automobile while the said defendant was in such intoxicated condition, with the defendant operating the same, she would be guilty of negligence and carelessness in so doing, and then knew that in such intoxicated condition defendant would not listen to, or heed any request plaintiff might thereafter make; that notwithstanding said knowledge on said plaintiff's part, she did so enter said automobile, and said defendant proceeded to drive and operate the same in said intoxicated condition; that shortly after reaching Franklin Boulevard, and while in said intoxicated condition, the said defendant engaged in a race with another certain automobile along Franklin Boulevard in a northerly direction from 23rd Avenue to Fifth Avenue and along Fifth Avenue to the intersection of 32nd Street, at all times operating her said automobile at an excessive rate of speed; that Franklin Boulevard at said time and place was heavily congested with vehicular traffic in each direction; that while so racing at such excessive rate of speed in said heavily congested vehicular traffic, defendant Nettie Brecht caused her said automobile to swerve from side to side across Franklin Boulevard in an effort to cut in and pass sundry and numerous automobiles; that plaintiff protested to defendant Nettie Brecht against the aforesaid actions of said defendant and asked that defendant Nettie Brecht stop said automobile; that defendant Nettie Brecht, on Fifth Avenue from Franklin Boulevard to 32nd Street, did drive her said automobile at an excessive rate of speed and

did drive it in such a manner as to cause it to swerve from one side of the street to the other, and at the intersection of 32nd Street, wilfully and unlawfully, and knowing that the result would probably be to collide with the automobile then being driven by F. N. McCuen, tried to cut in ahead of said F. N. McCuen, who was driving an automobile in a southerly direction on 32nd Street, thereby causing the automobile of said F. N. McCuen to then and there collide with defendant's said automobile.

"That at the time and place of the accident said defendant was then and there under the influence of intoxicating liquor to such an extent as to prevent her from exercising the care and caution in the operation of her said automobile which she, as a sober and ordinarily prudent person would have exercised under the same or similar circumstances, and the alcoholic liquor which she had been drinking had then and there so far affected her nervous system, brain and muscles as to impair, to an appreciable degree, her ability to operate said vehicle in the manner that she, as an ordinarily prudent and cautious person in the full possession of her faculties would have operated and driven the same had she not been so under the influence of intoxicating liquors;

"That the intoxication of the defendant was the proximate cause of the accident;

"The court further finds that the injuries of plaintiff resulting from said accident were proximately caused by her own carelessness and negligence in so entering the said automobile with knowledge then and there of the facts hereinbefore found."

This finding is to the effect that the intoxication of the defendant was the proximate cause of the collision. Judgment was entered that the plaintiff take nothing by reason of her action. From the judgment so entered this appeal is prosecuted, the appellant relying solely upon the allegation and finding of willful misconduct.

This presents for our consideration a portion of section 141 $\frac{3}{4}$ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580 and amended by St. 1931, p. 1693), which reads as follows: "Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle," etc.

The action before us is an outgrowth of the collision and attendant circumstances once considered by this court in the case of *Tracy v. Brecht* (Cal. App.) 39 P.(2d) 498, where the finding of the court as to intoxication is the same as the finding of the court in the instant case. In the *Tracy* Case, however, the allegation in the complaint of willful misconduct was withdrawn.

Again, upon the part of the appellant it is contended that the finding of willful misconduct governs, and that any negligence on the part of the plaintiff cannot be considered as a contributing cause to her injury.

[1, 2] While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a part of, and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had. In this, as in every case involving the responsibility of the driver of an automobile for an injury to a guest, the intent of the Legislature must be inquired into and determined in order to ascertain whether liability attaches to the driver.

[3, 4] A portion of the section, supra, which we have quoted makes a driver liable for an injury proximately resulting from intoxication or willful misconduct. While the words "intoxication" and "wilful misconduct" are used in the same sentence, and appear to be conjoined, we think that the intent of the Legislature was that the willful misconduct should be something different and apart from the acts and conduct of one whose reckless driving is superinduced by intoxication, that is to say, if the acts of the driver which would be classed as willful misconduct if not laboring under the influence of intoxicating liquor, when induced and brought about by the use of intoxicating liquor, then and in that case the action is to be regarded solely as the result of drunken driving or driving while one is under the influence of intoxicating liquor, and though the acts apparently are willful, intentional, and reckless, yet if, as found by the court, they proximately resulted from the use of intoxicating liquor, and the circumstances of the case show that the guest was a participant in the drunken orgy in all the acts and events which led up to the intoxicated condition, recovery cannot be had, for the simple reason that both par-

ties are equally culpable. If the acts and conduct of an intoxicated person can be separated from the condition of the person, and those acts set out and made the basis of an action sounding in willful misconduct, then and in that case the plaintiff is entirely relieved from any liability or responsibility on account of riding with a drunken driver, and the section of the Code, by such construction, would be rendered absolutely nugatory. It cannot be that the Legislature intended that the very acts upon which a court or jury might properly rely to establish the intoxicated condition of the driver, should relieve the plaintiff, knowing of that condition, from any charge of being equally guilty, and permit an action to be founded upon such acts, by naming the acts "wilful misconduct." The very acts referred to in the findings of the court in this case have been held to be evidentiary facts upon which a finding of intoxication of the driver might be based.

In *Hasten v. State*, 35 Ariz. 427, 280 P. 670, it is said: "It is a notorious fact that one of the first things a driver under the influence of liquor is apt to do is to drive at a high rate of speed, especially when an advanced state of intoxication has not yet been reached. Such being the case, the speed at which appellant was driving was one of the circumstances which the jury might properly consider in determining whether he was under the influence of liquor at the time." Citing a number of cases.

[5] In the instant case, just as in the *Hasten Case*, supra, we may add that the term "intoxication" covers a wide degree of both physical and mental incapacity, and if it shows the ordinary voluntary free will and capacity of the driver has been lessened to an appreciable degree, and that the ordinary clearness and control of his thinking processes have been clouded so as to render him unable to appreciate, as a reasonable person, the care and caution that should be exercised by a driver of an automobile upon the highway, the finding of intoxication is amply supported.

Here, just as this court said in the case of *Jones v. Pacific Gas & Electric Company*, 104 Cal. App. 47, 285 P. 709, the plaintiff, just as the plaintiff Jones, participated in the drunken orgy being engaged in by all of the parties. On page 57 of the case reported in 104 Cal. App., 285 P. 709, 713, supra, we find the following: "In *Schwartz v. Johnson*, 152 Tenn. 586, 280 S. W. 32, 33, 47 A. L. R. 323, the Supreme Court of Tennessee, in passing upon the right of one to recover who volun-

tarily rides with an intoxicated driver, used the following language: 'When one gets into an automobile which is to be operated by a drunken driver, through the traffic of a populous city, such person takes his life in his hands. All the authorities are to the effect that such contributory negligence prevents a recovery by one taking such a chance, if he is injured as a result of the driver's negligence.' Citing *Lynn v. Goodwin*, 170 Cal. 112, 148 P. 927, L. R. A. 1915E, 588; *Jensen v. Chicago, etc., Ry. Co.*, 133 Wash. 208, 233 P. 635; *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918C, 646; *Kirmse v. Chicago, etc., Co.*, 73 Ind. App. 537, 127 N. E. 837; *Cunningham v. Erie Ry. Co.*, 137 App. Div. 506, 121 N. Y. S. 706. In *Lynn v. Goodwin*, 170 Cal. 112, 148 P. 927, L. R. A. 1915E, 588, cited in the *Schwartz Case*, the following language is used: 'While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery' (citing cases) 'yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence * * * from the driver's negligence, barring the right of recovery.'"

In *Tracy v. Brecht*, supra, it is held that all the acts and circumstances in which the parties participated relative to drinking might be considered in determining the question of intoxication.

[6] In the instant case the court has found, just as appeared in the *Jones Case*, supra, that the plaintiff had every reason to know the condition of the defendant as the driver of the automobile, and also is chargeable with the knowledge of the fact that in entering the automobile and going with the defendant from place to place and participating in drinks, the plaintiff was doing and assisting the defendant in becoming liable to prosecution under section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537). Again, we repeat, under such circumstances to uphold appellant's contention would be a complete nullification of the act of the legislature as embodied in section 141½, supra, relative to riding with an intoxicated driver.

If we accept the ordinary definition of the word "wilful" as found in 68 C. J. p. 267, the plaintiff herself was guilty of willful misconduct, for the reason that all of her acts which led up to the intoxicated condition of the defendant were taken knowingly and inten-

tionally, and in face of the penal statute making her companion liable to criminal prosecution for driving an automobile while under the influence of intoxicating liquor.

The principle of law enunciated in the case of *Hinkle v. Minneapolis A. & C. Range Ry. Co.*, 162 Minn. 112, 202 N. W. 340, 341, 41 A. L. R. 1377, we think is applicable here, even though it be held that the defendant was guilty of willful misconduct. We quote from the opinion in that case as follows: "When a defendant is charged with ordinary negligence, contributory negligence is a good defense. Why? The answer is founded in proximate cause. In the absence of the doctrine of comparative negligence they are equally to blame. When two persons are equally at fault in producing the injury, the law leaves them where it finds them. Contributory negligence is not a defense to wanton and willful negligence, for the very simple reason that the parties are not equally delinquent in the violation of duty. In such case the negligence of the defendant is the proximate cause of plaintiff's injury while his negligence is no more than a remote cause. The theory of these variations of negligence leads to but one logical conclusion, and that is that the same basic reason which causes contributory negligence to prevent a recovery in an action sounding in ordinary negligence also prevents a recovery by one who is guilty of willful and wanton negligence. Such negligence is just as efficient to offset the defendant's negligence of the same character as contributory negligence offsets ordinary negligence. There can be no more comparative wantonness than there can be comparative negligence. When both parties are guilty of such negligence neither can be selected as that which is the proximate cause, and hence the law must leave both where it finds them. The conclusion is inevitable, even though its application be fraught with difficulties." Citing cases.

See 42 C. J. p. 893, where it is said: "Willfulness, which proximately contributes to causing a collision between motor vehicles, precludes a recovery for injuries received in such collision, even though the operator of the other motor vehicle was also guilty of willfulness."

The efficient cause in the instant case was intoxication, intoxication superinduced by the active participation of the plaintiff, and we find no line of demarkation separating the result from the cause, upon which the plain-

tiff can rely, and at the same time hold the defendant liable in damages.

The case cited by the appellant to the effect that ordinary negligence constitutes no defense to a charge of willfulness or wantonness, we think inapplicable where the facts show that the plaintiff was guilty of every act complained of, as against the defendant, and participated in bringing about the mental condition of the defendant which culminated in the collision.

While the instant case, in large measure, is one of first impression, and the question before us has not been definitely decided by courts of other jurisdictions (at least none have been called to our attention, and we have not discovered any), yet we think the language found in the case of *Spillers v. Griffin*, 109 S. C. 78, 95 S. E. 133, 134, L. R. A. 1918D, 1193, supports the conclusion at which we have arrived, to wit: "The presiding judge charged the law as to contributory negligence but refused to charge that contributory willfulness was a defense to willfulness. From this ruling, among others, the defendant appealed from the judgment against him. The respondent claims that there is no case in this state which allows such a defense, and only one case elsewhere, and that case sustains the ruling of the trial judge. The respondent claims that this court would have to make the law if it allowed such a defense to prevail. Of course the courts have no right to make the law. If there is no law to allow the defense of contributory willfulness, so there is no law that allows a plaintiff to recover when he has himself contributed willfully as a proximate cause to the injury. The plaintiff must show his right to recover in law and in fact. The courts, however, are not bound to find legislative authority or the authority of the other cases stating the same facts before they can declare the law in a new aggregation of facts. Law is a science, and it is the duty of the courts to apply well-recognized principles of law to new conditions."

[7] That the plaintiff may have been, to a greater or less degree, intoxicated, does not affect either her rights or relieve her from any responsibilities. *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918C, 646.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

6 Cal.App.2d 493

AUSTIN v. HARRY E. JONES, Inc., et al.
Civ. 9538.District Court of Appeal, Second District,
Division 2, California.
April 26, 1935.

Rehearing Denied May 22, 1935.

1. Account ⇐17(1)

In action for accounting by landowner on contract for building houses, whereby plaintiff was to reimburse defendant for bills for labor and materials, complaint *held* not to state cause of action.

2. Pleading ⇐360(1)

In action for accounting by landowner on contract for building houses, where motion to dismiss complaint, on ground it failed to state cause of action, although inartificial in phrasing, clearly disclosed contention that complaint was fatally defective and such contention was well founded, trial court erred in overruling motion and proceeding to trial on merits.

3. Judgment ⇐25(11)

In action for accounting by landowner on contract for building houses, judgment including amount based on claim not referred to in complaint could not be sustained.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Mary C. Austin against Harry E. Jones, Inc., C. E. Boag, Loren B. Curtis, and others. Judgment for plaintiff, and last two named defendants appeal.

Reversed.

J. R. Moulthrop, of San Francisco (William Kay Crawford, of Los Angeles, of counsel), for appellants.

Edward C. Purpus, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] Action for accounting. The complaint alleges that on or about February 1, 1928, plaintiff and M. P. Austin made an oral agreement with defendants and each of them for the construction and erection "upon a cost-plus basis" of a bungalow on each of two described lots owned by plaintiff. The consideration pleaded is "the payment of the bills, obligations by plaintiff herein," and it is also alleged that defendants agreed to incur and pay all bills for labor and materials, and that plaintiff would reimburse defendants for the

actual cost of all labor and materials. The complaint then alleges that defendants falsely and fraudulently misrepresented to plaintiff "the costs, financing and of labor and materials" used and expended in the erection of said buildings, and "have charged" plaintiff with approximately \$2,000 in excess of the actual costs of labor and material used; that demand was made upon defendants for a true and correct accounting of "the costs, financing and of labor and materials" used, and for the production of vouchers showing the actual cost and disbursements by defendants; and that defendants failed to comply with this demand. The final allegation is that "by reason of the actions of the defendants herein, said defendants have wrongfully, unlawfully and wilfully converted to their own use the sum of approximately \$2000.00." This last allegation obviously has no connection with the cause of action sought to be pleaded, as it nowhere appears in the complaint that defendants ever came into possession of \$2,000 or any other sum of money belonging to plaintiff which they could have converted. The allegation as to the demand for an accounting fails to state by whom such demand was made.

Furthermore, we find that the contract was made with the defendants by "plaintiff herein and M. P. Austin," and the complaint is wholly barren of any allegation which would entitle the plaintiff alone, as an assignee or otherwise, to maintain the action against the defendants. We should also mention, without need for further comment, the omission from the complaint of any allegation that any building has been erected or that plaintiff performed any of her portion of the contract; that any money was paid to defendants; that the "financing" of the work was part of the subject-matter of the contract or that defendants ever came into the possession of any money or property for which to account; and that there is no allegation as to the meaning or effect of the allegation as to a "cost-plus basis."

[2] At the time of trial and before the taking of any testimony, defendants moved to dismiss the complaint on the ground that it failed to state a cause of action for accounting. While this objection was somewhat inartificial in its phrasing, it clearly disclosed the contention that the complaint was fatally defective; and in view of the fact that this contention is well founded, the court erred in overruling the motion and proceeding to a trial on the merits.

[3] The trial court gave judgment in the amount of \$1,962.32 with interest. The fact that \$1,326.66 of this amount is based upon a claim for work, labor, and services performed by M. P. Austin upon four buildings located on Camellia avenue and belonging to defendant C. E. Boag, which buildings and claim are not referred to in the complaint, is a further reason why the judgment cannot be sustained.

The judgment is reversed.

We concur: CRAWL, J.; STEPHENS, P. J.



6 Cal.App.2d 500

CARDOZA v. WEST AMERICAN COMMERCIAL INS. CO.

Civ. 5280.

District Court of Appeal, Third District,
California.

April 26, 1935.

Hearing Denied by Supreme Court
June 25, 1935.

1. Appeal and error ☞931(1)

On appeal, rules applying to determination of sufficiency of evidence to support findings and judgment are favorable to prevailing party, and every reasonable inference that may be drawn from record as a whole must be resolved in support of judgment.

2. Appeal and error ☞1011(1)

When testimony is conflicting, weight of evidence and credibility of witnesses are questions for trial court, and court's conclusions regarding such matters may not be disturbed, in absence of a clear abuse of its discretion.

3. Insurance ☞646(3½)

Insurer had burden to prove allegation that automobile casualty policy was avoided on ground that automobile was being used at time of accident to convey passenger for hire.

4. Insurance ☞665(3)

Conflicting evidence held to support finding that automobile was not being used at time of accident to convey passenger for hire within provision of automobile casualty policy exempting insurer from liability.

5. Appeal and error ☞994(3)

Witness' credibility and question regarding her impeachment were questions for trial court's determination.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Joe V. Cardoza against the West American Commercial Insurance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Len H. Honey, of Stockton, for appellant.

Hawkins & Hawkins, of Modesto, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against it in a suit on an automobile casualty policy. It is contended the evidence fails to support the finding of the court and judgment.

The defendant was the insurer of an automobile owned by the plaintiff. The policy contains a clause exempting the insurance company from liability for damages resulting from an accident while the plaintiff's automobile was being used to convey passengers for hire. June 20, 1931, while the plaintiff's machine was being operated with his consent by his daughter, Belle Cardoza, a collision occurred with another automobile owned by J. W. Wheatley. Florence De Martini, who was then riding in the plaintiff's car, was injured as a result of the accident. In a suit for damages against the plaintiff and his daughter for personal injuries received as a result thereof, Miss De Martini recovered judgment against the plaintiff for the sum of \$5,698.17, and costs of suit. This action was then commenced for reimbursement against the insurance carrier. The cause was tried by the court sitting without a jury. Among the findings which were adopted by the court favorable to the plaintiff, was one which determines that the insurance policy contains a clause exempting the defendant from liability for an accident which occurs while the plaintiff's machine is being used to convey passengers for hire, but it was held that the car "was not at any time driven or operated * * * while carrying a passenger or passengers for consideration." Judgment was accordingly rendered against the defendant. From that judgment this appeal was perfected.

[1-4] The only question raised on appeal is whether there is substantial evidence to support the finding that the automobile was not being used at the time of the accident to convey a passenger for consideration. After

carefully reading the entire record we are satisfied the evidence adequately supports the finding in question and that the judgment should therefore be affirmed. On appeal the rules applying to the determination of the sufficiency of the evidence to support the findings and judgment are all favorable to the prevailing party. Every reasonable inference that may be drawn from the record as a whole must be resolved in support of the judgment. When the testimony is conflicting, as it is in the present case, the weight of the evidence and the credibility of witnesses are questions for the determination of the trial court and its conclusions regarding those matters may not be disturbed on appeal in the absence of a clear abuse of its discretion. 2 Cal. Jur. 879, § 515. In this case there is a hopeless conflict of evidence between the testimony of different witnesses, and sometimes a conflict of evidence appears to exist between different statements of the same witness. All these inconsistencies must be resolved in favor of the respondent. In determining whether the record adequately supports the finding that the plaintiff's car was not being used at the time of the accident to convey a passenger for hire, we observe that some of the witnesses were apparently intellectually sluggish. The burden was on the defendant to prove its allegation that the policy was rendered void for the reason that the car was being used at the time of the accident to convey a passenger for hire. It was not a question as to whether some compensation had been paid to the daughter of the plaintiff in previous years for conveying a passenger, although that fact might throw some light on the vital question as to whether it was being used for that purpose at the time of the accident. That circumstance was trivial. Such evidence regarding former transactions in a previous year is of small value. It is not charged that the plaintiff received pay for the use of his machine to convey passengers. The ladies who were involved in this accident had been employed in the cannery only nine days prior to the accident. They were friends. They ate their lunches together. It does not appear to have been the regular procedure for Belle Cardoza to always carry Florence De Martini to and from the cannery. In response to the question, "How many times did you take Miss De Martini to and from work in 1930," Belle Cardoza said, "I just brought her from work a couple of times at night." She testified positively that she had not received any money from Miss De Martini for conveying her to or from the cannery during the season of 1931, when the accident occurred, or for conveying any other passenger,

either during that season or at any other time, and that she never had any intention of charging her for that service. She does say that after the accident occurred, the brother of Miss De Martini one day brought \$1.50 to the Cardoza home, saying it was "some money that the lawyer sent me over to bring you." She told him that "nobody owes me any money." He left the money on the table, but she promptly returned it. In support of the judgment, the trial court may have reasonably assumed that some one was trying to pay her some money so as to set up the defense to the policy that it was rendered void by accepting pay for conveying a passenger. It appears without conflict that no money was actually paid for conveyance in the machine in the year 1931. But it is contended that the evidence shows that Miss Cardoza took her friend to and from the cannery with the understanding that she was to be paid. In fact Miss De Martini testified that on the day of the accident she said to Belle Cardoza, "Tomorrow is pay day and I will pay you," and that she replied, "That is all right." The subject of paying for the ride was not mentioned between them before that occasion. Miss Cardoza denies that this was said. The record fails to disclose the inflection with which the reply was made. Miss De Martini testified that she understood it to mean that she was not expected to pay for her conveyance; that when she offered to do so, Miss Cardoza, in effect, said, "That (riding with me) is all right, I don't expect you to pay for it." On cross-examination regarding that subject, Miss De Martini said:

"Q. * * * When you said to her 'Today is pay day and I will pay you', and she said, 'That is all right', what were you going to pay her for? A. Well I guess I wasn't going to pay her. * * * I wasn't going to pay her if she said it was all right. * * * If she didn't want anything I couldn't very well pay her. * * *

"Q. You understood from that that she wasn't going to make any charge for transporting you, is not that it? A. Yes."

While Miss De Martini did testify that she had paid for her transportation the year previous to the accident, she also testified in that regard:

"Q. Can you recall any time in 1930 that Belle Cardoza took you to the cannery? * * * A. I know I came home with her but I don't remember going (to the cannery with her).

"Q. Now, do you recall of ever paying her any moneys in 1930? * * * A. No, I can't recall."

[5] There was an effort to impeach Miss De Martini by showing that she had previously said she had paid Miss Cardoza for conveying her to the cannery in 1930, and that she had signed her complaint which was filed for damages for her personal injuries received in the accident, containing the statement that she had paid for her conveyance. But we are mindful of the fact that many persons who are not familiar with legal proceedings carelessly sign documents without knowing what statements they contain. At least the credibility of the witness, and the question regarding her impeachment, were questions almost exclusively for the determination of the trial court. Even though this court might have reached another conclusion regarding the expectation of Belle Cardoza to receive pay for transporting her friend to or from the cannery at the time of the accident, we are unable to say that the trial judge was not reasonably warranted in deciding that no such agreement existed.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



6 Cal.App.2d 94

**WHEPLEY OIL CO. v. ASSOCIATED
OIL CO.
Civ. 1332.**

District Court of Appeal, Fourth District,
California.

April 11, 1935.

1. Mines and minerals ⇨79(3)

Where oil lease provided that, if casing-head gasoline should be manufactured by lessee, lessor should be paid one-eighth of proceeds, less manufacturing and marketing costs, that 65 per cent. of proceeds should be regarded as covering such costs, and that lessee might contract for manufacture of casing-head gasoline by others for 65 per cent. of proceeds, and lessee contracted for manufacture of casing-head gasoline by others for 50 per cent. of proceeds, lessor was entitled to one-eighth of 50 per cent. of proceeds instead of 35 per cent. of proceeds received by lessee.

2. Appeal and error ⇨1008(3)

Where contract was treated by both parties thereto as ambiguous, trial court's con-

struction, which is consistent with terms of contract and the evidence, would not be disturbed on appeal.

3. Trial ⇨404(2)

Where action was tried on theory that contract was ambiguous and parol evidence was introduced to support opposed constructions, trial court's finding that allegations of certain paragraph of complaint, which set forth plaintiff's construction of contract, and other findings construing contract were true, *held* not insufficient as conclusions of law, since findings were findings of fact.

4. Appeal and error ⇨1071(1)

Findings of fact admitted by answer *held* harmless on defendant's appeal.

5. Mines and minerals ⇨78(7)

In action involving construction of ambiguous oil lease, allegation in answer that during life of lease cost of manufacturing and selling "the casinghead gasoline" had fluctuated *held* to refer to cost of manufacturing and selling casing-head gasoline covered by the lease and not to such cost generally.

6. Evidence ⇨129(6)

In action involving construction of ambiguous oil lease, offer to prove leases thereafter made by lessee with others *held* properly rejected, since such leases could not throw light upon meaning of lease in controversy.

7. Trial ⇨395(3)

Trial court's finding negating positive allegations of defendant's answer *held* not insufficient because not more specific than allegations negated, particularly where defendant offered no proof in support thereof.

8. Appeal and error ⇨1011(1)

Trial court's finding of fact on conflicting evidence is binding on appeal.

9. Appeal and error ⇨1071(5)

Where controversy concerned ambiguous oil lease, finding that certain provision was not inserted therein to avoid dispute as alleged by defendant *held* harmless because immaterial.

10. Accord and satisfaction ⇨7(3)

Compromise and settlement ⇨8(4)

Acceptance of royalty payments in ignorance that lessee was paying manufacturer of casing-head gasoline only 50 per cent. of proceeds, instead of 65 per cent. as agreed, *held* not to constitute "accord and satisfaction" (Civ. Code, § 1521).

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

11. Accord and satisfaction ⇨10(1)

Compromise and settlement ⇨6(2)

An "accord" is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled, and doctrine, an essential element of which is the intention of the parties, is applicable only where there is a dispute as to the amount due (Civ. Code, § 1521).

[Ed. Note.—For other definitions of "Accord," see Words & Phrases.]

12. Accord and satisfaction ⇨1

Compromise and settlement ⇨5(2)

Primary principles of the law of contract, one of which is that there must be a meeting of the minds of the parties, determine whether there has been an accord and satisfaction (Civ. Code, § 1521).

13. Accord and satisfaction ⇨12(2)

Compromise and settlement ⇨13

Acceptance of royalties after giving of notice of claim that they should be based on higher percentage, and agreement by the parties to arbitrate the controversy as provided in oil lease, impossibility of which resulted in agreement that either might sue, *held* not to constitute an "accord and satisfaction" (Civ. Code, § 1521).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by the Whepley Oil Company against the Associated Oil Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Humphrey, Searls, Doyle & MacMillan, Robert M. Searls, John Parks Davis, and W. F. Kiessig, all of San Francisco, for appellant.

W. H. Stammer, of Fresno, and Orrick, Palmer & Dahlquist, of San Francisco, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action for the purpose of recovering from defendant a specified sum of money which was claimed to be due as royalty on casing-head gasoline produced from natural gas derived from an oil well located on plaintiff's land which had been leased by plaintiff to defendant. Certain provisions of the agreement of lease formed the basis for plaintiff's claim that the defendant was legally obligated to pay the amount for whose recovery the suit was brought. Upon the conclusion of a trial of the issues raised by plaintiff's complaint and defendant's answer thereto, the trial court

made findings of fact from which it drew the legal conclusion that plaintiff was entitled to succeed and accordingly entered judgment for the amount demanded. From the judgment thus rendered the defendant prosecutes this appeal.

The lease contract between the parties was executed on November 10, 1924. By it the plaintiff, as lessor, agreed to lease to the defendant, as lessee, a tract of land located in the Kettleman Hills district in Kings county comprising 160 acres for a term of 20 years. The purpose of the contract was to enable the lessee to explore and drill for oil and other hydrocarbon substances on the land, and, if possible, to produce and extract such oil and substances. Oil was not discovered on the land until August 16, 1930, when a producing well was brought in. About this date the defendant entered into an agreement with the Los Nietos Producing & Refining Company, Limited, whereby the latter company agreed to process and treat the wet gas produced by defendant on plaintiff's land and to pay to defendant as royalty therefor 50 per cent. of the proceeds derived from the sale of the gasoline extracted from such gas. This latter agreement was in effect at the time the present action was instituted, and during the period mentioned in plaintiff's complaint the defendant received from the Los Nietos Company 50 per cent. of the proceeds derived from the sale of gasoline which was thus extracted from the gas. From the 50 per cent. royalty which was thus obtained, the defendant regularly paid to plaintiff a royalty of one-eighth of 35 per cent. of the proceeds derived from the sale of the gasoline, thus retaining for itself free from any royalty to plaintiff 15 per cent. of such proceeds. It was plaintiff's contention that it was entitled to receive a royalty of one-eighth of the entire 50 per cent. paid to defendant by the Los Nietos Company.

The provision of the lease contract entered into between plaintiff and defendant which formed the basis for plaintiff's claim is as follows: "If casinghead gasoline is manufactured on the demised premises, or elsewhere, by the Lessee, from gas produced from said wells, then the Lessee shall pay to the Lessors one-eighth (1/8th) of the proceeds from the sale of said gasoline less the entire cost of gathering, manufacturing, handling and selling the same. It is agreed between the parties hereto that sixty-five per cent (65%) of the gasoline extracted from gas produced on the demised premises shall be considered

as covering the entire cost of gathering, manufacturing, handling and selling said gasoline and the remaining thirty-five per cent (35%) shall be divided between the parties hereto on the basis of one-eighth (1/8th) to the Lessors and seven-eighths (7/8ths) to the Lessee. The Lessee shall have the right to contract for the manufacture of casinghead gasoline from gas produced on the demised premises on the same basis hereinabove mentioned, that is, sixty-five per cent (65%) to the party manufacturing said gasoline and thirty-five per cent (35%) to be divided between the parties hereto on the basis of one-eighth (1/8th) to the Lessors and seven-eighths (7/8ths) to the Lessee."

The trial court interpreted the above quoted language in accordance with the construction placed upon it by plaintiff, and decided that plaintiff was entitled to receive a royalty of one-eighth of the entire proceeds obtained by the defendant from the sale of casing-head gasoline.

It is appellant's first contention on this appeal that the language of the lease which provided for the payment of a royalty on casing-head gasoline is plain and unambiguous, that it clearly provides that an arbitrary figure of 65 per cent. should be considered as covering the cost of manufacturing casing-head gasoline, and that respondent should be paid a royalty on such gasoline amounting to one-eighth of the remaining 35 per cent. after the arbitrary proportion of 65 per cent. is deducted from the total amount of such gasoline produced. In connection with this contention, it may be remarked that respondent likewise contends that the language is clear and unambiguous, but arrives at the exactly opposite conclusion that it was entitled to receive one-eighth of the entire 50 per cent. which was shown to have been obtained by appellant under its contract with the Los Nietos Company.

[1, 2] It is our conclusion that the interpretation which the trial court gave to the above-quoted language is not so clearly untenable and so obviously inconsistent with the intent of the parties as manifested by the language of their agreement that we are warranted in disturbing it, even though it be assumed that the language is capable of the interpretation for which appellant contends. The provision contains three sentences. The first plainly states that, if the lessee, appellant, itself manufactures casing-head gasoline either on or off the demised premises from gas produced from wells drilled on respondent's land, the lessee shall pay to the lessors one-eighth

of the proceeds derived from the sale of such gasoline, less the entire cost of gathering, manufacturing, handling and selling the same. In other words, if appellant itself manufactured the gasoline, it was obligated to pay to respondent one-eighth of the net proceeds derived from the sale of the gasoline, and the net proceeds would be the amount which remained after the entire cost of manufacture, handling, and sale was deducted from the gross amount obtained. There is no dispute, and obviously there could be no dispute, as to the meaning of this sentence. The language employed is too explicit to admit of dispute. The second sentence provides that the parties agree that 65 per cent. of the gasoline extracted shall be considered as covering the entire cost of gathering, manufacturing, handling, and selling said gasoline, and the remaining 35 per cent. shall be divided between the parties on the basis of one-eighth to the lessors and seven-eighths to the lessee. This language is likewise explicit, and there can be no doubt as to its meaning. Taking the two sentences together, it is manifest that the parties to the contract intended that, if the lessee should itself manufacture the gasoline, it would pay to the lessors a royalty of one-eighth of the net proceeds remaining after the entire cost of manufacturing, which was arbitrarily fixed at 65 per cent. of the gross proceeds, was deducted therefrom. The third sentence provides that the lessee "shall have the right to contract for the manufacture of casinghead gasoline * * * on the same basis hereinabove mentioned, that is sixty-five per cent (65%) to the party manufacturing said gasoline and thirty-five per cent (35%) to be divided between the parties hereto on the basis of one-eighth (1/8th) to the lessors and seven-eighths (7/8ths) to the lessee." The language employed in this sentence is likewise plain and definite. By it the possibility that appellant might contract with a third party for the manufacture of casing-head gasoline rather than itself engaging in such manufacture was taken into account, and it was specifically provided that it should be privileged to do this on a certain definite basis, which was exactly the same basis so far as arbitrary allowance for the cost of manufacture is concerned as had been provided in the event appellant itself should perform the work of manufacturing the gasoline. It must be observed that by this language appellant was not given the right to contract for the manufacture of gasoline on any basis other than that which is so definitely described. However, neither of the parties contends that appellant could not properly contract for the

manufacture of gasoline on a different basis than that which is so specifically stated. The question which is here presented is whether appellant might contract with a third party on a more favorable basis than the 65 per cent.-35 per cent. division and yet pay to respondent a royalty based on the allowance of an arbitrary figure of 65 per cent. for cost of manufacture. We are not prepared to declare that the construction for which appellant contends is an unreasonable construction. Equally unprepared are we to declare that the interpretation drawn by the trial court is unreasonable or untenable or so clearly inconsistent with the intent of the parties as disclosed by their language that we must substitute therefor the interpretation for which appellant contends. In such a situation, it is settled that a reviewing court is not justified in disturbing the construction adopted by the trial court. *Adams v. Petroleum Midway Co., Ltd.*, 205 Cal. 221, 270 P. 668; *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 582, 300 P. 34; *Manley v. Pac. Mill & Timber Co.*, 79 Cal. App. 641, 648, 250 P. 710.

The record herein, however, shows that the action was tried on the theory that the above-quoted provision of the lease contract was not clear and unambiguous, and that the trial court received evidence, without objection, of the negotiations which took place between the parties prior to the execution of the agreement for the purpose of discovering what the intention of the parties was with respect to the happening of the contingency which was shown to have taken place.

Appellant maintains that the evidence thus received for the purpose of arriving at a correct interpretation of the contract entirely fails to support the trial court's construction. Examination of the record compels the conclusion that this contention is untenable. The respondent produced a witness who was the attorney and counselor of the trustees for the stockholders of respondent at the time the lease was executed. This witness, who took a prominent part in the negotiations which preceded the making of the lease, testified positively that the representative of appellant with whom he discussed the provisions of the lease prior to its execution stated that the arbitrary allowance of 65 per cent. for cost of manufacture was merely a guaranty that appellant would not take more than 65 per cent., and that, if the cost of manufacture should not amount to the arbitrary allowance provided therefor, respondent would receive one-eighth of the net proceeds remaining after deducting the actual cost of manufacture.

The evidence produced by appellant on the contrary showed that the allowance of 65 per cent. for cost of manufacture was set as an arbitrary figure which should govern whether appellant itself manufactured the gasoline or contracted with a third party for its manufacture. It is idle to contend that the evidence which was presented to the trial court with respect to the circumstances preceding the execution of the contract was not conflicting. It is apparent that the evidence was in direct conflict. Hence the familiar rule which estops a reviewing court from disturbing an interpretation of language of doubtful meaning which is drawn from conflicting evidence must prevail. *Laidlaw v. Marye*, 133 Cal. 170, 179, 65 P. 391; *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 161 P. 25; *Hasendahl v. J. D. Halstead Lumber Co.*, 132 Cal. App. 205, 22 P.(2d) 577; *Brant v. California Dairies (Cal. App.)* 38 P.(2d) 846. In this connection, it should be noted that it is conceded that the lease contract was prepared by the supervisor of lands and leases of the appellant corporation. In performing the task of interpreting the language of the lease, the trial court undoubtedly applied the familiar rule of interpretation which provides that, in cases of uncertainty, the language of a contract shall be interpreted most strongly against the party who caused the uncertainty to exist. Under the circumstances, the court was amply justified in applying the above-mentioned principle which is unequivocally declared both by statute (section 1654, Civ. Code), and by numerous decisions. *Laidlaw v. Marye*, *supra*; *Robert Marsh & Co. v. Tremper*, 210 Cal. 572, 574, 292 P. 950; *Cockrill v. Boas*, 213 Cal. 490, 493, 2 P.(2d) 774.

[3, 4] Appellant particularly complains of a number of findings of fact which were made by the trial court. With respect to all of the criticized findings, with the exception of one, the cause of complaint is that they are mere conclusions of law, and therefore insufficient as findings of fact in accordance with the familiar principle announced in 24 California Jurisprudence, p. 969, in the following language: "It follows that statements of conclusions of law * * * are insufficient as findings."

The first finding which is the object of appellant's above-stated attack is one whereby the trial court simply found that all the allegations of the first seven paragraphs of respondent's complaint are true. Reference to paragraph VII of the complaint shows that therein respondent set forth its interpretation of the language of the lease which provided

for the payment of a royalty on casing-head gasoline and that the paragraph concludes with the allegation "that plaintiff is, and has been at all times herein mentioned, entitled to receive from defendant under said lease one-eighth of said entire proceeds so received by defendant from the sale of said one-half of said casinghead gasoline."

Examination of the complaint discloses that the lease contract upon which the cause of action was based was pleaded, first, by attaching to the complaint, and by proper reference thereto, a copy of such contract, and, second, by setting forth its substance and the legal effect thereof as contended by respondent. No valid criticism to this method of pleading the instrument is apparent. *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 198, 86 P. 193. Examination of the answer shows that appellant met the allegations of the aforementioned paragraph of the complaint by setting forth its interpretation of the disputed language of the lease and its conclusion of the legal effect thereof. It is obvious that the important feature of the whole case was the interpretation of the language of the contract. Respondent claimed that it should be interpreted in a certain manner. Appellant contended that an entirely different construction should be placed upon it. Both parties produced evidence during the trial to which no objection was interposed which purported to show the circumstances that surrounded the execution of the lease under the theory that these circumstances would throw light on the language of the instrument and thus enable the trial court to interpret this language in accordance with the intention of the parties at the time they made the contract. Since the action was tried on the theory that the meaning and construction of the language of the contract were doubtful and that extrinsic evidence was required to enable the trial court properly to interpret the language, and since it also appears that the extrinsic evidence which was produced was conflicting, the determination of the conflict resulted in a finding of pure fact. *Brett v. Vanomar Producers*, 45 Cal. App. 286, 290, 187 P. 758. Appellant's contention that the finding amounts to no more than a conclusion of law is therefore untenable and may not be sustained. The same reasoning is applicable to the remaining findings of fact which are criticized by appellant on the ground that they are merely conclusions of law, and therefore insufficient as findings of fact. Each of such findings is based upon the trial court's interpretation of the disputed language of the lease which was reached by a determination of conflicting ex-

trinsic evidence produced by the parties for the purpose of enabling the court to perform the necessary task of interpretation. It is observed by appellant that portions of these findings are unnecessary, since the facts which are there found are admitted by the answer. It is obvious that such portions are harmless. Appellant has no reason to complain because the court has found the existence of certain facts which it admits are true.

[5] As to the trial court's fourth finding of fact, a different attack is presented. This particular finding states that it is not true that, during the life of the contract between the parties, the cost of gathering, manufacturing, handling, and selling the casing-head gasoline from the leased premises has fluctuated or that in other contracts the cost of manufacturing the casing-head gasoline has been a matter of dispute between the oil-producing companies and their lessors, or that the clause of the lease contract between the parties which contains the disputed language was inserted in said contract for the purpose of avoiding any dispute between the parties as to the cost of gathering, manufacturing, handling, or selling said casing-head gasoline.

It is conceded that the first part of this finding which finds that it is untrue that the cost of manufacturing the casing-head gasoline from the leased premises has fluctuated during the life of the lease was inserted to meet an allegation of the answer that there was such fluctuation. It is, however, observed that the court specifically limited its finding with respect to fluctuation of cost to the casing-head gasoline produced on the leased premises, whereas it is urged that the allegation of the answer is that the cost of manufacturing casing-head gasoline generally has fluctuated and that appellant attempted to prove general fluctuation during the trial, but was not permitted to do so.

The language of the answer is as follows: "This defendant further alleges that during the life of said lease contract between the plaintiff and defendant the cost of gathering, manufacturing, handling and selling the casinghead gasoline has fluctuated." (*Italics ours.*) The remainder of the paragraph in which the above allegation is contained is in the following language: "And in other contracts has frequently been a matter of dispute between the oil producing companies and their lessors; that said clause above referred to and quoted from said lease was inserted therein for the express purpose of avoiding any dispute between the plaintiff and defendant as to the cost of gathering, manufactur

ing, handling and selling said casinghead gasoline, and is binding and conclusive on both parties, irrespective of whether the cost to defendant of such gathering, manufacturing, handling and selling said casinghead gasoline is sixty-five per cent of the proceeds derived therefrom or any greater or lesser sum."

It is evident that the trial court entertained the opinion that fluctuation of the cost of manufacturing casing-head gasoline generally was immaterial to the issues of the action then pending before it. In arriving at this conclusion, we cannot declare that the trial court committed error. The court was faced with the task of interpreting certain language of the contract which related to the cost of manufacturing casing-head gasoline extracted from gas which was produced on the leased premises. Appellant was insisting that the language meant that an arbitrary allowance of 65 per cent. of the total amount of such gasoline was fixed by the parties as the cost of manufacture whether appellant itself engaged in the business of manufacturing such gasoline or contracted with a third party for its manufacture. To sustain this contention, it produced evidence which tended to show that during the oral negotiations between the parties which preceded the execution of the contract this particular matter was discussed and the parties agreed on the arbitrary percentage allowance. Certainly evidence which tended to show that, after the lease contract between appellant and respondent was executed and during its existence, there was a general fluctuation in the cost of manufacturing such gasoline, could throw no light on the essential element of the intention of the parties at the time the lease was executed. If the evidence had been admitted and it had been made to appear therefrom that there was such general fluctuation of cost, the court would have derived no assistance therefrom in its performance of the task of interpretation.

Furthermore, we think the court was justified in taking the view that the language of the answer respecting the fluctuation of cost related to the manufacture of casing-head gasoline produced on the leased premises and in so finding. The grammatical construction of the sentence is indicative of such an intent. The employment of the article "the" modifying the phrase "casinghead gasoline" is significant. In the paragraph immediately preceding that in which the allegation relating to fluctuation of cost is found, casing-head gasoline is twice mentioned in each instance accompanied by the modifying adjective "said."

It may not be denied that thereby appellant referred, not to casing-head gasoline generally, but to the particular casing-head gasoline produced on the land leased from respondent. When, therefore, appellant next states that during the life of the lease the cost of manufacturing the casing-head gasoline has fluctuated, it is reasonable to assume that it is continuing to refer to the very casing-head gasoline produced on the leased land.

[6] The finding is further criticized because it states that it is untrue that in other contracts the cost of gathering, manufacturing, handling, and selling the casing-head gasoline has been a matter of dispute between the oil-producing companies and their lessors.

It is declared that appellant offered to prove other oil and gas leases which were executed between 1924 and 1930 and was not permitted to do so. It is said that this evidence was preliminary to showing that disputes had arisen between oil companies and their lessors regarding the manufacture of casing-head gasoline. The record shows that appellant sought to introduce evidence which would tend to prove that, during a period of approximately six years after the execution of the lease agreement between the parties to the present action, appellant had made two other contracts with respect to the manufacture of casing-head gasoline. The record further definitely shows that the reason given for seeking to introduce this evidence was that, if the provisions of one of such contracts which affected territory near the Kettleman oil field had been written into the contract between the parties to this action, the respondent would actually have received \$41,000 less as royalty on casing-head gasoline than they did receive under the 65 per cent.-35 per cent. basis contended for by appellant. The record shows that objection was made to the introduction of the offered evidence on the ground that it related to the execution of other contracts subsequent to the execution of the lease between appellant and respondent, and could not therefore shed any light on the intention of the parties in making the agreement which formed the basis of the present suit, and that the evidence was further irrelevant and immaterial as tending to show an isolated contract without any preliminary showing that it had any connection with the lease contract between appellant and respondent. There was no showing that the evidence was offered as a preliminary step to a showing that disputes had arisen between oil companies and their lessors regarding the manu-

facture of casing-head gasoline. We have no means for determining whether the offered evidence would have tended in the slightest degree to show that such disputes had arisen. We can, however, declare, and do declare, that the rejection of the offered evidence, bearing in mind the single reason given for its offer, was correct.

[7] Appellant complains that the court made a positive finding that it was not true that in other contracts the cost of manufacturing casing-head gasoline had been a matter of dispute between oil-producing companies and lessors of oil-bearing lands, and that there was no evidence before the court to justify such a finding, and that the finding is fatally uncertain because it does not appear what "oil producing companies and their lessors" or what "other contracts" are referred to in the finding.

The complaint is wholly untenable. If the portion of the finding to which the objection of uncertainty is raised has any importance, it is obvious that it was designed to meet the positive allegation in appellant's answer to the effect that "in other contracts" the cost of manufacturing casing-head gasoline had "frequently been a matter of dispute between the oil producing companies and their lessors." Since appellant had affirmatively alleged that such was the case, the burden rested upon it to support its positive allegation by competent evidence. So far as appears, it made no effort to do so, and may not now complain that the trial court has taken note of its failure in this regard by making a negative finding. Furthermore, it is apparent that the finding of itself is wholly inconsequential and unimportant. Whether or not the cost of manufacturing casing-head gasoline had given rise to frequent disputes between oil-producing companies and their lessors generally is a matter which is not in the slightest degree pertinent to the question of interpretation which was involved in the present action.

Appellant also complains that the final part of the criticized finding specifically states that it is not true that the clause of the lease contract which provided for the payment of a royalty on casing-head gasoline was inserted for the purpose of avoiding any dispute between appellant and respondent as to the cost of manufacturing said casing-head gasoline.

It is declared that this portion of the finding is wholly unjustified because certain evidence to which reference is made showed that the parties to the contract discussed the mat-

ter of the cost of manufacturing casing-head gasoline, and that appellant's representative said that respondent would receive one-eighth of 35 per cent., and "there would be no questions from then on as to how the gasoline was split."

[8, 9] Appellant's complaint for insufficiency of the evidence to support the finding may be dismissed with the observation that the evidence respecting this feature of the matter was conflicting. Furthermore, there is not an iota of evidence tending to show that the clause was deliberately inserted for the purpose of avoiding any future dispute between the parties as to the cost of manufacturing casing-head gasoline in the event such gasoline should be manufactured by a third party with whom appellant might contract for such manufacture. Finally, it should be observed that the finding is of no importance. If the court had found in accordance with appellant's contention that the clause was inserted for the stated purpose, it is obvious that the purpose failed, and the disputed language of the contract would have been clarified in no respect by a finding that the parties inserted the clause for the purpose of avoiding the possibility of a future dispute regarding the cost of manufacturing casing-head gasoline.

[10-12] Appellant's final complaint is that the trial court's finding that respondent did not accept the monthly payments made by appellant under the lease contract in full satisfaction of all royalties due from appellant on account of casing-head gasoline produced on the leased premises is lacking in evidentiary support.

The evidence with respect to the royalty payments by appellant may be summarized as follows: Beginning on September 20, 1930, and on or about the 20th day of each succeeding month, appellant drew a check payable to the order of the Fresno branch of the Security First National Bank of Los Angeles, and caused the check to be delivered to the Fresno bank. Attached to each of such checks was a statement showing the amount of money payable to respondent for its proportion of gasoline produced on the leased premises during the preceding 30 days and another amount payable to respondent for its share of dry gas produced during the same period. The total of these two amounts constituted the amount of money represented by the check to which the voucher was attached. The voucher was detached from the check and sent to respondent. On the reverse side of each check the following statement appeared: "Endorsement by payee of this check guarantees acceptance of

it in full settlement of account as stated on accompanying voucher which he acknowledges to have received and detached." Each check was indorsed as follows: "Deposited to the credit of Whepley Oil Co. Fresno Branch, Security-1st National Bank of Los Angeles." After being thus indorsed, each check was then deposited to the credit of respondent in the payee bank. So far as the record shows, no officer or director of respondent saw any of these royalty checks. However, at the time the check was drawn, a complete statement showing the total production of dry gas for the preceding month, the royalty of one-eighth of such amount payable to respondent and the total amount of wet gas treated, the amount of gasoline extracted therefrom, gasoline revenue amounting to 35 per cent. of the gasoline extracted and royalty payable to respondent amounting to one-eighth of the 35 per cent. of the total amount of gasoline extracted was prepared and sent to respondent. The undisputed evidence of respondent showed that respondent had no knowledge of the existence of the contract between the Los Nietos Producing Company and appellant whereby appellant received 50 per cent. of the proceeds of casing-head gasoline instead of 35 per cent. thereof until about the month of April, 1931. Appellant was thereupon notified that respondent was contending that it was entitled to receive a royalty of one-eighth of the 50 per cent. derived by appellant from casing-head gasoline. On July 2, 1931, respondent requested that the matter be submitted to a board of three arbitrators as was provided in the contract. For several months thereafter an effort was made to select three arbitrators to whom the controversy might be submitted. The effort was unsuccessful and on December 29, 1931, the parties entered into a formal contract one of the provisions of which stated that a controversy had arisen between them as to the method and basis of payment of royalties on casing-head gasoline and that either party might thereafter institute action to determine such controversy without prior submission to arbitration. The delivery by appellant of the checks representing monthly payments of royalties to the Fresno branch of the Security First National Bank of Los Angeles was accomplished in accordance with the following provision of the lease: "The lessee agrees to make payment to the Lessors on the twentieth (20th) day of each calendar month for all royalty substances purchased by the Lessee from the Lessors during the preceding calendar month, said payment to Lessors for royalty substances and, or moneys paid for monthly rentals

are to be made to the Pacific Southwest Trust & Savings Bank, Fresno Branch, or the successors of said bank as agent for the Lessors, and the receipt of said Bank as agent, shall be and taken to be the same as if the Lessors themselves had acknowledged it and shall be responsible for the proper distribution of the moneys paid."

Appellant contends that the foregoing evidence showed that there was a complete accord between the parties and full satisfaction each month of the amount agreed to be due to respondent as royalty on casing-head gasoline. It is therefore urged that the trial court's findings specifically negating such accord and satisfaction are wholly unsupported by the evidence, and that the judgment should therefore, for this reason, be reversed.

From the above-stated recital of the evidence which related to the payment of royalty, it is apparent that the first seven payments of royalty on casing-head gasoline were received and accepted by respondent without any knowledge that the information respecting the revenue derived by appellant from the sale of casing-head gasoline which appeared in the monthly statements rendered by appellant was untrue. As heretofore noted, each of such monthly statements contained a plain, unequivocal declaration that the revenue derived by appellant from gasoline during the preceding month was based on a calculation of 35 per cent. of the total amount of gasoline produced during such month. It is conceded that during all of this time appellant actually derived a revenue from casing-head gasoline which was based on a calculation of 50 per cent. of the total amount produced under the contract with the Los Nietos Producing Company.

It is our conclusion that, during the time respondent was ignorant of the fact that appellant was actually receiving 50 per cent. instead of 35 per cent. of the total production of casing-head gasoline, it may not be successfully contended that the receipt of royalty payments for such gasoline calculated on the basis of the smaller percentage established an agreement by respondent to accept the smaller amount. There is no strange magic in the legal doctrine of satisfaction and accord. An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled. Civ. Code, § 1521; *Sierra, etc., P. Co. v. Universal Elec., etc., Co.*, 197 Cal. 376, 386, 241 P. 76. In order that the doctrine shall be applicable, it must appear that there is a dispute between

the parties as to the amount due. *Berger v. Lane*, 190 Cal. 443, 447, 213 P. 45. The intention of the parties is an essential element of the doctrine. *Everhardy v. Union Finance Co.*, 115 Cal. App. 460, 464, 1 P.(2d) 1024. Accord signifies an agreement between the parties, and the primary principles which govern the law of contracts are necessarily applicable in arriving at a determination of the question as to whether or not there was an accord and satisfaction. One of such principles is the fundamental rule that there must be a meeting of the minds of the contracting parties in order that a contract shall come into existence. Since it is undenied that respondent had no knowledge of the existence of the contract between appellant and the Los Nietos Company, whereby appellant received 50 per cent. of the gross amount of casing-head gasoline produced on the leased premises until April, 1931, it is idle to contend that the acceptance of royalties based on a receipt by appellant of 35 per cent. prior to this date amounted to an agreement to accept the smaller percentage as a basis for calculation of royalty. *Meyer v. Henry Cowell Lime, etc., Co.*, 21 Cal. App. 602, 604, 132 P. 611. Up to the time respondent was apprised of appellant's contract with the third party, there was and could be no dispute between the parties to this action as to the royalty due on casing-head gasoline. Appellant makes some suggestion relative to respondent's opportunity to have discovered sooner than it did that appellant was receiving 50 per cent. rather than 35 per cent. We are unable to discover in the facts of this case any reason to apply the doctrine that opportunity of discovery is the equivalent of knowledge. The circumstances here presented do not demand application of the suggested principle.

[13] We likewise fail to discover that the evidence was sufficient to establish that an accord and satisfaction took place when respondent continued to accept the monthly payments based on the smaller percentage after it was informed that appellant was actually receiving the larger percentage. The evidence clearly showed that respondent promptly advised appellant that it took the position that it was entitled to receive a royalty based on 50 per cent. rather than the royalty based on 35 per cent., and made reasonable request that the controversy be submitted to arbitrators as was provided in the lease contract. The evidence also shows that appellant acquiesced in the proposal for arbitration, and that for a period of several months the parties endeavored to select a

board of three arbitrators, as was provided in the lease. When it finally developed that a third arbitrator mutually acceptable to both parties could not be selected, the parties agreed that the matter should be submitted to a court. The acceptance by respondent of amounts smaller than it was demanding during the time when negotiations for arbitration were being carried on is not indicative of an accord. It may not be argued successfully that respondent, who, during all of this period, was insisting that it was entitled to larger royalty payments, evidenced an intention to abandon its claim by its acceptance of smaller amounts.

Our conclusion that the trial court's findings negating existence of an accord and satisfaction are supported by the evidence has been reached without consideration of respondent's contention that the bank which received the royalty checks was not authorized to agree to accept the payments in full settlement of respondent's claim. The only evidence respecting the scope of the bank's agency which was presented to the trial court consisted of the hereinabove quoted language of the lease respecting the making of royalty payments to the bank "as agent for the Lessors," which provided that "the receipt of said Bank as agent shall be and taken to be the same as if the Lessors themselves had acknowledged it." Taking the language in its entirety, it would appear that the bank was empowered to do no more than to receive and to acknowledge the payments which were delivered to it in the manner heretofore described. It is not contended that the bank had any knowledge of the contract between appellant and the Los Nietos Producing Company prior to the time respondent became informed of its existence. No question of the bank's duty to advise its principal of the existence of this contract could therefore arise.

For the reasons stated herein, the judgment is affirmed.

I concur: BARNARD, P. J.

MARKS, Justice.

I concur.

This case was tried upon the theory that the provisions of the oil lease governing the royalty to be paid by respondent on the manufacture of gasoline from casing-head gas were uncertain and ambiguous, and the introduction of parol evidence was permitted to aid the trial court in interpreting them. If these provisions be so regarded, the foregoing opin-

ion effectually disposes of the contention of appellant that the evidence does not support the views of the trial judge on this question as disclosed in the findings and judgment.

My interpretation of the terms of the lease, in regard to their being uncertain and ambiguous, is somewhat different from that put upon them by counsel for both parties during the trial. In my opinion, the language of this paragraph pertaining to the royalty to be paid on the manufacture of gasoline, when read in connection with the balance of the lease of which it is a part, is sufficiently clear and certain, and should be interpreted from that language without the need of evidence bearing upon the intention of the parties using it.

In the first place, under this paragraph, the right to extract casing-head gasoline from the gas is permissive, and no duty is placed upon appellant to produce it. If appellant avails itself of the right to produce gasoline from casing-head gas, either one of two conditions governing the method of determining the royalty due respondent is contemplated: First, when manufactured by the lessee either on or off the leased premises; and, second, when extracted by a third party. If the lessee elects to extract the casing-head gasoline itself, it is clear that it must pay to the lessor one-eighth of the proceeds derived from the sale of such gasoline, less "the entire cost of gathering, manufacturing, handling and selling the same." This cost is arbitrarily fixed at 65 per cent. of the gasoline so extracted from the gas. The lessee is given the right, which it is not required to exercise, of contracting with a third party to extract this gasoline. If it elects to take advantage of this right, it is given the further privilege of paying to the party with which it contracts 65 per cent. of the gasoline so manufactured as the cost of manufacture. The right to so pay this 65 per cent. is permissive only, and no duty is cast upon the lessee to pay such a percentage of the gasoline to the manufacturer. The lessee availed itself of the right, given it in the lease, to contract with a third party to extract the gasoline, but did not exercise the right to pay it 65 per cent. of the gasoline manufactured as the cost of manufacture. It is therefore evident that, while the quoted paragraph clearly provides for respondent's share of the gasoline in the in-

stances (1) where appellant manufactured the gasoline itself, and (2) where it contracted with a third party and agreed to give the manufacturer 65 per cent. of the gasoline as the cost of manufacture, neither of these contingencies arose, as it contracted with a third party for the manufacture of the gasoline and agreed to pay it, not 65, but 50 per cent. of the gasoline manufactured, as the cost of manufacture. Therefore I must examine the other paragraphs of the lease in order to determine if any of the other provisions are applicable to this situation which evidently is not covered by the paragraph specifically pertaining to the manufacture of gasoline.

The lease gave the right to "the Lessee of exploiting and drilling for, developing, producing, extracting, bringing to the surface, obtaining, taking, storing, removing and carrying away petroleum, oil, natural gas, naphtha, and other mineral oil, and hydrocarbon substances in, upon and from said land. * * *" It also required the lessee to pay to the lessor "a royalty of one-eighth (1/8th) of the net amount of all petroleum, oil, naphtha and other hydrocarbon substances which may be produced and saved from the demised premises. * * *"

I understand that gasoline is included within the term "other hydrocarbon substances" as that expression is generally used in oil leases. Therefore, if the royalty to be paid to respondent on the gasoline manufactured is not covered by the paragraph specifically dealing with the subject, it should be determined by the general royalty provisions of the lease just quoted. The term "net" is in common use, and means the clear profit remaining after deducting all expenses. The expense to appellant of producing the gasoline was the 50 per cent. paid to the manufacturing company, which left 50 per cent. of the gasoline manufactured as the "net amount of * * * other hydrocarbon substances * * * produced and saved from the demised premises." It therefore seems clear to me that, under the clearly expressed language of the lease, respondent is entitled to one-eighth of the 50 per cent. of the gasoline received by appellant, or, as this gasoline had been sold, to the one-eighth of the proceeds of the sale of this 50 per cent. which the judgment gave it.

6 Cal.App.2d 531

TAYLOR et al. v. PACIFIC ELECTRIC**RY. CO. et al.**

Civ. 9720.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

Hearing Denied by Supreme Court

June 28, 1935.

1. Negligence ⇨136(9)

Ordinarily, contributory negligence is fact question for jury, and is law question only when court is impelled to say that reasonable men can draw but one inference, pointing unerringly to negligence of plaintiff contributing to his injury.

2. Appeal and error ⇨934(1)

On appeal from judgment for defendants notwithstanding verdict, truth of plaintiffs' evidence should be admitted, and evidence should be interpreted most strongly against defendants.

3. Street railroads ⇨99(6)

Motorist colliding head-on with street car in broad daylight, after driving 200 feet astride rails with nothing to prevent him from seeing street car, *held* contributorily negligent as matter of law.

4. Street railroads ⇨103(3)

Where motorist collided head-on with street car in broad daylight after driving 200 feet astride rails with nothing to prevent him from seeing street car, last clear chance doctrine *held* inapplicable, where there was no evidence that motorist was in situation of danger from which he could not escape by exercise of ordinary care, that motorman was aware of dangerous situation, that he realized motorist's inability to escape, or that motorman had a clear chance thereafter to avoid injuring motorist.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Agnes A. Taylor and others against the Pacific Electric Railway Company and another. From a judgment for defendants notwithstanding verdict for plaintiffs, plaintiffs appeal.

Affirmed.

Ames Peterson and P. V. Davis, both of Los Angeles (Frankley & Spray, of Los Angeles, of counsel), for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal from a judgment in favor of the defendants in an action for damages

for the death of John S. Taylor resulting from a collision between the automobile he was driving and an electric street car of the defendant company which was being driven by the defendant Tate. After the jury returned a verdict for the plaintiffs, the court granted defendants' motion for judgment notwithstanding the verdict; a motion for a directed verdict at the close of the evidence having been denied. Appellants contend that the court erred in entering said judgment.

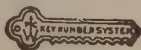
[1-3] The decedent was driving his automobile in broad daylight on a public highway and over and upon the street car tracks towards a street car of the defendant company which was moving in the opposite direction and approaching the decedent on the same tracks. The street car was plainly open to the decedent's view with nothing to prevent him from slowing down or turning off the track, but instead of doing so he continued on at a speed of 25 to 40 miles per hour in a business district. His conduct resulted in a head-on collision with the street car, causing his death. The trial court granted the motion for judgment, on the theory that the decedent was guilty of contributory negligence as a matter of law. We have read the evidence, keeping in mind that ordinarily contributory negligence is a question of fact to be determined by the jury, and that contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that inference one pointing unerringly to the negligence of the plaintiff contributing to his injuries (*Flores v. Fitzgerald*, 204 Cal. 374, 268 P. 369; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125), that for the purpose of the ruling on this question the truth of plaintiffs' evidence should be admitted, and the evidence should be interpreted most strongly against the defendants. The briefs are full of the evidence. It would serve no useful purpose to set the evidence out in detail in this opinion. Appellants have much to say about the negligence of the defendants, but in no way or manner are they able to excuse or justify the negligence of the decedent in driving a distance of at least 200 feet astride the rails toward the street car with nothing to prevent him from seeing it. In our opinion, only one conclusion can be reasonably drawn from the evidence, and that is that the deceased was guilty of contributory negligence.

[4] Appellants next contend that the doctrine of the last clear chance should have

been applied. In our opinion there is no room for the application of that doctrine in this case. There is no evidence that the decedent was in a situation of danger from which he could not escape by the exercise of ordinary care. Assuming that the decedent was in such dangerous situation, there was no evidence that the defendant motorman was aware of his dangerous situation under such circumstances that he realized or ought to have realized decedent's inability to escape therefrom. Assuming that the defendant realized said inability to escape, there was no evidence that he had a clear chance thereafter to avoid injuring the decedent. If any one of these elements was missing the rule does not apply. Hence the doctrine of the last clear chance does not apply.

Judgment affirmed.

I concur: STEPHENS, P. J.



6 Cal.App.2d 593

A-1 GARAGE v. LANGE INV. CO.
Civ. 9807.

District Court of Appeal, First District,
Division 2, California.

May 6, 1935.

Hearing Denied by Supreme Court
July 5, 1935.

1. Damages ⇐78(6)

Where lease provided that \$10,000 paid at execution was absolute payment to lessor as consideration for lease and that in event of termination of lease for any cause before its expiration, lessee should have no claim against lessor on account of such fund, lessee, after termination of lease through its default, held not entitled to recover difference between such sum and amount of judgment against lessee for accrued rent, on ground that provision was illegal stipulation for "liquidated damages" (Civ. Code, § 1670).

[Ed. Note.—For other definitions of "Liquidated Damages," see Words & Phrases.]

2. Contracts ⇐143

Where contract is clear and unambiguous, courts will not substitute their interpretation, particularly when such interpretation would render an otherwise valid contract void.

Appeal from Superior Court, San Francisco County; Walter Perry Johnson, Judge.

Action by the A-1 Garage against the Lange Investment Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Lombardi & Minnis, of San Francisco, for appellant.

Knight, Boland & Riordan and F. Eldred Boland, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the balance of a sum of money paid the defendant upon execution of a lease of real property. The cause was tried before the court without a jury and defendant had judgment.

On November 10, 1929, defendant leased to plaintiff a garage for the period of eight years at a total rental of \$100,200. Coincident with the execution of the lease, and as consideration therefor, the plaintiff paid to the lessor \$10,000. In August, 1932, the lessor took possession of the premises through unlawful detainer proceedings and had judgment against the lessee for \$2,975.02 as accrued rent. Plaintiff then brought this action to recover the difference between this sum and the \$10,000 paid when the lease was executed.

The pertinent portions of the lease from which this controversy arises are found in paragraph 14, which reads: "In further consideration for the execution of this lease by lessor, lessee has paid to lessor and lessor hereby acknowledges receipt of the sum of ten thousand dollars (\$10,000) from the lessee herein; and it is distinctly agreed and understood that in the event of the faithful performance by the lessee of each and every, all and singular, the terms, conditions and covenants of this lease, and the prompt and faithful payment of all the rent and other sums herein provided to be paid, at the times and in the manner herein provided, and only in this event, lessor will allow and rebate to the lessee the sum of \$41.66 on account of the rent to be paid each month during the term hereof, up to the month commencing January 10, 1937; the sum of \$391.00 on account of the rent to be paid for the month commencing January 10, 1937, and the sum of \$1,100.00 on account of the rent to be paid for the months commencing on the 10th day of each February, March, April, May, June, July, August, September and October, 1937. It is distinctly agreed and understood that this allowance and rebate shall be made by the lessor only

in the event of the faithful performance by the lessee of all and singular, each and every of the terms, covenants and conditions hereof, *which is the sole consideration therefor*; and in the event of a termination of this lease at any time before the expiration of the term herein provided for any cause or reason whatsoever, said lessee shall have no claim against the lessor, except as in section eight hereof provided, for any allowance or rebate on account of the rent herein provided to be paid, or on account of the sum of \$10,000 paid to lessor by the lessee, which is the consideration for the making of this lease, *and said lessee agrees that the same is so paid as a consideration therefor, and for the purpose of obtaining this lease, and is an absolute payment to the lessor for that purpose.*" (Italics ours.)

We are unable to reconcile appellant's "Statement of the Question Involved" with the record before us, and we will, therefore, approach the case in our own way. The simple question raised is this: When the parties to a lease declare in plain language that the money paid is a consideration for the lease and nothing else and that it is an absolute payment to the lessor for that purpose, may the courts declare that they intended it to be an illegal stipulation for liquidated damages?

There are several types of cases involving payments of this kind—not different lines of authority adopting divergent rules on the legal principle involved, but different groups of cases dependent upon the special facts. Within these groups the rules of law are settled and our authorities are in complete harmony. First, because of more frequent occurrence, come the cases involving an absolute payment in advance of the rent for the last few months of the term. When paid under such circumstances, the lessor is entitled to retain the fund on default of the lessee. *Curtis v. Arnold*, 43 Cal. App. 97, 108, 184 P. 510; *Redmon v. Graham*, 211 Cal. 491, 494, 295 P. 1031; *Galbraith v. Wood*, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609; *Wetzler v. Patterson*, 73 Cal. App. 527, 532, 238 P. 1077; *Weinreich v. Vernon*, 109 Cal. App. 60, 61, 292 P. 651; 16 R. C. L. p. 931. Second, where the payment is made by way of a deposit as security for the performance of the covenants of the lease. Cases within this group should be again divided into two classes—where the lease provides that the sum shall be forfeited to the lessor in the event of breach by the lessee, and, where the sum is treated as a trust fund to which the lessor may look for relief upon proof of damages arising from the breach. Where a forfeiture is provided for

and the deposit treated as liquidated damages, this clause has been uniformly held invalid in this state under section 1670 of the Civil Code. *Green v. Frahm*, 176 Cal. 259, 262, 168 P. 114; *Knight v. Marks*, 183 Cal. 354, 357, 191 P. 531; *Redmon v. Graham*, supra. On the other hand, where the sum is deposited merely as security for the performance of the covenants by the lessee, without a penalty or forfeiture clause, the payment is valid to that extent and the lessee is not entitled to a return of the fund upon a breach of the lease, but the lessor may look to the fund for damages proved. *Green v. Frahm*, supra, 176 Cal. 259, 263, 168 P. 114; *Giddens v. Krogh*, 116 Cal. App. 416, 421, 2 P.(2d) 821; *Gallagher v. McMann*, 119 Cal. App. 688, 690, 7 P.(2d) 204.

Another group of cases of increasing number is where the lease calls for the flat payment of a sum as a bonus, or "consideration" for the execution of the lease. Such clauses have been uniformly held valid in this state and the lessee has been denied recovery when the lease has been canceled through his default. *Ramish v. Workman*, 33 Cal. App. 19, 21, 164 P. 26; *Curtis v. Arnold*, 43 Cal. App. 97, 101, 102, 184 P. 510; *Wood v. Hipwell*, 107 Cal. App. 680, 682, 290 P. 1040; *Dutton v. Christie*, 63 Wash. 372, 115 P. 856, 857.

We have omitted from the foregoing citations our own opinion in *Walter H. Sullivan, Inc., v. Johnson*, 116 Cal. App. 591, 3 P.(2d) 72, because it seems to require special consideration. In that case the lessee had been wrongfully evicted and sued to recover the deposit made upon execution of the lease. As appears from the last paragraph of the opinion, the facts were admitted, and we were then asked to interpret the clauses in the lease which were rendered uncertain by the peculiar language used. In examining the case as a whole, in the light of the admitted facts, we held that the parties did not treat the payment as a consideration for the execution of the lease or as an advance payment of rent, but that the facts compelled the conclusion that the parties at all times treated the payment as security for faithful performance and not otherwise. With this interpretation of the intention of the parties, we followed the accepted rule that the lessee was entitled to the return of the deposit because of the wrongful eviction. *Blessing v. Fetters*, 40 Cal. App. 471, 477, 181 P. 108.

[1] The distinction between the *Sullivan* Case and the case at bar is readily seen. In that case the lease was admittedly uncertain and ambiguous and required interpretation.

Here the lease is plain and unambiguous. The parties stipulated in language which is plain and needs no interpretation that this was "an absolute payment to the lessor" as consideration for the lease, and that, in the event of a termination of the lease for any cause before its expiration, the lessee should have no claim against the lessor on account of this fund. By the express terms of the lease we then have a case where the money is paid as a bonus and as consideration for the lease. This brings the case squarely within the rule of *Curtis v. Arnold*, supra, *Wood v. Hipwell*, supra, and allied cases.

[2] It is not inappropriate to observe that the clause in question was admittedly drawn by counsel to meet the rule of the cases last cited; that the parties had the legal right to freely contract in that manner; and that the provision in the lease to refund by way of credits in the monthly rental due, though an item to be considered in the interpretation of a doubtful lease, is not inconsistent with the expressed intention of the parties found here. And it is a commonplace observation that when the contract of the parties is clear and unambiguous the courts will not substitute their interpretation, particularly when such interpretation would render an otherwise valid contract void.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



SCHULTZ v. TOWN OF LAKEPORT et al. *

Civ. 5299.

District Court of Appeal, Third District,
California.

April 29, 1935.

Rehearing Denied May 29, 1935.

Hearing Granted by Supreme Court
June 28, 1935.

1. Waters and water courses ⇨202

Water company, public or private, may adopt reasonable regulations for conduct of its business.

2. Waters and water courses ⇨203(13)

Water company, public or private, may provide by rule that water furnished by it may be cut off for nonpayment therefor, with certain limitations, as in case of disputed bills.

3. Waters and water courses ⇨203(13)

Town, owning its water system, had no legal right to shut off water from premises occupied by consumer because of his nonpayment of bill exceeding \$208, of which only \$72.69 was legally due, after he tendered \$72 to town.

4. Waters and water courses ⇨203(13)

One whose only available source of water supply was water system maintained by town, which demanded that he pay sum, amounting to approximately half of damages awarded him for discontinuance of supply, on disputed bill for water previously furnished him, *held* not bound to do so in order to avoid excessive damages.

5. Waters and water courses ⇨203(13)

Water company will not be allowed to shut off water for ulterior purpose or to compel payment of disputed bill, but has such right solely to compel payment of current bills as they accrue, and equity will interfere to protect consumer, if transaction is closed, validity of bill is doubtful, or right to shut off water is not clear.

6. Waters and water courses ⇨203(13)

Town, owning its water system, had no right to shut off water from premises in order to compel occupant to pay bills against which statute of limitations had run, whether or not items therein were for water actually used.

7. Waters and water courses ⇨203(13)

Award of \$450 damages for loss of entire crop of vegetables, berries, etc., wholesale value of which grower testified, without objection, was \$688.85, as result of town's discontinuance of water supply during producing season, *held* not error, though there was no testimony as to cost of marketing.

8. Evidence ⇨555

Vegetable grower's testimony as to whether it was possible for plaintiff, in action against town for damages by discontinuance of water supply during producing season, to lose amount testified to by plaintiff because of failure to get water on his land, and what amount of money could be taken off such land, *held* properly excluded.

Appeal from Superior Court, Lake County;
Benjamin C. Jones, Judge.

Action by E. C. Schultz against the Town of Lakeport and L. H. Stone and others, as members of the council thereof. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellants.

Louis Bartlett, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendants for the sum of \$450 on account of damages alleged to have been suffered by him by reason of the defendants having shut off and deprived him of a water supply during the months of August and September, and a part of October, in the year 1932. From this judgment, the defendants appeal.

The damages claimed by the plaintiff are based upon being deprived of the use of water at his residence during the period of time mentioned, and also in being deprived of the use of water for irrigating a garden upon there was standing and growing an alleged valuable crop of vegetables, berries, and other agricultural products.

The town of Lakeport is a municipal corporation of the sixth class, and owns its own water system. The plaintiff in the action, it appears, began taking water from the town of Lakeport in April, 1927, and continued the use thereof until August 2, 1932. At that date and shortly prior thereto the town of Lakeport claimed that there was due from the plaintiff for the use of water during said time, the sum of \$208.15, of which \$134.63 was claimed as being due on account of water furnished to the residence of the plaintiff, and also for the plaintiff's use in irrigating the garden just referred to, upon which the plaintiff had paid nothing.

A short time prior to August 2, 1932, it appears that an examination was made of the books of the town, in which were kept, or purported to be kept, the accounts of water users, and it was discovered that about 65 per cent. of the water users of the town were not paying their bills. It was also ascertained in this manner that the plaintiff had been using water for 5½ years without making any payment therefor. Thereupon, the plaintiff was called before the council, and demand was made of him that he pay the amount so alleged to be due in twelve different installments. The record shows that the plaintiff disputed the bill, and also claimed that he was unable to pay the amount. At this time the plaintiff offered to pay the current rates, both at his residence and for his store. The defendants, however, refused to accept payment of current rates, but did offer to accept

the payment tendered by the plaintiff upon the old account. It likewise appears that the plaintiff made a tender of the amounts which would be due for May, June, and July of 1932. This the council refused to accept unless it be credited on his old account. Suit was begun in the justice's court against the plaintiff by the town of Lakeport, and on October 5, 1932, the court decided in favor of the town of Lakeport against the defendant, and gave judgment in favor of the town of Lakeport for the sum of \$72.69. Of this amount \$36.69 was found to be due on account of water used at the plaintiff's residence and for irrigating his garden, \$36 being for water used at the store belonging to the plaintiff.

The record also shows that about the time when the water was turned off the plaintiff claimed that there was due on account of water used at his residence the sum of only \$36, and at the same time tendered to the town of Lakeport the sum of \$36. This, however, the city council of the town of Lakeport refused to accept.

After the judgment was entered, as above stated, the plaintiff paid to the town of Lakeport \$36.69 on account of said judgment, and \$1 for turning on the water, and on the 18th day of October, 1932, the town of Lakeport resumed furnishing water to the plaintiff.

It appears from the record that the plaintiff was purchasing the premises, upon which water was being used, upon a contract, and was under the impression that the owner of the premises was paying the water bills.

The installments in which the defendants demanded that the back bill be paid amounted to a sum slightly in excess of \$21. Upon the trial of the action just referred to, the court held that the statute of limitations had run against the bills claimed by the town of Lakeport, save and except for the two years just preceding the beginning of the action, as the record showed that the town of Lakeport had kept no book accounts of the water used by different consumers, and the amounts due therefor. The judgment of the court shows that the tender made by the plaintiff lacked only 69 cents of being the amount actually legally collectible by the town of Lakeport for the use of water by the plaintiff in his residence and in the irrigation of his garden.

The principal contention made by the appellants here is to the effect that if the plaintiff had permitted the amount of his tender to be applied upon the old account, the damages suffered by him might have been avoided; that the plaintiff, in disputing the bill, should have paid the sum demanded by the defend-

ants, and brought an action to enjoin the defendants from shutting off his water supply until the disputed bill had been adjusted. While a number of authorities support the contention of the appellants, we have found no case, nor have we been cited to any case, where such a proceeding has been sustained, or where a city or water company has been upheld in an attempt to collect accounts for the use of water, against which the statute of limitations has run.

If the contention of the appellants were to be upheld, it would give power to enable the appellants to collect bills by threat of turning off the water supply, which they could not collect by an action at law. In other words, it would enable the appellants to avoid the statute of limitations. This, of course, appears to be the plain purpose of the demand of the appellants that the money tendered by the appellants for current rates should not be applied to payment of water used during the current periods, but should be applied upon the oldest periods in the account. In this manner collection would be made of all outlawed items.

Three questions and answers in the transcript which appear in the testimony of one of the councilmen illustrates the situation, to wit:

"Q. There was a dispute then, between Mr. Schultz and the City Council of the amount due, is that correct? A. Yes.

"Q. And the City Council decided to turn off the water because Mr. Schultz would not agree to the correctness of the statement rendered by the City. Is that correct? A. Yes.

"Q. Was there any reason, other than to force Mr. Schultz to pay the amount claimed by the City to be due, irrespective of the amount, for turning off the water? A. No."

Likewise, as to the offer of the \$36:

"Q. He agreed to pay \$36.00 before the City Council brought suit? A. He offered that as a compromise.

"Q. That was all the judgment you got against him? A. That is my understanding.

"Q. In other words, Mr. Schultz made an offer of all the City Council had a right to collect? (Mr. Fraser, interrupting): The judgment was for \$36.69."

The record further shows that a meter was installed in the premises occupied by the plaintiff; that it was read for a few months, and then for a number of months it was not read, and apparently was not operating. The record also shows that a few statements or

monthly bills were sent by the clerk of the town of Lakeport to the plaintiff.

Ordinance No. 93 of the town of Lakeport specifies that the town of Lakeport might make rules and regulations for the use of water. Section 2 of the ordinance reads: "Every person taking the water shall be considered as having expressed his consent to be bound by said rules and regulations, and whenever any of said rules and regulations are violated, the right is reserved to shut off the water without notice and the person whose water is thus shut off shall forfeit all payments made, and the water shall not be turned on again until all unpaid rents and charges are paid, together with a charge of \$1.00 for turning on the same again."

Section 9 of the ordinance provides that all water rates shall be paid to the superintendent of water rates, in advance.

Section 13 reads: "Meter rates are due and payable monthly on presentation of bills," etc.

[1, 2] The general rule is, as contended by the appellants, that a water company, public or private, may adopt reasonable regulations for the conduct of such business, and may by rule provide that the water furnished may be cut off for nonpayment therefor. This rule has its limitations. *Dodd v. City of Atlanta*, 154 Ga. 33, 113 S. E. 166, 28 A. L. R. 465, has appended thereto a long list of annotations giving an almost unlimited number of cases relative to the question of the right of a city or water supply to shut off water in the event of nonpayment of bills. Practically all of the cases make an exception, and that exception relates to disputed bills, and denies to water companies the power to arbitrarily shut off a water supply unless payment is made of the disputed bill as claimed by the water company. This exception is clearly set forth in the case of *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 877, 128 Am. St. Rep. 923. (We quote from 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, page 923 as follows): "While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term. *State v.*

Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785; Wood v. City of Auburn, 87 Me. 287, 32 A. 906, 29 L. R. A. 376. The inconvenience arising from subjecting the water company to the necessity of resorting to the regular courts to collect disputed claims is not to be compared to the hardship of the consumer, as a member of the public, involved in permitting the water company to be judge in its own cause, and to coerce the disputant into submission by denying him water."

[3] In 67 C. J., p. 1267, § 821, we find the following, relative to the right of a water company to shut off water in the event of the amount due being disputed, to wit: "Neither can it be resorted to as a means of collecting an overdue and disputed instalment of water rent after the company has accepted payment of a subsequent instalment, or of collecting a debt for water supplied at a previous time, and by another Company assigned to the one asserting the right; and, when he tenders payment of the established rate in advance for the service he is demanding, the company cannot, as a condition precedent to supplying him, require a consumer to pay an old or disputed bill for water furnished him at some previous time," etc. In the instant case the demand is made that the plaintiff pay a bill slightly in excess of \$208, upon which there was legally due, both for the water furnished the plaintiff's residence and the water furnished to his store, the sum of only \$72.69. Under such circumstances, the appellants had no legal right to shut off water from the premises the plaintiff was occupying. We quote from 27 Ruling Case Law, p. 1457, relative to the right of a water user to maintain injunction, to wit: "A consumer of water may recover excessive charges made where he pays under protest and by reason of a threat to turn off the water if payment is not made, for a payment under those circumstances is not voluntary. Where a water company threaten to turn off a consumer's supply unless he pays excessive and illegal charges, he is not bound to show a tender of the exact amount due as a condition to a recovery of the excess, where it is clear that a tender would be useless. But this remedy is not adequate and he may seek relief in equity and under proper circumstances the company will be restrained from shutting off the water till the determination of the question involved. An injunction is the proper remedy to prevent the shutting off of the water in cases where the consumer denies in good faith either his liability or the amount of the charge."

In the instant case, it is shown by the judgment of the court in an action instituted by the defendants that the plaintiff was liable only for the sum of \$72.69, and that the plaintiff had tendered to the appellants within 69 cents of the amount found due for water used at his residence and for the irrigation of his garden.

We think the record justifies the following language, which we find in the opinion of the trial court denying the appellants' motion for a new trial, to wit: "The position of the plaintiff in the matter is that he tendered payment of his current bills at the rates fixed by the City Council, and stood ready at all times to pay the amount actually due from him to the City when and as the same should be finally determined, and in fact, did offer to pay a sum equivalent to that which was later adjudicated to be due. Furthermore, he at all times demanded the restoration of water service to his property, and, as the record discloses, was almost in constant negotiation with the City authorities from the date of the first demand until water service was finally restored."

[4] While a number of cases do hold that where the payment of a slight sum may avoid excessive damages, such payment should be made, and we may quote from the opinion of the trial court, which answers the contention of the appellants that the plaintiff should have taken that course, to wit: "In this case, however, the demand of the defendants amounted to approximately fifty per cent. of the damage awarded plaintiff. There was no source of water supply available, other than that maintained by the defendants. Plaintiff could only secure water from them upon the condition that he pay the amount demanded, which an adjudication in the Justice's Court determined was not due. It cannot be said that under the circumstances of this case the plaintiff would only be put to a slight expense where he was called upon to pay approximately fifty per cent. of the actual damage sustained before he could procure an adequate supply of water. The courts have been no less hesitant to refuse to apply the rule contended for by the defendants under such circumstances. *Chambers v. Belmore Land, etc., Co.*, 33 Cal. App. 78, 164 P. 404; *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8-28, 276 P. 1017; *Coulter v. Sausalito Bay Water Co.*, 122 Cal. App. 480, 10 P.(2d) 780."

[5] The language found in volume 1, *Farnham on Waters and Water Rights*, p. 854, relative to the shutting off of water, is applicable here: "It" (referring to powers of

water companies) "will not be allowed to use its power to shut off the water for an ulterior purpose, or to compel payment of disputed bills. The right is given it solely with reference to current matters and to compel payment of bills from period to period as they accrue; and if the transaction is closed, or there is doubt as to the validity of the bill, or the power to shut off the water involves the exercise of a right on the part of the company which is not clear, equity will interfere to protect the consumer."

[6] It follows as a necessary conclusion from what we have said, and the authorities cited, that the appellants in this case had no right to shut off the water in order to compel the plaintiff to pay any items for the use of water against which the statute of limitations had run, irrespective of whether the items in the respective bills or charges were or were not for water actually used. What we have said also shows that the findings of the court were amply supported as to the tenders of payment made by the plaintiff and the refusal of the appellants to accept the same, and also of their attempt to compel payment of accounts which legally could not be collected.

[7] The court awarded damages in the sum of \$450. The record shows that the plaintiff had cultivated a garden of considerable size, planting the same to different kinds of vegetables, berries, etc., from which he made sales during the producing season. The plaintiff claims that his damages amounted to the sum of \$688.85.

The plaintiff testified as to the quantity and value of the various products destroyed by the lack of water. After testifying as to the various items or products destroyed, the witness stated that he gave the wholesale value. There does not appear in the record any testimony as to the cost of marketing. However, the various items set forth in the transcript, and testified to by the plaintiff, give a value considerably in excess of the damages allowed by the court, and therefore the court must have made some deductions on account of the cost of the harvesting and marketing. It does not appear that either plaintiff or appellants attempted to follow the rule approved in *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, in determining damages where growing crops have been destroyed either by flood waters or lack of water for irrigation. However, no objection was made by the appellants to the manner in which the

testimony set forth the damages suffered by the plaintiff. Without giving the quantity or value of the different products destroyed, we will list the different items, to wit: Pole beans; special pole beans; lima pole beans; yellow and red tomatoes; large red tomatoes; bush beans; long carrots; row of chards; row of salsify; three rows of gladiolas (460 feet in all); one 90-foot row of chrysanthemums; four 90-foot rows of raspberries; one 90-foot row of peppers; strawberries, 3 patches, one 40x40 feet, one 30x30 feet, and one 60x4 feet; patch of cantaloupes, 30x50 feet; patch of violets; destruction of lawn; young berry plants; loss of fall garden carrots, cabbages, beets, onions, etc.; cost of hauling water; loss of reseeding bulb seeds. Total \$688.85. The size of the garden did not cover more than possibly one-third of an acre, or perhaps a smaller portion, but the entire crop, according to the testimony in the record, and which justified the court in so finding, was lost by reason of the failure to furnish water.

While the value of the crop, as testified to by the plaintiff, appears to be somewhat excessive, we find nothing in the record and nothing has been pointed out which would justify this court in holding that the trial court erred in fixing the plaintiff's damages at the sum of \$450.

[8] Complaint is made that the court erred in sustaining objections to certain portions of the testimony of the witness Donner, sworn on behalf of the appellants. That the court did not err is fully shown by quoting the testimony:

"Q. How long have you been raising vegetables? A. Thirteen years.

"Q. Have you been down there at Mr. Schultz's on the lakeshore? A. I have.

"Q. You have seen where his vegetable garden is there? A. Yes.

"Q. You have heard him testify yesterday, he estimated, because he did not get water on that land, he lost \$688.85. Was that possible?" (Answer not allowed.)

"Q. You heard him testify as to what vegetables he had on that particular property, did you not? A. Yes.

"Q. And after hearing that testimony, what would you say would be the estimate of the money that could be taken off that particular land?" (Objection to the question was sustained.)

In addition to home use, the plaintiff sold the products of his garden at the store cen-

ducted by him in the town of Lakeport. None of the testimony sought to be introduced by the appellants tended to show the quantity of vegetable and berry products that could be produced from a garden belonging to the plaintiff, market value, or cost of production. It was all along the line similar to the questions which we have set forth herein, from which of course the trial court could draw no conclusions.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

3 Cal.2d 478

KAYSER v. GORMAN et al.
S. F. 15051.

Supreme Court of California.
April 30, 1935.

Rehearing Denied May 27, 1935.

1. Partnership ⇨325(1)

In action against receiver of partnership by bank seeking to hold partnership liable on guaranty of note executed by member of partnership in his individual name, burden was on bank to prove that act was that of partnership and not of partner individually.

2. Contracts ⇨99(1)

Presumption is that written instrument deliberately executed expresses intention of parties.

3. Contracts ⇨99(1)

Presumption that a written instrument deliberately executed expresses intention of parties should prevail unless evidence offered to show contrary contention is clear and convincing.

4. Contracts ⇨100

Whether presumption that written instrument deliberately executed expresses intention of parties has been overcome by evidence is for trial court to determine.

5. Guaranty ⇨91

In action against receiver of partnership by bank seeking to hold partnership liable on guaranty of note executed by partner in his individual name, evidence *held* to sustain finding that note was not guaranteed by or on behalf of or as act of partnership, but was guaranteed by partner individually.

6. Appeal and error ⇨1058(2)

Any error of trial court in sustaining objections to questions asked witness *held* not to require reversal where witness subsequently testified to same matters involved in questions.

7. Interest ⇨40

Allowance of interest to receiver of partnership on amount recovered by receiver on counterclaim against bank from date on which bank filed its claim with receiver *held* not error, even though bank had never contracted to pay interest, since interest awarded was by virtue of statute and not contract (Civ. Code, §§ 3287, 3302).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Petition by the Bank of America National Trust & Savings Association for allowance of claim filed with W. E. Hills, who had been appointed as receiver of a partnership in an action by Elmer Prichard Kayser against Alfred Walter Gorman and others for dissolution of the partnership. W. E. Hills, as receiver, etc., filed a counterclaim against the Bank of America National Trust & Savings Association and, from a judgment that the bank take nothing and that the receiver recover on his counterclaim, the Bank of America National Trust & Savings Association appeals.

Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

Albert A. Rosenshine, J. H. Hoffman, and Rosenshine, Hoffman, Davis & Martin, all of San Francisco, for respondent.

CURTIS, Justice.

In this action, entitled Elmer Prichard Kayser v. Alfred Walter Gorman et al., instituted for the purpose of dissolving a partnership consisting of said plaintiff, said defendant Alfred Walter Gorman and the ten other defendants, under the firm name of Gorman, Kayser & Co., for the appointment of a receiver and for the distribution of the assets of said copartnership to persons legally entitled thereto, respondent, W. E. Hills, was appointed receiver of the assets of said partnership. The appellant, the Bank of America National Trust & Savings Association, presented its claim against said partnership to said receiver, which claim said receiver refused to allow. Thereupon said claimant filed its petition in the Superior Court of the City and County of San Francisco, praying for the allowance of said claim. The receiver filed an answer to said petition, in which he denied that said partnership was liable to said bank in the amount claimed, or in any other amount. With his answer he filed a counterclaim against said bank for the sum of \$14,943.69. There were afterwards filed by the bank an amendment to its petition and by the receiver an amendment and supplement to answer to the petition. The action was tried by the court without a jury. Upon practically all the controversial issues made by the pleadings the trial court found in favor of the receiver, and against the bank, and rendered judgment that the bank take nothing by its petition, and that the receiver recover on its counterclaim against the bank

the sum of \$14,943.69, together with interest on said sum from June 29, 1931, at the legal rate of interest, and for his costs. From this judgment, the bank has appealed.

In July, 1926, Gorman, Kayser & Co. was organized as a corporation to deal in bonds and investment securities. Its founder was A. W. Gorman, a man then of large means who became its president and general manager. E. P. Kayser was vice president, and his duties were largely those of an assistant in carrying out the policies adopted and approved by its president. Gorman owned 48 per cent. of the stock of the corporation, and the balance was divided between some twelve to fifteen other stockholders, no one of whom owned any considerable number of shares. Some months prior to November 1, 1928, it was decided to change from the original business of the corporation to the stock brokerage business, and to become members of the San Francisco Stock Exchange and the San Francisco Curb Exchange. As a corporation was not eligible to membership in those organizations, it was decided to disincorporate the corporation and form a copartnership. This plan was carried into effect. The corporation was disincorporated, and a partnership was formed consisting of Gorman, Kayser, and eight other stockholders, together with two other persons who had not been stockholders in the corporation. Gorman had a 47.5 per cent. interest in the partnership, and the others lesser and various interests, no one of whom held more than a 7 per cent. interest in said partnership. The partnership retained the same name of the dissolved corporation. This partnership was evidenced by articles of copartnership of date October 31, 1928, and the court found that said partnership was formed on that date. In order to make this change from the corporation to the partnership structure, it was thought necessary to obtain the consent of all the stockholders of the corporation to secure the surrender of the shares of stock of each and every such stockholder. The stock of a number of the smaller stockholders who did not become members of the partnership was purchased from them. However, the stock of Charles J. Ebner, Jr., amounting to 150 shares, had been pledged by Ebner to the United Security Bank & Trust Company, together with certain stock of the Continental Investment Company, owned by Ebner, to secure the payment of a promissory note for \$23,000, which sum Ebner had borrowed of said bank to purchase the stock of the Continental Investment Company. Ebner could not pay his note and the bank refused to sur-

render his Gorman, Kayser & Co. stock unless he paid his note or gave the bank additional security. Ebner desired to retain his interest in the business after the reorganization. For the purpose of securing a release of the stock, Gorman guaranteed the payment of Ebner's note to the United Security Bank & Trust Company by signing his name to a written guarantee of payment on the reverse side of the note. The stock was turned into the corporation and Ebner received his proportionate interest in the partnership, as represented by the value of this stock. Some time after its formation as a partnership, Gorman, Kayser & Co. became financially involved and as a result the proceedings referred to at the inception of this opinion were instituted, in which said receiver was appointed to liquidate the assets of said firm. The United Security Bank & Trust Company became merged in the Bank of America National Trust & Savings Association, and the Ebner note became the property of said last-named association. We will refer hereafter to the owner and holder of said note as the bank or the appellant, whether said note was at the time held by the original payee, or its subsequent owner and holder after said merger.

The claim of the bank against the receiver is based upon the written guaranty of Gorman to pay the note for \$23,000 executed by Ebner in favor of the bank. The position of the bank may be best understood from the following allegation of its petition, "that said note was indorsed by and on behalf of, and as the act of, the partnership by causing, and that it did cause, the name of defendant Alfred Walter Gorman to be written on the reverse side thereof for and on behalf of said partnership; that said indorsement was as follows: 'A. W. Gorman. For value received I hereby guarantee payment of the within obligation * * * A. W. Gorman.'"

Upon the issue presented by a denial of this allegation by the respondent receiver, the trial court found "that said partnership of Gorman, Kayser & Co. never indorsed or guaranteed the promissory note set forth in the petition, and that said note was never indorsed or guaranteed by or on behalf of, or as the act of said partnership, and that said partnership never caused the name of defendant Alfred Walter Gorman to be written on the reverse side of said note for or on behalf of said partnership; but on the contrary, the said note was indorsed and guaranteed by and in the name of A. W. Gorman as the personal and individual act of said defendant Alfred Walter Gorman."

The appellant bank challenges the sufficiency of the evidence to support this finding, and advances the theory in support of its contention that in order for said partnership to be formed, it was necessary that the corporation be dissolved and that the dissolution of the corporation could not be effected and membership secured in the San Francisco Stock Exchange unless all of the stock was surrendered, and to accomplish this end Gorman guaranteed the note, and that he did so in the interest of and on behalf of the partnership and as the act and deed of the partnership. It is not contended that at the time the guaranty was signed, there was any representation made to the bank or to any of its officials by Ebner, or Gorman, or by anybody connected either with the corporation or with the partnership that Gorman was acting for the partnership or was attempting to bind the partnership by his personal indorsement of the note. Neither is it contended that there was any meeting of the membership of the proposed partnership, or any general understanding or agreement among all its members, that Gorman should guaranty said note and that his guaranty was for the benefit of the partnership and that it should be binding upon the partnership, or upon its property.

[1] In support of its contention that Gorman guaranteed said note for and on behalf of the partnership and as the act and deed of the partnership, the appellant relies on the evidence given by four witnesses. These witnesses are Charles J. Ebner, Jr., H. F. Sleeper, A. W. Gorman, and John T. Irilarry, the latter the vice president and manager of the bank at the time the guaranty was made, and who had charge of the matter at that time for the bank. We find nothing in the testimony of Ebner or Irilarry which in any way tends to prove that Gorman was acting for the partnership in guaranteeing the note. All that the witness H. F. Sleeper testified to was that Gorman told him that he was forced to indorse the note and that the obligation was one for the firm. Sleeper was a member of the corporation, and continued with the organization after it became a partnership. He testified that he had conversations with Gorman both before and after the note was indorsed, and that "Mr. Gorman ran the firm; he indorsed the note; and that is all there is to it." In answer to a question on direct examination as to whether he or anybody else made any request or recommendation to Gorman to indorse the note, he stated, "No, I didn't suggest that he indorse the note." On cross-examination Sleeper stated,

"It was up to him (Gorman) whether he signed the note or not; he ran the firm." The testimony of A. W. Gorman goes into all the details of the reorganization of the business structure from a corporation into a partnership. He testified that at a meeting of their stockholders of the corporation, at which were present all stockholders who afterwards became members of the partnership, the plan of converting the corporation into a partnership was discussed and decided upon, and he and E. P. Kayser were directed to take steps for the conversion of the corporation into a partnership. This was held some sixty days prior to October 31, 1928, the date the articles of partnership were executed. No claim is made that Gorman was requested to guarantee said note, or that said note or the guaranteeing thereof was mentioned or referred to in any manner at said meeting. The substance of his further testimony is that they were able to get control of all the stock except the 150 shares owned by C. J. Ebner, which was pledged to the bank to secure Ebner's note for \$23,000, and that much against his will and better judgment he finally agreed to guarantee the payment of his note, in order to release the 150 shares of stock so that the plan to form the partnership could be carried out. We might concede that his testimony, if accepted by the trial court, would have been sufficient to support a finding that the guaranty was made solely for the benefit of his associates in order for them to reorganize themselves into a partnership. Evidently the trial court did not accept his version of the transaction. It was for the trial court to weigh his testimony and pass upon its value as evidence. There were a number of reasons why the trial court was justified in scrutinizing his evidence with care, and if in its judgment it found his account of the transaction to be lacking in evidentiary value, to reject it. In the first place, Gorman was an interested party in this proceeding. Should he succeed in convincing the court that he was acting simply as the agent of an undisclosed principal, and thereby fix the liability for the payment of the note on to his principal, the partnership, instead of himself, he would reap a most material advantage. Then again, Gorman's testimony contained many inconsistent statements which greatly weaken it as a whole. We will mention but one of these statements. While, in his general statement, he insisted that he guaranteed the note for the partnership, and not for himself personally, yet in giving an account of how he happened to guarantee the note he gives the impression that he was doing it for

the express purpose of helping out Ebner and keeping him in their organization, and not for the benefit of the partnership. His testimony on this phase of the case is as follows: "Ebner came to me because Kayser spoke to him and Ebner spoke to me, and he was just checkmated; he said he did not know what to do. He wanted to stay in the partnership, and he didn't want to take the proceeds from his corporation stock to pay for that note. They needed additional collateral, and not having that collateral, they broached the subject of my indorsing a note for Ebner in order to keep that—to keep his interest in the business intact." The trial judge was justified in drawing from this statement the inference that Gorman acted in this matter as a favor to Ebner and not on behalf of the plaintiff. It is true, in other parts of his testimony he denies that he was assisting Ebner, or had any intention of doing so, but the fact remains that his guaranty of the note was a most material benefit to Ebner, and his denial that it was done for that purpose cannot efface from the record the inference from his testimony just quoted. As a third and final reason which we will cite why the trial judge might well have looked with distrust upon the testimony of Gorman that in guaranteeing Ebner's note he was acting for the partnership and not for himself personally, might be mentioned the course of conduct pursued by the partnership after it began active business operations. As we have seen, Gorman's interest in the partnership far exceeded the interest of any of the other partners. He dominated the partnership, as he had the corporation before, and dictated its policy in all important matters. The evidence shows that the books of the partnership never showed the note of Ebner as a liability of the partnership, either direct or contingent. In all the financial statements made out by the partnership for the stock exchange and for the appellant bank, this obligation on the Ebner note was never listed, nor shown as a liability of the partnership. While it may be true that the omission of this liability from the financial statement and books of the partnership may not be evidence of the nonexistence of said liability, yet when we consider this omission in connection with the testimony of Gorman, who directed the preparation of these financial statements and the manner in which the books of the company were kept, it becomes quite a material factor in the case. There is a direct conflict, on the one hand, between Gorman's testimony that the partnership was liable on the Ebner note, and, on the other

hand, the books of the partnership which were kept as directed by Gorman, and the financial statements prepared under his direction, each of which showed no such liability. These and other reasons not necessary to mention may well have impelled the trial court to reject in toto the testimony of Gorman as to the reasons which prompted him to guarantee Ebner's note. The burden of proof was upon the appellant and without some substantial testimony in its behalf the trial court was in duty bound to deny it any relief. Practically the only testimony which would tend to prove that the partnership was bound by Gorman's guaranty was the evidence given by him, which the trial court was justified in rejecting, and which the findings show the court did reject.

[2-4] In support of the finding of the trial court that the guaranty of Gorman was his individual act, and not the act of the partnership, the respondent relies upon the written instrument signed by Gorman in his individual name. It contains his individual promise, "I hereby guarantee the payment of the within obligation," and is signed, "A. W. Gorman." The presumption is that a written instrument deliberately executed expresses the intention of the parties. *Mahoney v. Bostwick*, 96 Cal. 53, 58, 30 P. 1020, 31 Am. St. Rep. 175; *Welk v. Conner*, 102 Cal. App. 286, 289, 282 P. 963. This presumption should prevail unless the evidence offered to show a contrary contention is clear and convincing. *Mahoney v. Bostwick*, supra. It is for the trial court to determine if this presumption has been overcome. 2 Cal. Jur. 933, 934. Evidently the trial court was not of the opinion that this presumption had been overcome by the evidence of the appellant, and as this question was for the determination of the trial court, its decision must be considered final.

There was also the testimony of Ebner and Irilarry. Instead of the testimony of these witnesses being favorable to the bank, we think, when taken as a whole, it supports the contention of the respondent. Ebner gave in detail an account of all of the transactions leading up to the signing of the note. His associates wanted all the stock in the corporation turned in to the corporation before they could form the partnership. He was unable to deliver his stock because of its pledge to the bank. He talked with Mr. Irilarry of the bank about getting an indorser on his note and the latter informed him that it would be satisfactory. He talked with Mr. Sleeper, who said they would have to get Mr. Gorman

to indorse for Ebner. Ebner later talked with Mr. Gorman about indorsing for him, and Mr. Gorman asked whether the bank would be satisfied with his indorsement, and Ebner replied that he would go over and see. He then interviewed Mr. Irilarry again and the latter informed him that Mr. Gorman's indorsement would be satisfactory. The final agreement of Gorman to indorse the note was secured in an interview between Ebner, Sleeper, and Gorman. Sleeper said to Gorman, "Al, you will have to indorse this note for Charley to get the note out of the bank." Gorman said he did not want to indorse the note and would not. Sleeper said he would have to do so "or we won't be able to get the stock out," and Gorman replied, "Bring over the note and I will indorse it." Irilarry testified that when Ebner came to him regarding Gorman indorsing the note he said, "Jack, Al will indorse the note, will you take his indorsement and release the stock?" to which he replied, "I will, and subsequently Mr. Gorman came into the bank and indorsed the note, and we released the stock." In all these conversations and negotiations as given by these witnesses, Ebner and Irilarry, not one word was said by any of them or by anybody else that Gorman, in guaranteeing the note, was acting for the partnership, or that the liability thus incurred was a liability of the partnership. Irilarry, who represented the bank in all of those negotiations, testified, "The mere fact that Gorman was going to indorse the note was sufficient for me. I didn't give a whoop whether it was for the firm or who it was for; I knew he had money in the firm; I knew he had outside assets."

[5] It is unnecessary to prolong this discussion of the evidence, as in our opinion there can be no question of its sufficiency to support the court's finding that said note was never indorsed or guaranteed by or on behalf of, or as the act of the partnership, but that "said note was indorsed and guaranteed by and in the name of A. W. Gorman as the personal and individual act of said defendant Alfred Walter Gorman."

In view of the conclusion just stated, it is not material whether Gorman was authorized by his associates to guarantee said note for the partnership. Upon this question there is a conflict in the evidence which, were we called upon to decide it, would render it obligatory on our part to sustain the finding of the trial court that no such authority was ever given Gorman.

Considerable discussion is to be found in the briefs on file regarding the exact date when the partnership was formed, the bank claiming that the partnership was transacting business the date the note was indorsed, while the respondent contends that it was not formed until October 31st, which was three days after Gorman indorsed the note. The court found that the latter date marked the time when the partnership was formed. The articles of partnership bore that date and there was other evidence indicating that October 31st was the correct date, sufficient in our opinion to sustain the finding of the trial court.

[6] The further contention is made that the trial court erred in sustaining the objection of respondent to certain questions asked A. W. Gorman as to his purpose or object in guaranteeing the Ebner note. Whether the court erred in sustaining this objection, we think, is immaterial, as this witness subsequently testified to the very same matters involved in the questions to which objections were sustained. It is true that the court criticized the manner in which this testimony was given, but we are not convinced that the trial court failed to give it the weight to which it was entitled, notwithstanding the irregular manner in which it was injected into the record.

[7] Finally the appellant contends that the trial court erred in allowing the respondent interest on the amount of his counterclaim from June 29, 1931, the date on which the bank filed its claim with said receiver. It is contended that the receiver is not entitled to recover interest as the bank never contracted to pay interest. The interest awarded was by virtue of the statute and no express contract was necessary. Civ. Code, §§ 3302, 3287. The amount due on the counterclaim was fixed at that date, and under the sections cited the receiver was entitled to legal interest on the amount unpaid. Appellant cites and relies upon Bank of America National Trust & Savings Ass'n v. California Savings & Commercial Bank, 218 Cal. 261, 22 P.(2d) 704. That motion was to recover a special deposit from a bank in liquidation, and it was held, in view of these facts, no interest should be allowed, as its payment would reduce the amount available to pay general depositors. The case has no application to any question involved in the instant action. The further objections to that part of the judgment allowing respondent interest on the amount of interest are so lacking in

merit that no useful purpose would be gained in their discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.



3 Cal.2d 606

**CALIFORNIA CANNING MACHINERY CO.
v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.
L. A. 15144.**

Supreme Court of California.
May 6, 1935.

1. Continuance ☞10

Trial court of its own motion can order continuance of case pending determination of appeal from previous action between same parties involving same agreement, or can otherwise exercise its inherent discretion in aid of orderly procedure and prevention of multiplicity of suits.

2. Trial ☞14

Ordering action for declaratory relief off calendar pending determination of appeal from previous action between same parties involving same agreement did not eliminate action for declaratory relief, but merely postponed its final determination.

3. Trial ☞14

Ordering action for declaratory relief off calendar pending determination of appeal from previous action between same parties involving same agreement *held* not abuse of discretion.

4. Appeal and error ☞964

Appellate court will not disturb action of trial court in ordering cause off calendar except for abuse of discretion.

In Bank.

Proceedings by the California Canning Machinery Company against the Superior Court in and for Los Angeles County and another, for a writ of mandate to compel the vacation of an order removing an action from the trial calendar and the trial of such action.

Writ denied.

Prior opinion, 37 P.(2d) 845.

Charles L. Nichols, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

THOMPSON, Justice.

The Benton Ballou Company, Limited, brought an action against the California Canning Machinery Company, and other defendants, for injunctive relief due to a controversy arising over the interpretation of a license agreement between the plaintiff and the defendant corporation for the use and manufacture of peach-pitting machines, the patents covering which are owned by the California Canning Machinery Company. The point involved is whether the Canning Machinery Company had reserved to itself a joint right to manufacture the pitting machines over and above the 700 then in existence, and as to whether Benton Ballou Company, Limited, had been granted the exclusive right to sublicense others to use the 700 machines then in existence and a right, not exclusive, to manufacture additional machines embodying the inventions covered by patents, and to sublicense others to use the machines so manufactured. By answer, counterclaim, and cross-complaint of the canning company substantially the same issues were raised, and the canning company further sought to have it adjudged that the agreement had been rescinded. Upon the trial the judgment went in favor of Benton Ballou Company, decreeing that the agreement was in effect, and enjoining the canning company from interfering in any manner with the licensees of Benton Ballou company, or attempting to remove any peach-pitting machines. The action was dismissed as against the personal defendants. The canning company appealed, and the appeal is now pending in the District Court of Appeal.

On March 16, 1934, the canning company filed what it denominated "Complaint for Declaratory Relief and Other Relief," in which it sought to have it decreed that the license or contract agreement was exclusive only as to certain machines, that the defendants should be compelled to exploit and promote said machines and keep the same in use, and that, if such provisions are not expressed in the agreement, the contract be reformed to so provide, and to otherwise clarify the obligations and rights of the parties.

The defendants (plaintiffs in the action on appeal) answered and included, among other

defenses, a plea in abatement, referring to the prior action as having been prosecuted to judgment and as involving practically the same issues, the appeal from which is still pending. A demurrer directed solely to the plea in abatement was sustained. Benton Ballou Company did not amend within the time allowed, and at the time the case was called for trial it filed objections to proceeding therewith on the ground that the issues between the parties had been adjudicated and the judgment appealed from, and that the trial of the second case would involve issues common to both and asked that the trial of the second or declaratory relief case be continued pending final determination. The trial court put the case off the calendar.

The petitioner herein seeks the writ of mandate compelling the trial court to hear and determine the action for declaratory relief at once.

[1-4] The canning company argues that the parties and issues are not identical within the requirements for pleas in abatement, but it very clearly appears from the petition that the previous action was between the same parties as in the second case; that there were other defendants, all of whom had been dismissed by the judgment of the court; that the same agreement was involved as interpreted and adjudicated in the first case, now on appeal.

This alone would have been sufficient for the trial court of its own motion to have continued the case, *Brown v. Campbell*, 100 Cal. 635, 647, 35 P. 433, 38 Am. St. Rep. 314; *Lincoln v. Superior Court*, 95 Cal. App. 35, 41, 271 P. 1107; *Robinson v. El Centro Grain Co.*, 133 Cal. App. 567, 573, 24 P.(2d) 554, or otherwise to have exercised its inherent discretion in a matter within its jurisdiction in aid of orderly procedure and prevention of multiplicity of suits, *Houghton v. Superior Court*, 187 Cal. 661, 665, 203 P. 765; *Smith v. Jones*, 128 Cal. 14, 15, 60 P. 466; *Pellissier v. Title Guarantee, etc., Co.*, 208 Cal. 172, 184, 280 P. 947.

The complaint for an adjudication of declaratory rights was not eliminated by putting off the calendar, as counsel argue, but merely postponed pending final determination on an action involving at least some of the issues. It does not appear that the respondent superior court abused its discretion, without which the appellate court is not warranted in disturbing its action by the writ of mandamus. *Lynch v. Superior Court*, 150 Cal. 123, 88 P. 708; *Lindsay Strathmore Irriga-*

tion District v. Superior Court, 121 Cal. App. 606, 9 P.(2d) 579; *Lorraine v. McComb*, 220 Cal. 753, 32 P.(2d) 960.

The application for a peremptory writ of mandamus is denied.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.



6 Cal.App.2d 626

WORK v. CENTRAL UNION HIGH SCHOOL
DIST. et al.
Civ. 1351.

District Court of Appeal, Fourth District.
California.

May 6, 1935.

Hearing Denied by Supreme Court
July 5, 1935.

1. Schools and school districts ⇨133

Under School Code section providing that no person employed in administrative or supervisory position shall be classified as permanently employed other than as classroom teacher, petitioner's service as high school principal for five years did not entitle him to tenure as a classroom teacher, since under such section person employed in administrative position is classifiable as classroom teacher only when classroom teaching actually performed entitles him to such classification (School Code, § 5.502, as added by St. 1931, p. 1395, § 4).

2. Schools and school districts ⇨133

High school principal acting as such for five years held not to have acquired permanent status as classroom teacher through teaching one class a day throughout first three years of his employment as principal (School Code, § 5.502, as added by St. 1931, p. 1395, § 4).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Mandamus proceeding by Cree T. Work against the Central Union High School District and others. Judgment for petitioner, and respondents appeal.

Reversed.

Glenn M. De Vore and Dan F. Conway, Dist. Attys., and Arthur C. Shepard, W. C. Tupper, and Conley, Conley & Conley, all of Fresno, for appellants.

David E. Peckinpah and Harold M. Child, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is a mandamus proceeding brought to compel the respondent district to "reinstate and restore petitioner to his position as a permanent teacher in said High School and to pay him such salary for such services as he may be regularly entitled to."

The petition alleged that the petitioner was the holder of a legal high school certificate; that he was employed on July 21, 1928, as one of the regular classroom teachers of said high school for the school year 1928-1929; that he successfully taught as one of the classroom teachers throughout that school year; that he was re-employed and successfully taught as such a teacher during each of the succeeding two years; that at the end of the school year 1930-1931 he had been successfully employed for three consecutive school years in such position as a classroom teacher in said high school; that thereupon he became entitled to classification as a permanent employee of said district and was so classified; that thereafter he continued to be an active permanent employee of said district, acting as principal of said high school throughout the school years 1931-1932 and 1932-1933; and that about the end of the school year of 1932-1933 he was dismissed and discharged as teacher and principal in said high school without charges of any nature being preferred against him.

An answer was filed denying the allegations of the petition and affirmatively alleging that from the school year 1928-1929 to and including the school year 1932-1933, the petitioner was employed from year to year as principal of this high school; that the board at no time voted to employ the petitioner as a teacher, nor was he at any time given a contract as a teacher; that during the school years 1928-1929, 1929-1930, and 1930-1931, the petitioner voluntarily offered to and did teach one class occupying one-eighth of the school day, which class was taught by him entirely as a voluntary act and without any contract or compensation therefor; and that throughout the school years 1931-1932 and 1932-1933 petitioner did no teaching whatever, his time being completely and fully occupied with his administrative duties as principal of said high school.

The action was submitted to the trial court upon the following stipulated facts: That the petitioner was employed by the respondent board as shown by the contracts and minutes

of the board covering the five years, copies of which were attached to the stipulation, and that there are no other records or documents pertaining to said employment; that at the time petitioner was employed an oral request was made by members of the board that he teach one class a day in addition to his duties as principal; that he agreed to this request but no formal resolution or order was ever made; that during the school years 1928-1929, 1929-1930, and 1930-1931, in accordance with this understanding, he taught as a classroom teacher for one period of each day; that during all of said time there were eight teaching periods in the day in said school; that the total duration of petitioner's employment in said district was a period of five years; that at the meeting of the board when petitioner was employed for his fourth year an informal discussion was had between him and the board during which it was decided that his duties as principal had so increased as to render his further teaching of a class impracticable; that no formal action was taken thereon but in conformance with said discussion and resultant understanding the petitioner did not thereafter perform any regular service as a classroom teacher; that the school enrollment increased each year during petitioner's employment, being 295 for the first year and 418 for the fifth year; that at the end of the fifth year of employment the respondents notified the petitioner that his services would no longer be required; that the petitioner thereupon notified the respondents that he desired to be retained as a classroom teacher; and that the petitioner presented himself on the opening of the next school year and requested an assignment as a classroom teacher, which request was refused.

Attached to the stipulation are copies of the contracts for each of the five years with the minutes of the board showing what was done with respect to employing the petitioner for each of these years. The minutes refer only to his employment as principal, and each of the five contracts recites that he had been elected as principal of said high school.

The trial court made no findings of fact, but entered judgment in favor of the petitioner and issued a peremptory writ of mandate commanding the respondents to reinstate and restore the petitioner to the position of a full-time permanent classroom teacher in said high school and to make provision for the payment of his salary, as provided by law, from the 25th day of September, 1933. From the judgment so entered, the respond-

ents took this appeal. For convenience, the parties will be herein referred to as petitioner and respondents, respectively.

While the petitioner concedes that under the provisions of the School Code he is not entitled to tenure as a principal, his main contention is that section 5.502 of that Code entitles such a principal, after more than three years' service, to permanent classification as a schoolroom teacher regardless of whether or not he has done any classroom teaching as a part of his work.

A state-wide teachers' tenure was first provided in 1921 by amendment to section 1609 of the Political Code (St. 1921, p. 1663). In *Bland v. Board of Trustees*, 67 Cal. App. 784, 228 P. 395, after pointing out that in many of the smaller schools one of the teachers is designated as the principal thereof and that the act then in force disclosed an intent on the part of the Legislature to draw a distinction between a principal and a principal-teacher, it was held that the act gave tenure to such a teacher but not to a principal who is not a teaching principal. In 1927 (St. 1927, p. 1913), this section was amended by changing the clause relating to dismissals so as to include "permanent employees in positions requiring certification qualifications." At the same time the section was so amended as to provide that "no person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee other than as a classroom teacher." In *Anderson v. Board of Education*, 126 Cal. App. 514, 15 P.(2d) 774, 775, 16 P.(2d) 272, a case involving a school principal in the city of San Francisco under a different statute and a charter provision, the court said: "It may have been contemplated that in many of the smaller school districts it might not be practicable to place principals in this classification, but that, in the larger districts which were coterminous with the boundaries of chartered cities, permanency in the employment of school principals would be desirable." These provisions of section 1609 of the Political Code were carried over into the School Code which was adopted in 1929. Section 5.501 of this Code (as added by St. 1931, p. 1394, § 4) provides that every employee of a school district having an average daily attendance of less than 850 pupils, who has completed three consecutive school years in a position requiring certification qualifications and who is re-elected for the next succeeding school year to such a position, may be classified by the governing board of the

district as a permanent employee. Section 5.502 (as added by St. 1931, p. 1395, § 4) provides that no person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee other than as a classroom teacher. By amendment in 1931 it was provided that this section shall not apply in certain cases in a city or city and county where the charter thereof provides otherwise.

[1] The petitioner contends that since he was employed for more than three years in a position requiring certification classifications he became a permanent employee of the district. He argues that while section 5.502 of this Code prevents his being given a permanent status as principal, it must be interpreted as requiring that he be classified as a permanent classroom teacher. We think the whole history of this legislation indicates a contrary intention on the part of the Legislature. It has frequently been held that the right of tenure accrues from and is based upon the kind of work done during the probationary period. In *Cullen v. Board of Education*, 126 Cal. App. 510, 15 P.(2d) 227, 228, 16 P.(2d) 272, the court said: "This right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a rank and grade equivalent to that occupied for the probationary period and to which the teacher has thus become 'elected' under the statute." The distinction between a principal and a teacher is a natural one and there are good reasons why a principal who is not given tenure in that capacity should not be arbitrarily given tenure in the entirely different work of a classroom teacher. The qualities required for a good administrator may be and often are quite different from those required for a good teacher. A school board might well be allowed to pick out a good administrator, especially in a school of a fair size, without being compelled to keep him indefinitely as a classroom teacher when his services were no longer desired as a principal. We have no doubt the Legislature recognized this distinction and that in providing that a person employed in an administrative or supervisory capacity should not be classified as a permanent employee other than as a classroom teacher, it intended only to protect the rights of a teacher who had incidentally acted as a principal and to enable such a teacher to retain his rights as a teacher and to be classified under his teach-

ing record and in accordance therewith, and not to provide that a person exercising administrative functions only must be permanently retained in an entirely different capacity. We think this section means that a person employed in an administrative position may be classified as a classroom teacher only when the same is justified by the work upon which the classification is based or, in other words, when classroom teaching actually performed entitles him to such classification. In our opinion, this section was intended to carry out the former policy of not giving tenure to principals, outside of certain cities, and the same was designed to maintain the distinction between principals and teacher-principals and to protect the latter in the rights which they have acquired as classroom teachers. We therefore hold that the petitioner is not entitled to tenure as a classroom teacher because of his five-year service as a principal in the respondent district.

[2] The next question is whether the petitioner acquired a permanent status through teaching one class a day throughout the first three years of his employment by the respondent board. The petition alleges that he was employed as a classroom teacher during the first three years; that having been successfully employed as such for that time he became entitled to classification as a permanent employee; that he was so classified and that he acted as principal of said high school during the next two years. There is no proof that he was classified as a permanent teacher by the board at the end of the first three years. It fully appears that when he was re-employed for the fourth year it was not contemplated that he should continue his part-time teaching, and that it was expressly agreed otherwise.

The written contracts show that he was employed as a principal during the whole five years. Some reliance is placed upon the fact that the contract for the fifth year referred to him as a permanent employee. It would appear that this was a mistake upon the part of the clerk of the board, as the minutes of the board show no such classification, and the same statement appears in the first written contract entered into in 1928 before the petitioner had performed any service at all. In any event, this statement in the contract for the fifth year could relate only to petitioner's work as a principal and, if we are correct in the views above expressed, the board had no power to classify

the petitioner as a permanent employee by reason of that work.

Assuming that the petitioner might have acquired a permanent status as a classroom teacher, at least so far as one period a day is concerned, had he continued to teach such a period for more than three years, a different situation is here presented. When he was re-elected principal for the fourth year, it was agreed that he should devote his entire time to his work as principal and should do no further teaching except in emergency cases. Pursuant to this agreement he discontinued his part-time teaching. Any permanent status as a classroom teacher could come only from classroom work carried on for three years and thereafter continued. By accepting employment as a principal only and by discontinuing his classroom service the petitioner lost any right to a permanent standing based upon a continuation of any teaching done during the probationary period. Under these circumstances, the teaching of one class a day for three years did not ripen into tenure even for that amount of work, much less for full-time employment as a schoolroom teacher.

Under the view we take of the main questions involved, it is not necessary to consider or decide the other questions raised.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.



7 Cal.App.2d 48

MOSHER v. HELFEND et al.

Civ. 9102.

District Court of Appeal, Second District,
Division 1, California.

May 16, 1935.

1. Partnership ☞121

Evidence held insufficient to sustain finding as to amount of loss sustained by partner, in partner's action to recover share of loss due from copartners.

2. Partnership ☞108

Remedy of one partner against another is in equity for dissolution and accounting where there has been no settlement or accounting, and one partner cannot sue another at law or recover damages for breach of partnership agreement.

3. Partnership ⇨120

Action by partner against copartners to recover proportionate share of loss sustained by plaintiff must be dismissed, in absence of allegation of dissolution of partnership or accounting, and action could not be treated as one for dissolution or accounting.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Will M. Mosher against R. M. Helfend and another. Judgment for plaintiff, and defendants appeal.

Reversed.

E. A. Kline, of Los Angeles, for appellants.

Lester E. Hardy and Bernard B. Laven, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

The litigants in this action formed a partnership in June of 1925 for the purpose of buying English walnuts in Rumania to sell in the United States, and contributed capital in varying amounts, agreeing, nevertheless, to divide the profits equally. Respondent contributed to the capital of the partnership substantially more than the combined contributions of the two others, who are the defendants and appellants herein. Respondent alleged, and the court found, that they also agreed that, in the event a loss were sustained, such loss would be shared equally by all three.

Respondent alleged, and the court found, although the record is absolutely devoid of any evidence to sustain said finding, that a loss of \$36,700.58 was suffered entirely by respondent. The record does show with overwhelming redundancy that the venture was a failure. An affidavit was introduced in evidence signed by respondent and appellant Helfend which avers under collective oath of the two mentioned that in the deal in question R. M. Helfend contributed \$5,000, Bernson \$2,000, and William Mosher \$36,000, and then proceeds to recite: "That said B. Berenson" (meaning appellant Bernson) "was a silent partner in said transaction and that said Berenson is indebted to said partnership for his portion of the loss, or profit incurred therein."

What the awesome significance of the said recital is, or what the affidavit or any part of it establishes, except that two of the partners went on record under oath as to the specific amounts that had been contribut-

ed by all three, is beyond the grasp of this court. With the exception of the affidavit mentioned (the value or relevancy of which we do not understand), there is not a scintilla of evidence, upon which the finding can be based, that the respondent suffered a loss of \$36,700.58.

The amended complaint, upon which the parties went to trial, is by respondent as plaintiff against his two partners as defendants. It alleges a partnership for the purpose and upon the terms mentioned. It alleges a loss suffered by plaintiff in the sum found, and then proceeds to recite that a suit was filed by respondent and appellant Helfend, "doing business as Helfend and Mosher, copartners," against the California Bank, a corporation, "to recover the said loss." Respondent at the trial testified that the suit was brought on behalf of the partnership with which we are concerned. The amended complaint further alleges that the suit was lost, whereupon demand was made upon appellants for one-third from each of said total loss, which demand was ignored by each and is unpaid. There is no allegation of the dissolution of the partnership or an accounting between the partners and no evidence of either. Bernson testified: "I didn't see Mr. Mosher since I have landed in New York up until I seen him in this court." The trial court found: "That upon ascertaining the loss sustained as hereinabove alleged, the aforesaid partners, believing that they had a good cause of action against the California Bank to recover all or a portion of that loss, agreed that an action should be brought against said bank to recover on such claim; such an action was thereafter brought * * * with the consent of the defendant B. Bernson * * * was prosecuted * * * with reasonable diligence to a final determination, which came about on April 30, 1931, when a judgment against the said partnership became final." And further: "That on said date, to-wit: April 30th, 1931, the winding up of the affairs of the partnership became complete and that at said time, the partnership loss in the walnut venture amounted to \$36,700.58."

[1] There is no evidence that the loss was ever ascertained. There is no evidence that Bernson consented to the bringing of suit against California Bank. There is no evidence that on the date of the final determination of the suit against the bank that "the winding up of the affairs of the partnership

became complete and that at said time the partnership loss in the walnut venture amounted to \$36,700.58."

The record shows that large quantities of nuts were purchased. Whether these were sold, what became of the proceeds of said sale, if sold, and, if unsold, who had the nuts, nowhere appears. We have scrutinized the entire reporter's transcript, which is both voluminous and redundant in testimony, with more care than respondent has any right to expect, since he has not deigned to file any sort of brief to assist us in an effort to discover evidence which will support the trial court's finding of a termination of the partnership and ascertainment of loss. The only bit of evidence we have been able to discover which even squints at those conclusions is that respondent and Helfend had a conversation in which it was determined that a lawsuit should be brought against the bank.

[2] It has been already noted that the complaint alleged neither a dissolution of the partnership nor a settlement of account. Even though the facts would support a finding of either, respondent at no time asked or received permission to amend his complaint pursuant to such assumed proof and the complaint has not been amended to allege either or both. Until there has been a settlement or accounting between the partners, the remedy of one against the other is in an equity action for dissolution and accounting, since, until an accounting is had, the various rights and liabilities of the parties cannot be determined. *Johnstone v. Morris*, 210 Cal. 580, 292 P. 970; *De Rigne v. Hart*, 94 Cal. App. 209, 270 P. 1013; *Dukes v. Kellogg*, 127 Cal. 563, 60 P. 44; *Singh v. Singh*, 74 Cal. App. 396, 400, 240 P. 1025; *Brown v. Barnett*, 111 Cal. App. 456, 295 P. 579.

In the case of *De Rigne v. Hart*, supra, the court says (94 Cal. App. 209, page 211, 270 P. 1013): " * * * Since it is a thoroughly established rule that partners cannot sue one another at law in respect to any of the business of the partnership, or to recover damages from the one or the other of the copartners for a breach of the partnership agreement. *Stone v. Fouse*, 3 Cal. 292, 294; *Russell v. Ford*, 2 Cal. 86; *Buckley v. Carlisle*, 2 Cal. 420; *Nugent v. Locke*, 4 Cal. 318, 320; *Pico v. Cuyas*, 47 Cal. 174; *Fisher v. Sweet*, 67 Cal. 228, 230, 7 P. 657; *Bremner v. Leavitt*, 109 Cal. 130, 41 P. 859; *Dukes v. Kellogg*, 127 Cal. 563, 60 P. 44; *Rassaert v. Mensch*, 17 Cal. App. 637, 120 P. 1072; *Street-*

er & Riddell, Inc., v. Bacon, 49 Cal. App. 327, 193 P. 285. As the foregoing cases say, the remedy is by a suit in equity for a dissolution of the partnership and an accounting and settlement of the partnership affairs."

[3] Neither can this action be treated as one for a dissolution and an accounting, since the pleadings tender no issues necessary to such a proceeding. In *Brown v. Barnett*, supra, this court, speaking with reference to such a situation, says (111 Cal. App. 456, page 457, 295 P. 579): "We are satisfied that the court erred in trying this action as an action for an accounting between partners when, as it plainly appears, the pleadings tendered no issue of that kind. 'It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts.'"

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



6 Cal.App.2d 760
PEOPLE v. JOHNSTON et al.
Cr. 2566.

District Court of Appeal, Second District,
Division 1, California.
April 29, 1935.

Appeal from Superior Court, Los Angeles
County; Charles S. Burnell, Judge.
Prior opinion, 36 P.(2d) 225.

Erwin P. Werner, Paul Friedman, and
McGee & Robnett, all of Los Angeles, for ap-
pellants.

U. S. Webb, Atty. Gen., and Frank Rich-
ards, Deputy Atty. Gen., for respondent.

PER CURIAM.

The same issues of law presented in these appeals were presented to and have been determined by the Supreme Court in *Ex parte Johnston and Pratt*, 43 P.(2d) 541. On the authority of that decision, the judgments herein are reversed, and the orders denying the motions of defendants for a new trial are reversed.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. DENNISON et al. *
Civ. 9978.

District Court of Appeal, Second District,
Division 2, California.

May 8, 1935.

Rehearing Granted June 6, 1935.

1. Constitutional law ☞107

One does not have vested right in statute of limitations until it has run in his favor, and, if cause of action is not barred, Legislature may shorten or extend time within which it may be asserted, provided adequate means of enforcing right still remain.

2. Statutes ☞263

Statutes will be construed to operate prospectively unless legislative intent to contrary is clearly expressed, especially where retroactive operation would impair obligation of contracts or interfere with vested rights.

3. Mortgages ☞561

Action brought March 20, 1934, to recover balance due on note after sale under trust deed on August 15, 1932, *held* not barred by statutes effective August 21, 1933, which limited actions to recover deficiencies to three months after foreclosure sale, since statutes were not retroactive (Code Civ. Proc. §§ 3, 339; § 337, as amended by St. 1933, p. 2116; § 580a, as added by St. 1933, p. 1672).

4. Mortgages ☞282(2)

Grantee assuming payment of mortgage or note secured by trust deed as part of purchase price becomes, as to mortgagor or trustor, principal debtor, and mortgagor or trustor becomes surety.

5. Mortgages ☞558

Liability of grantee who assumes payment of mortgage or trust deed must be enforced by foreclosure of mortgage or by sale under trust deed, and deficiency judgment may be entered against grantee only on security becoming exhausted (Code Civ. Proc. § 726).

6. Limitation of actions ☞27

Action against grantee who assumed payment of note secured by trust deed *held* not barred by two-year limitation as to actions on oral contracts, since grantee's liability was on trust deed obligation and not on promise to pay note secured by trust deed as new and independent agreement (Code Civ. Proc. §§ 337, 339, 726).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Bank of America National Trust & Savings Association against Marcus P. Dennison, also known as M. P. Dennison, and others. From judgments of dismissal, plaintiff appeals.

Reversed and remanded, with directions.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Scott McReynolds, of Los Angeles, and Samuel F. Hollins, of Fresno, for respondents.

STEPHENSON, Presiding Justice.

Plaintiff commenced this action on March 20, 1934, to recover the balance due on a promissory note, executed by respondents Marcus P. Dennison and Emma Dennison, on May 1, 1929, payable May 1, 1930, and which had been secured originally by a trust deed of certain real property and a chattel mortgage on certain personal property executed by the makers contemporaneously with the note, a sale having been had under such trust deed on August 15, 1932, and under the chattel mortgage on February 13, 1934. On February 3, 1931, respondent Mariana V. De Topete accepted a deed of the real property described in the trust deed and assumed and agreed to pay the above-described note secured thereby, and at the same time executed and delivered to M. P. Dennison a chattel mortgage on certain personal property as additional security for \$1,000 of the principal of said note, which chattel mortgage was, on July 20, 1932, assigned to appellant, and a sale was likewise had thereunder on February 13, 1934.

To the complaint setting forth the above facts, respondent Mariana V. De Topete, filed a separate demurrer alleging that the action was barred by the provisions of section 337 of the Code of Civil Procedure, as amended by St. 1933, p. 2116, more than three months having expired since the time of sale under the trust deed, and also that it was barred by the provisions of section 339 of the same Code. Respondents Marcus P. Dennison and Emma Dennison filed a separate demurrer, stating the general ground of failure to state sufficient facts, and the further ground that it appeared from the facts stated that the action was not commenced within the time limited by sections 337 and 581a of the Code of Civil Procedure. It is conceded

by the parties herein that section 580a as added by St. 1933, p. 1672, was intended instead of 581a, and we will consider this case on the assumption that section 580a was pleaded. Both demurrers were sustained without leave to amend, and separate judgments of dismissal were entered, from which this appeal is prosecuted.

Other than as affected by the plea of the statute of limitations, the complaint stated facts sufficient to constitute a cause of action against all the respondents. We must presume, therefore, that the demurrer of the Dennisons was sustained on the ground that the action was barred by the provisions of section 337 of the Code of Civil Procedure, as amended, and section 580a, as added by St. 1933, p. 1672.

At its session of 1933, the Legislature amended subdivision 1 of section 337, which fixed a 4-year limitation to bringing an action upon a contract, obligation, or liability founded upon an instrument in writing, by adding a proviso that the time within which any action may be brought for a money judgment for the balance due upon an obligation, for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of such power of sale, shall not extend beyond three months after the time of sale under such trust deed or mortgage. At the same session, section 580a was added as a new section to the Code of Civil Procedure, wherein it is provided, among other things, that any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of such power of sale, must be brought within three months of the time of sale under such trust deed or mortgage. Both these acts went into effect at the same date, August 21, 1933. As the sale under the trust deed herein occurred on August 15, 1932, nearly one year prior to such effective date, it is obvious that appellant could not comply with these new statutes after they became effective as laws.

[1, 2] It is recognized as a fixed rule that no one has a vested right in the statute of limitations until it has run in his favor, and that if a cause of action is not barred the Legislature may shorten or extend the time within which it may be asserted, provided, however, adequate means of enforcing the right still remain. *Kerckhoff-Cuzner Mill & Lum-*

ber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; *Doehla v. Phillips*, 151 Cal. 488, 91, P. 330; *Steinbauer v. Bondesen*, 125 Cal. App. 419, 14 P.(2d) 106. By section 3 of the Code of Civil Procedure it is provided that no part of that Code is retroactive, unless expressly so declared. "It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. * * * The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights." *Jones v. Union Oil Co.*, 218 Cal. 775, 25 P.(2d) 5, 6. "It is not disputed that the law of the forum can regulate the remedy, which, generally speaking, forms no part of the contract, and thus is not within the constitutional interdict. But it is just as well settled that the Legislature has no right so to regulate the remedy as that it shall destroy the contract by denying all means of enforcement. A right without a remedy is, practically, no obligation at all. A contract is just as much impaired by a prohibition to sue upon it, as it is by direct legislative action declaring it void. It is the same thing for the Legislature to say that a promissory note, now due and collectable, shall not be sued on if it has been due for a year, as to say that all promissory notes overdue that length of time, shall be void." *Scarborough v. Dugan*, 10 Cal. 305. In the case last cited, it was held that an amendment to the former statute of limitations, which provided that actions on any judgment, contract, obligation, or liability, for the payment of money or damages obtained, executed, or made out of this state, could only be commenced within five years from the time the action has accrued, whereby the period was reduced to two years, could only be construed to apply to judgments not in esse at the time of the passage of the amendatory act, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the former act. In *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, 49, the court had under consideration a motion to dismiss an appeal which raised the question of the effect of an amendment of section 939 of the Code of Civil Procedure regulating time for appeal from judgments of the superior court. The amendment reduced the former period of twelve months to six months after entry thereof, and the judgment involved in that case was more than six months old at the

date the amendment went into effect. The court said: "It is quite obvious that great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered." This case was cited with approval in the case of *San Francisco, etc., Rys. v. Superior Court*, 172 Cal. 541, 157 P. 604, 605, wherein the court construed and applied the amendment of section 600 of the Code of Civil Procedure enacted in 1915 (St. 1915, p. 202), whereby the power of the superior court to pass on a motion for new trial was expressly limited to three months after the verdict of the jury or service of notice of decision of the court, instead of at the earliest practicable time as provided theretofore. No express saving clause as to proceedings on motion for a new trial initiated before the taking effect of the amendment was continued in the section as amended. The court said: "We do not think this provision may fairly be construed * * * as authorizing a trial court to pass on a motion for new trial pending at the time it went into effect, at any time within three months after it so went into effect, or at any time within three months after the record on which such motion was to be heard is finally settled. The only time expressed in the provision is 'within three months after the verdict of the jury or service on the moving party of notice of the decision of the court.'" Citing the *Pignaz Case*, the court then said: "The court squarely held that to apply the statute to judgments entered before it went into effect would give it a retroactive effect, and that the statute gave 'no time whatever * * * to appeal in those cases in which judgments had been entered six months or more previously,' and, in view of this construction and the consequent cutting off of the right of appeal if the law were construed as retroactive, it was held that the Legislature intended that the operation of the law should be limited to 'judgments thereafter entered.' * * * We are here dealing with

a provision of law which deprives a court of power to pass on a motion for new trial unless such power is exercised within a specified time after verdict or notice of decision. The time is designated in clear and unequivocal terms, and, if the provision is applicable at all to proceedings pending at the time it became operative, its terms are such, in our opinion, as to preclude a construction to the effect that it did not absolutely take away from a trial court the power to pass on the motion for a new trial after the expiration of three months from the rendition of the verdict or service on the moving party of the notice of the decision of the court, regardless of all other circumstances. This being the construction that must be given to the provision, we have no doubt that it should not be construed as applicable to proceedings on motion for new trial pending at the time it became operative. *Pignaz v. Burnett*, supra [119 Cal. 157, 51 P. 48], is practically controlling as to this."

[3] Applying the rule clearly reflected in all the foregoing cases, and expressed in definite terms in the case of *Pignaz v. Burnett*, supra, and approved and applied in *San Francisco, etc., Rys. v. Superior Court*, supra, we are constrained to hold that the amendment to section 337, and the terms of the new section 580a of the Code of Civil Procedure, were not intended by the Legislature to operate upon an action for money judgment for the balance due upon an obligation secured by a trust deed after sale thereunder where such sale had occurred before the act went into effect. We are satisfied that the Legislature intended that the operation of these practically duplicate laws should be limited to cases where the sale took place after their effective date. And for the reasons given in the case of *San Francisco, etc., Rys. v. Superior Court*, supra, we are equally convinced that these new laws may not fairly be construed as compelling action to be commenced within three months after such effective dates in cases where the sale has previously been made, for both these acts expressly require that action be brought within three months after the time of sale. To so construe them would in effect be judicial legislation rather than interpretation. In view of the rather extended quotations of such pertinent expressions of our appellate courts embodying the rules and creating authentic precedent for guidance and determination of the law question arising under the record herein, it is unnecessary to add further comment. The decisions quoted de-

clare the law, and we apply it to the case at bar, and hold that it was error to sustain the demurrer of the respondents Marcus P. Dennison and Emma Dennison.

The separate demurrer of respondent Mariana V. De Topete, in so far as section 337 of the Code of Civil Procedure is concerned, was, for the same reasons as above given, erroneously sustained. But in that demurrer there was also pleaded the bar of section 339 of the Code of Civil Procedure, embracing the 2-year limitation as to actions upon a contract, obligation, or liability not founded upon an instrument in writing with certain exceptions not pertinent herein. This plea is predicated on the proposition that Mariana V. De Topete, on February 3, 1931, accepted a deed of the real property, encumbered by the trust deed here in question, in which it was stated that she assumed and agreed to pay the note secured thereby.

[4-6] It is the settled rule in this state that where the grantee of the mortgagor or trustor in a deed of trust assumes the payment of the mortgage or note secured by the trust deed as part of the purchase price, he becomes, as to the mortgagor or trustor, the principal debtor, and the mortgagor or trustor the surety. *Essey v. Phillips*, 136 Cal. App. 3, 28 P.(2d) 38; *Tompkins v. Powers*, 106 Cal. App. 464, 289 P. 685. The liability of the grantee in such a case is the indebtedness secured to be paid by the mortgage or trust deed. It must, however, be enforced by foreclosure of the mortgage in the one instance or by sale under the trust deed in the other, and a deficiency judgment may be entered against him only upon the security becoming exhausted. Section 726, Code Civ. Proc.; *Newhall v. Bank of Livermore*, 136 Cal. 533, 69 P. 248; *Bank of Italy, etc., Ass'n v. Bentley*, 217 Cal. 644, 20 P.(2d) 940. It necessarily results in the case at bar that the statute of limitations must run against the trust deed obligation—the note secured thereby—for that is the grantee's liability, and not against the promise to pay the trust deed note as a new and independent agreement. *Roberts v. Fitzallen*, 120 Cal. 482, 52 P. 818. It therefore follows as a matter of law that section 339 of the Code of Civil Procedure is not applicable to the obligation of Mariana V. De Topete, but that the action against her must be tested by the provisions of section 337 of the same Code as it existed prior to the amendment of 1933. The earliest date on which this statute could begin to run under the facts alleged in the

complaint was May 1, 1930. As this action was commenced on March 20, 1934, the 4-year statute of limitations had not ripened into a bar. The foregoing conclusions render it unnecessary herein to consider and determine the point raised by appellant that it was the legislative intent to limit the application of these new provisions to actions of the character here involved where a trust deed was the sole security for payment of the note, and not to apply to notes secured by security additional to that of a trust deed. Nor is it necessary to pass upon appellant's claim that the acts in question were violative of the constitutional inhibition against special legislation. Const. art. 4, § 25.

Opinion in this case was prepared in tentative form upon a review of the briefs by Honorable Henry M. Willis while acting as a justice pro tempore of this court, and is adopted without material change after oral argument before us.

The judgments are and each of them is reversed and the cause remanded, with directions to overrule the demurrers and each of them.

We concur: CRAIL, J.; FRICKE, Justice pro tem.



6 Cal.App.2d 641

EDWARDS et al. v. MORTGAGE SECURITIES, INC., OF SANTA BARBARA et al.
Civ. 5274.

District Court of Appeal, Third District,
California.
May 7, 1935.

1. Mortgages — 283(3)

Where obligors were in default on note and deed of trust and notice of default and election to sell were recorded by obligee, and thereafter obligors conveyed property described in trust deed to others, none of whom assumed payment of indebtedness, action of obligee in canceling notice of default held not an extension of time to principal debtor so as to release obligors from liability for deficiency as sureties, where note did not mature until after notice of cancellation of default was recorded.

2. Principal and surety ¶106

To constitute an extension discharging surety, extension must have been given for a definite time, pursuant to an enforceable agreement between principal and debtor.

3. Mortgages ¶283(2)

Where obligors were in default on note and deed of trust and notice of default and election to sell were recorded by obligee, and thereafter obligors conveyed property described in trust deed to others, none of whom assumed payment of indebtedness, and thereafter obligee recorded cancellation of notice of default and additional security was given and foreclosure further postponed, delay occasioned by acts of cancellation and postponement did not discharge obligors as sureties.

4. Principal and surety ¶125

Mere forbearance, delay, or discontinuance of proceedings by a creditor do not effect a release of a surety.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by John Edwards and another against the Mortgage Securities, Incorporated, of Santa Barbara and others, wherein named defendant filed a cross-complaint. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Robertson Crawford & Nichols and Harry W. T. Ross, all of Santa Barbara, for appellants.

Heaney, Price & Postel and Norman W. Ambrose, all of Santa Barbara, for respondents.

PAULSEN, Justice pro tem., delivered the opinion of the court.

Action to quiet title. Defendant corporation had judgment and plaintiffs appeal.

The essential and undisputed facts are these: On February 1, 1928, appellants executed a promissory note and deed of trust in favor of respondent for \$10,850. The principal of the note was payable three years after date with interest payable quarterly. Respondent was given the option to declare the whole sum of principal and interest immediately due and payable in the event of default in the payment of any instalment of interest. The interest was not paid on June 1, 1928, and on June 7, 1928, respondent recorded a notice of default and election to sell under the trust deed. On June 27, 1928,

appellants conveyed the property described in the trust deed to a third party and thereafter it changed hands several times. None of appellants' successors in interest assumed payment of the indebtedness. On August 13, 1929, respondent, who had taken no steps to effect a sale of the property, recorded a cancellation of its notice of default and election to sell. Appellants had no actual knowledge of any steps or transactions taken or had after they conveyed the property on June 27, 1928. On May 13, 1931, respondent notified appellants that the interest on the note was due; that they were personally liable for any deficiency that might arise in the event of sale, and demanded additional security. Relying upon this representation as to their personal liability, appellants conveyed certain other property to respondent. Subsequently, and after appellants had again defaulted in the payment of interest, said deed of trust was foreclosed by respondent who purchased the property and claimed a deficiency of \$5,950.95. On January 4, 1932, appellants made a written demand for a reconveyance of the property given as additional security upon the ground that it had been obtained as the result of the misrepresentation of respondent and that there was no consideration for it. By cross-complaint respondent sought to foreclose the lien on the additional security.

In addition to findings covering the foregoing facts, the court found that the representation of respondent that appellants were personally liable for a deficiency was true. Appellants moved to set aside the judgment and have judgment rendered in their favor, but this motion was denied by failure of the court to act upon it within the time required by law.

Appellants argue that the cancellation of the default without their consent, and after their conveyance of the property to a third party, amounted to an extension of time to a principal debtor and that they, as sureties, were thereby released from any liability for a deficiency; that in the absence of such liability there was no consideration for the conveyance of May 13, 1931. The record does not show all the circumstances surrounding the giving of this conveyance and presumably some extension of time was given appellants as the result of it. In any event, no point is made as to the absence of consideration except that mentioned above.

"Where a conveyance is made of mortgaged property and the vendee does not assume

payment of the mortgage debt, the relation of principal and surety springs up between the land and the mortgagor, he being the surety and the land being the principal debtor, and he becomes at once entitled to all the protection which the law gives to sureties. * * * Where there is an extension of time by the creditor to the principal, without the consent of the surety, the latter is released" from further liability. *Braun v. Crew*, 183 Cal. 728, 192 P. 531, and cases there cited.

[1, 2] It must be conceded that if the cancellation of the default by respondent under these circumstances actually amounted to an extension of time not contemplated by the original contract, the appellants would have been released and there would have been no consideration for the conveyance in question. But it does not appear that such an extension was given. By the express terms of the note it did not mature until February 1, 1931. The option given respondent to declare a default earlier because of nonpayment of interest was inserted solely for its benefit. Its election to exercise this right did not preclude it from waiving the default at a later date. In *Moore v. Russell*, 133 Cal. 297, 65 P. 624, 625, 85 Am. St. Rep. 166, a case involving a note and mortgage, the court said: "It is firmly established that an option of that character is a mere penalty put on the maker in favor of the holder of the note, which the latter may waive, and that even his express declaration of an election to exercise the option does not put it out of his power to waive it." In *California Sav., etc., Soc. v. Culver*, 127 Cal. 107, 59 P. 292, the holder of the note had declared a default for nonpayment of interest and had brought suit to foreclose the mortgage. Later, but before maturity of the note, he accepted the interest due and dismissed the suit. The court held that as the option was given for his benefit his bringing of the suit did not put it out of his power to waive the default and that the statute of limitations started to run from the date of maturity and not from the time the original default was declared. See, also, *Hinkel v. Crowson*, 83 Cal. App. 87, 256 P. 479. It is true that these cases did not involve an application of this rule to the relation of principal and surety, but they recognize a principle of law that is determinative of the instant case. Appellants' whole argument is based upon the proposition that when the default was once declared the original contract was irrevocably terminated, and that the waiver of the default constituted a

new contract of extension. Such is not the law. The only effect of the waiver was to restore the original contract to its full force and effect and this was done by a provision of the note, previously consented to by the surety, and not by a new contract between respondent and the principal. "To constitute an extension discharging the surety, it should appear that the extension was for a definite time, pursuant to an enforceable agreement, between the principal and creditor." 50 C. J. 136, § 227. The present case does not meet this test.

[3, 4] It appears that the cancellation of the default restored the original obligation so that it matured on February 1, 1931. Thereafter additional security was given and foreclosure was further postponed. But the delay occasioned by these voluntary acts of cancellation and postponement did not discharge the surety. It is well settled that mere forbearance, delay, or discontinuance of proceedings by the creditor do not effect a release of a surety. *Vogel Bros. & Co. v. Bastin*, 84 Okl. 273, 203 P. 219; 21 R. O. L. 1020. § 67; 50 C. J. 162, § 264.

It follows from the foregoing conclusions that at the time respondent made its demand for additional security, appellants were still liable for a deficiency in the event of sale, and therefore that the deed was not given without consideration on such account.

Judgment affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



6 Cal.App.2d 546

PHELPS v. A. L. JAMESON & CO. et al.

Civ. 8706.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1935.

1. Fraud ☞59(2)

In action for fraudulent representations in sale or exchange of property, measure of damages is difference between actual value of property received, and value if property had been as represented.

2. Fraud ☞58(1)

In action for fraudulent representations inducing stock exchange, finding that issu-

ance and sale of stock were void because made without statutory permit, and that therefore stock was valueless, held unsupported by evidence (St. 1929, p. 1251, § 2 (c) (3).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Laura M. Phelps against A. L. Jameson & Company, A. L. Jameson, and others. Judgment for plaintiff, and defendants named appeal.

Reversed.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for appellants.

Sherman & Sherman, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Respondent herein commenced this action against A. L. Jameson & Co., a Nevada corporation; A. L. Jameson, Columbia Cement Company, a Nevada corporation; and W. J. Shaw, by filing her complaint on May 15, 1931, charging defendants with fraud and deceit in respect to representations made by defendants individually and as agents of each other, resulting in an exchange of 300 shares of preferred stock of Monolith Midwest Cement Company, owned by respondent and of the reasonable value of \$3,000, for 200 shares of preferred and 100 shares of common stock of said Columbia Cement Company, alleging damage in the sum of \$3,000 and praying for that amount. The defendant Shaw defaulted, and his default was duly entered. Defendants A. L. Jameson & Co. and A. L. Jameson filed a joint answer denying all the allegations of the complaint except those relating to residence of the parties and the corporate capacity of the two corporations named as defendants. After trial and submission of the cause, the court found that 7 out of 12 specifications of representations set forth in the complaint were made to plaintiff by defendants Shaw and Jameson, acting individually and as agents for A. L. Jameson & Co.; that the same were false and were made with intent to deceive plaintiff and induce her to make the exchange, and that plaintiff believed the same and relied thereon, and as a result thereof made such exchange; "that defendants offered the sale of said Columbia Cement Company stock to the public, and the sale of said 200 shares of the preferred capital stock and the 100 shares of the common capital stock of Columbia Cement Company by the defendants to plaintiff was and is a sale to the public, and that said sale

of said stock was made by defendants to plaintiff at a time when the Columbia Cement Company had no permit from the commissioner of corporations of the state of California permitting the sale of said stock to the public;" that said Columbia stock "was and now is of no value whatsoever and the same is void"; "that the issuance and sale of said stock to plaintiff was in violation of the Corporate Securities Act of the State of California and the sale and issuance of said stock was and is void;" that said Monolith stock at the time of exchange had an agreed and reasonable value of \$2,624.40. From the facts found, the court concluded that the sale or exchange of the Columbia stock was in violation of the Corporate Securities Act, and that plaintiff had been damaged in the sum of \$2,624.40, with interest from November 4, 1929, and was entitled to judgment against defendants A. L. Jameson & Co., A. L. Jameson, and W. J. Shaw for that amount. Judgment was entered accordingly, from which A. L. Jameson & Co. and A. L. Jameson appeal.

[1] Appellants contend that the findings as to damages are not supported by the evidence. Without question, the proper measure of damages to be applied in an action to recover damages resulting from fraudulent representations in a sale or exchange of property is the difference between the actual value of the property purchased or received in exchange and the value it would have had had the property been as represented. *Divani v. Donovan*, 214 Cal. 447, 454, 6 P.(2d) 247, and cases therein cited. No evidence was given herein, nor was any finding made as to the actual value of the Columbia stock at the time of exchange, or the value it would have had had the stock been as represented. But there was evidence which supported the finding that at the time of exchange and delivery of the Columbia stock to plaintiff the Columbia Cement Company had no existing permit to issue or sell its stock to the public. The court also found that the issuance and sale of this stock to plaintiff was a sale to the public and was void, and that the stock was, at the time of exchange, and now is, of no value whatsoever. These latter findings, if supported by the evidence, are sufficient, in conjunction with the finding as to lack of a permit, to support the finding of damages in the sum found, in view of the further finding that one of the false representations made was that this Columbia stock was worth \$3,000 at the time of exchange. It is obvious that the finding as to the sale of stock here in question was predicated on the assumption or implied finding of the court that the stock sold and

delivered to plaintiff was issued and sold by Columbia Cement Company through its selling agents. There is no direct finding that such was the fact, and in the absence of such direct finding it is necessary to ascertain if there is any evidence to support the implied finding or assumption that the stock sold to plaintiff was treasury stock of the company or stock which required authority of a permit to render it valid upon sale thereof.

[2] We have examined the transcript of the evidence and find no evidence which would support any finding that the stock delivered to plaintiff was treasury stock or stock issued by the company under any offer of sale to the public. The undisputed evidence reveals the fact that the two certificates of stock issued and delivered to plaintiff in performance of this contract of exchange, and being the stock sold by defendant Shaw to plaintiff, were reissues from surrendered certificates of stock issued some years before to one Fred A. Ballin in the state of Nevada, and which he had contracted to sell to Shaw. In short, the stock sold to plaintiff was part of a block of privately owned stock, presumably legally issued under the laws of the state of Nevada to Ballin and which the latter had delivered to Shaw for sale under a contract. This stock was entirely separate and apart from the treasury stock of the company, which was for a time covered by a permit authorizing its sale to the public in California, but which permit stood suspended at the time this exchange was made. As there was undisputed evidence that the stock actually sold and delivered was privately owned stock, sold or exchanged in an individual transaction, the finding that the sale was one made to the public without a permit is entirely lacking in support, and the conclusion or finding that such sale was void and the stock therefore valueless falls for lack of support in the evidence or in the findings of facts. This makes it quite patent that failure to find the actual value of the stock at the time of exchange, and the value it would have had had the stock been as represented, leaves the finding of damages entirely unsupported. "It is elemental that proof of damage is necessary to establish a cause of action for fraud." *Dyer v. Hunter*, 133 Cal. App. 267, 23 P.(2d) 1049, 1050.

In 1929 (St. 1929, p. 1251), by an amendment to section 2 of the Corporate Securities Act of 1917 (St. 1917, p. 673) effective on August 14, 1929, it was provided as follows:

"(c) Except as hereinafter expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * * (3) The sale in a bona fide way of any security by an owner who is not the issuer or an underwriter thereof, who sells the same for his own account; and not for the purpose of evading the provisions of this act." The evidence herein shows without substantial conflict that the stock sold to plaintiff was owned by Fred A. Ballin, who was not the issuer thereof, and under option contract to defendant Shaw, that neither Shaw nor A. L. Jameson & Co. nor A. L. Jameson was an underwriter thereof. There was evidence that A. L. Jameson & Co. had underwritten an entirely different block of stock which had been subscribed for by James Sayers, C. Thoms, and F. J. Thoms, and for the sale of which to the public a permit of the corporation commissioner had been issued, but stood suspended at the date of the sale to plaintiff.

For the defect in the findings and the consequent lack of support for the judgment, the judgment must be reversed, and it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.



7 Cal.App.2d 1

KATZ v. KAPPER et al.

Civ. 9157.

District Court of Appeal, Second District,
Division 1, California.

May 15, 1935.

1. Trade-marks and trade-names and unfair competition ⚡92

In action by wholesale fish dealer against competitors, complaint alleging that defendants, with sole intention to put plaintiff out of business, maliciously threatened plaintiff's customers with establishment of cut-price retail store and with ruin of their businesses unless they purchased from defendants, and that defendants did open retail store and undersold plaintiff and his customers at loss to defendants, *held* demurrable; alleged acts of defendants not being unlawful.

2. Trade-marks and trade-names and unfair competition ¶68(1)

Courts will not regulate business practices beyond applying legal or equitable remedies in cases involving unlawful acts of oppression or deceit.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by J. Katz against Sam Kapper and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

E. A. Kline, of Los Angeles, for appellant.

Hugh M. Foster, of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendants after an order sustaining a demurrer to the complaint.

Plaintiff and defendants were rival wholesale fish dealers in the city of Los Angeles. The defendants Kapper, Isenberg, Baker, and Simon comprised a single firm doing business under the name of "Central Market." The action is for damages alleged to have been sustained to plaintiff's business by reason of the acts of defendants, and for exemplary damages. The complaint alleges that plaintiff had a well-established wholesale fish business, the good will of which was valuable; that with the sole intention "to put the plaintiff out of business, ruin him, deprive him of his customers and custom, and to take away from him all of his business and trade, together with the good will, without any benefit to themselves," the defendants maliciously called meetings of the customers of plaintiff, threatened them that they would be driven out of business and ruined if they continued to purchase fish from plaintiff, but promised that if they purchased fish from defendants, they would be given substantial reductions in price, so that they could successfully compete with plaintiff and drive him out of business; that if said customers continued to buy from plaintiff, the defendants would open a retail store and would sell fish to the customers of plaintiff's customers at such low prices that plaintiff's customers would be driven out of business. It was further alleged that the defendants did open such a store, did widely advertise and sell fish at lower prices than either plaintiff or defendants could purchase the same, and at a loss to the defendants;

that all of said acts were done for the purpose of driving plaintiff out of business; and that as a result thereof "a considerable number of said retailers and peddlers and customers ceased from doing business with plaintiff and made their purchases from these defendants to plaintiff's damage," etc.

To this complaint, defendants interposed a general and special demurrer, which was sustained by the court, and plaintiff declining to amend, judgment of dismissal was entered. The general demurrer presents the questions whether the purposes of the defendants were unlawful, and, if lawful, whether they were sought to be accomplished by unlawful means.

In deciding whether the conduct of defendants alleged in the complaint is actionable, it is necessary to apply certain well-settled rules relating to competition in business. These may be generally stated as follows: "Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader if left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, or the procurement of the violation of contractual relations. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, as where a merchant undersells or oversells his neighbor, it is *damnum absque injuria*." 15 R. C. L., p. 73, and cases cited.

"It has long been a rule of the common law that a man has the right to start a store, and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others." *Id.*, 79.

"Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring plaintiff, and not to benefit themselves." *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, at page 603, 98 P. 1027, 1036, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165.

These principles are stated and many supporting authorities are cited in *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, and *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 105 F. 163, 44 C. C. A. 426, 62 L. R. A. 673.

There are cases relied upon by appellant, of which *Dunshie v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263, is a leading one, in which interference with business is held actionable. In that case, the defendant pursued a policy of selling gasoline and oil to plaintiff's customers from tank wagons purchased and used solely for that purpose, initiating the practice for the purpose of driving the plaintiff out of business, and with the intention of discontinuing it when such purpose was accomplished. An action was held to lie because the object of the defendant was not to engage in real competition or to build up its own business but to ruin a business rival. The cases that follow this doctrine proceed on the theory that an act lawful in itself becomes unlawful if induced by a wrong motive. This principle is not generally recognized by English or American authorities. In California the Supreme Court in *Boyson v. Thorn*, 98 Cal. 578, 33 P. 492, 21 L. R. A. 233, adopted the rule that an act lawful in itself does not become unlawful because of a malicious or wrongful motive. *People v. Schmitz*, 7 Cal. App. 330, 94 P. 407, 419, 15 L. R. A. (N. S.) 717, and *Parkinson Co. v. Building Trades Council*, supra, follow this principle. We may apply either rule to the facts of the present case with the same result because they both recognize the principle that detriment to business which is incidental to lawful competition is *damnum absque injuria*.

[1, 2] It very clearly appears from the allegations of the complaint that the primary purpose of the defendants was to acquire for themselves the business of plaintiff's customers, and that the detriment which would result to plaintiff's business from the accomplishment of defendants' purpose was incidental thereto. This view must be taken of the complaint, notwithstanding the allegation that the sole purpose was to drive plaintiff out of business. The defendants are not charged with making any effort to deprive plaintiff of his trade except by transferring the same to themselves. This is essentially business competition. The defendants did or threatened to do nothing other than to gain a business advantage proportionate to the

losses sustained by plaintiff, and by the accomplishment of that end their purposes would have been satisfied. It cannot be said that the methods used by the defendants were unlawful. They threatened plaintiff's customers with the ruin of their businesses if they continued to trade with plaintiff, but a threat is not unlawful if it is to do a lawful thing.

In *Union Labor Hospital v. Vance Lumber Co.*, 158 Cal. 551, 112 P. 886, 33 L. R. A. (N. S.) 1034, the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the intent to subserve their own interests. The Supreme Court said (158 Cal. 551, page 554, 112 P. 886, 887, 33 L. R. A. (N. S.) 1034): "But if this were not so, and their purpose were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

The threats alleged in general terms are identified and particularized by the allegations that the defendants threatened to and did undersell the plaintiff and his customers at retail prices less than the wholesale prices at which the commodities could be purchased. These must be taken as the only acts of coercion either threatened or done, since no others are alleged. They were not unlawful nor were they committed in an unlawful manner. They related solely to the aims of the defendants to engage in business competition with plaintiff for the resulting business advantage to themselves. The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or deceit which are unlawful. Any extension of this jurisdiction must come through legislative action. In this case no questions of statutory law are involved. The alleged acts of defendants do not fall within the category of business methods recognized as unlawful, and hence they are not actionable. The demurrer to the complaint was properly sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

6 Cal.App.2d 699

BROMBERG v. BROWER.

Civ. 8596.

District Court of Appeal, Second District,
Division 1, California.

May 13, 1935.

1. Pledges ☞55

Payee, who in consideration of note assumed payment of maker's prior indebtedness to bank, which indebtedness was thereupon discharged, could maintain action on note without first selling collateral deposited by maker with bank as security.

2. Pledges ☞55

Possession of pledged personal property does not suspend right of pledgee to proceed personally against payor without selling pledge, in absence of statute or contrary stipulation.

3. Appeal and error ☞907(2)

Existence of evidence to support trial court's findings must be assumed on appeal, in absence of contrary showing in record.

4. Receivers ☞184

Objection to introduction of evidence on ground of plaintiff's want of legal capacity to sue as receiver in behalf of corporation held properly overruled, where order appointing plaintiff receiver was introduced in evidence.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Robert Bromberg, as trustee in bankruptcy of the Vernon Oil Refining Company, substituted for Alois Mesmer, receiver in equity of the Vernon Oil Refining Company, against J. A. Brower. Judgment for plaintiff, and defendant appeals.

Affirmed.

Walter F. Haas and H. O. Johnston, both of Los Angeles (Gerald E. Kerrin, of Los Angeles, of counsel), for appellant.

Raphael Dechter and Russell B. Seymour, both of Los Angeles, for respondent.

YORK, Justice.

This is an action brought by Alois Mesmer, receiver in equity of the Vernon Oil Refining Company, to collect a certain unpaid note dated October 6, 1931, for the sum of \$25,924.55, signed by defendant Brower and made payable to said Vernon Oil Refining Company. Defendant denied the note constituted a part of the assets of the oil com-

pany, and denied that the receiver had any right, title, interest, or estate therein, and he alleged that he had deposited with the Citizens' National Trust & Savings Bank of Los Angeles 787 shares of Texas Corporation as collateral security for payment of this note, and that no effort was made by the receiver to enforce said collateral or sell the same and apply the proceeds of sale on said note.

Appellant's statement of the question involved in this appeal is as follows: "Can a receiver of an indemnitee enforce payment on a collateral promissory note given to indemnify against loss, when no detriment or loss has been suffered by the indemnitee or his receiver?"

In addition to this statement, appellant sets out in his brief a statement showing his grounds of appeal as follows:

(1) That the finding of the court to the effect that the principal amount of \$25,924.55 or interest has not been paid and the whole now remains due and unpaid, is contrary to and unsupported by the evidence.

(2) That the finding of the court to the effect that the principal amount of \$25,924.55 and interest is now due from the defendant to plaintiff, is contrary to and unsupported by the evidence.

(3) That the court erred in overruling the defendant's objection to the introduction of any evidence at the trial herein.

(4) That the court erred in signing and filing the findings of fact and conclusions of law submitted by plaintiff and as amended by the court, and in not signing and filing in lieu thereof the findings of fact and conclusions of law submitted by the defendant.

(5) That the judgment entered herein is contrary to law.

(6) That said judgment is not supported by and is contrary to the evidence.

There is sufficient evidence in the record to show that, although defendant Brower and one W. N. Brower, an officer of said Vernon Oil Refining Company, testified to a certain limitation as to the giving of the note, in that they claimed said note was given only by way of indemnity, nevertheless, such oral testimony was not sufficient to offset the written terms of the note itself. The evidence also shows that after said note was delivered to the oil company, the said corporation used it to obtain credit, and included it in its statement of assets for that purpose,

at a time when said witness W. N. Brower and the appellant were both directors of said corporation.

[1-3] Regarding appellant's points 1 and 2, attacking findings of fact, and specifying that the evidence does not support the finding that the amount of the note, principal or interest, has not been paid, and that the evidence does not support the finding that said amount of principal and interest is now due and unpaid, it is conceded that there has been no payment. That the note was due as alleged in the complaint appears from the fact that the note, dated April 6, 1931, was a promise to pay "6 months after date." Thus appellant's objection to these findings is reduced to the single proposition that the note, although unpaid, was not due. The claim that the note was not due rests on the further claim that the note was not to become due at all, unless first the maker was required to and did pay the pre-existing debt of Brower to Citizens' National Trust & Savings Bank. However, the court found (and this finding stands unchallenged) that in consideration of the note on which suit is brought herein, the payee assumed and agreed to pay to the bank said prior indebtedness of Brower to the bank "which said personal indebtedness to said bank was thereupon discharged." The case is not different in effect from what it would be if in consideration of the note in suit the money had been delivered by the payee to Brower, and used by him to pay his debt to the bank; except, perhaps, that Brower's deposit of collateral is a circumstantial difference. In this connection, in the absence of statute or stipulation to the contrary, the possession of pledged personal property does not suspend the right of the pledgee to proceed personally against the payor for his debt without selling the pledged personal property. *Stern v. McDonald*, 47 Cal. App. 79, 190 P. 221.

We will have to assume, in the absence of a showing to the contrary appearing in the record, that there was evidence to support these findings as drawn by the trial court.

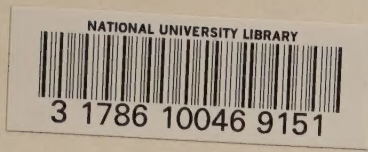
[4] As to appellant's point 3, that the court erred in overruling defendant's objection to the introduction of any evidence at the trial, said objection being based upon the grounds that the complaint failed to state a cause of action against appellant, and that respondent did not show the necessary legal capacity to sue, the record shows that appellant interposed a demurrer, which was overruled,

the grounds of which, among others, included the grounds upon which the above objection was based. Further than that, there was introduced into evidence a copy of the order of court appointing plaintiff receiver of the oil company, from which the court found that the plaintiff was the duly appointed receiver of the Vernon Oil Refining Company, and that as such receiver said plaintiff was duly authorized to bring and defend suits or proceedings relative to the assets or estate of said company. It therefore appears to us that there is no merit in appellant's third point.

The judgment is affirmed.

We concur: CONBEY, P. J.; HOUSER, J.





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